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**A COMMENTARY  
ON THE  
CONSTITUTION OF INDIA**



# **A COMMENTARY** **ON THE** **CONSTITUTION OF INDIA**

**BY**

**DURGA DAS BASU, M.A., B.L.,**  
*(Of the West Bengal Civil Service, Judicial)*

**WITH A FOREWORD**

**BY**

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*(Minister for Law, Government of India)*

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**FIRST EDITION**

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*Companion Volume Under Preparation*  
**CASES ON THE CONSTITUTION OF INDIA**  
*(By the same Author)*

A. 16. C.

DEDICATED  
TO  
THE FREE CITIZEN OF INDIA

that "if any Bill is passed by the Legislature which is in direct contravention of any of the Directives, the President or the Governor may refuse to give his assent." Many like me will be alarmed by this view. It is a dangerous doctrine and I am sure our Constitution does not warrant it. I hope that this is the only doctrine which can be so described and that the rest of his views are safe and sound.

*October 23, 1950.*  
*1, Hardinge Avenue,*  
*NEW DELHI.* }

B. R. AMBEDKAR.



## PREFACE

As DR. AMBEDKAR observed in the Constituent Assembly, it is impossible to frame a Constitution which is absolutely new or original, at this hour in the history of the world. "The only new things, if there be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country." A proper understanding of *our* Constitution is not thus possible unless it is studied with reference to the Constitutions of other countries, particularly those from which the framers of *our* Constitution have borrowed provisions or ideas, and the interpretation put by the Courts upon those provisions. Ever since the Constituent Assembly first sat in December, 1946, I cherished the desire of preparing such a Commentary on *our* Constitution as would not only explain it in the light of analogous provisions of other Constitutions, but would also place *our* Constitution in a distinctive position amongst the leading Constitutions of the world, by elucidating the points upon which the framers of *our* Constitution have sought to improve, in the light of experience gathered from elsewhere.

The method of treatment adopted in this work, is, therefore, *comparative*. Though this has inevitably led to an increase in the bulk, the reader would find in this book a Commentary not only of the Constitution of India, but also on the parallel provisions of the Constitutions of the *United States, Eire, Australia, Canada, South Africa, Japan, the Fourth Republic of France, Burma* and *Ceylon* with important decisions available up to 1948-49. The Constitution of *Burma* has indeed been given a fuller attention in view of the fact that the hands of the same expert—the world-renowned Sir B. N. Rau—are at the foundation of both the structures—the Constitutions of India and Burma. As a matter of fact, anybody in need of a Commentary on the Constitution of Burma may very well rely on the present work.

Though the Constitution of *England* is unwritten and we do not get codified expressions, it is commonplace to point out that the immutable principles of modern constitutional government were first evolved in Britain and that no later Constitution adopting the Parliamentary system of government could do without drawing from the basic principles of England. Even the fathers of the American Constitution were guided by those fundamental English principles, though, owing to difference in the soil, the traces of their English origin are at places obliterated beyond recognition. So, these principles of English Common Law, as modified by important legislation, have also found a place in this Commentary. In order to avoid confusion, the comments under each Article have been divided under two heads: (a) 'OTHER CONSTITUTIONS'; (b) 'INDIA'. For a ready reference to the annotation of the clauses of *our* Constitution, only the contents under the head 'INDIA' need be referred to.

So far as the Author is aware, such a systematic comparison of different Constitutions, from the standpoint of legal interpretation, has not so far been attempted in any other work. (If this treatment is appreciated, a fuller treatment of foreign Constitutions will be attempted in future Editions).

A Constitution may be studied from different points of view,—legal, political, sociological and the like. The object of this work, primarily, is to present a *juridical* interpretation of the Constitution of India as may be of use in the Courts, where the application, progress and development of the Constitution would be shaped. An attempt has been made to incorporate a reference to decisions of the Supreme



Court of India which have been reported up to the date of publication of this Commentary. In view of the fact that a flood of leading decisions may be expected during the first few years of the working of the Constitution, this Commentary is proposed to be supplemented by publishing, shortly, a critical and analytical study of the 'Cases on the Constitution of India.'

On the other hand, though the object of this Commentary is a juridical study of the Constitution,—the political and constitutional aspects, too, have been given full attention so that the publication may be of use to statesmen, parliamentarians and research students of Political Science and Comparative Politics. A reference to the comments on the Parts dealing with the Executive and the Legislature will bear this out. Again, constitutional interpretation from the legal standpoint becomes hollow without reference to existing laws, with reference to which the question of interpretation has arisen and will arise. So, the book contains a reference to the statute law under the major Constitutions, particularly of *England, the United States* and *India*. If the reader looks into the Index ('Statutes') and the comments under the 7th Schedule, he would get a fairly comprehensive idea as to the laws still standing on the statute books of these countries. Orders, Rules and Notifications under the Constitution of India, available up to the time of printing, have been inserted in the proper places under the relevant articles, for easy reference.

Technical imperfections and printing errors are inevitable in such a hurried publication. It is, however, hoped that the reader will overlook them when he takes note of the fact that the Commentary had to be prepared as the debates in the Constituent Assembly went on, and that a substantial portion of the manuscripts had to be supplied to the Press hardly within a month of the publication of the official edition of the Constitution, and the rest prepared as the printing went on. But for a sudden scarcity of paper the book would have been published much earlier. The Publishers have, however, risen to the occasion, by using imported paper for the latter half of the book, though it increased the costs of production. Thanks are due to the M.L.J. Press, for their ungrudging acceptance of last-minute additions and alterations which occasionally interrupted the progress in the Press.

Those who are connected with the public services are aware how difficult it is for an officer to sustain the strenuous effort involved in a work like the present one. Perhaps I would be permitted to say that the difficulties are enhanced owing to the unfortunate fact that the worth of academic research in the field of working law has not yet come to have its proper appreciation in our land, and that the 'public service' has not yet come to be viewed as a 'national service' in its fullest sense, apart from its being a mere machinery of the administration. To say this is not to criticise anybody, but to express my difficulties together with my heart-felt gratitude to those who have encouraged my serious endeavour even under the above depressing atmosphere. If I cannot name them all, I should not leave without mentioning Sir S. M. Bose, Advocate-General, West Bengal, and, coming nearer home, my colleague and companion Sree Amar Nath Banerjee, M.A., B.L., who has been a source of inspiration and encouragement, throughout.

I am also glad that one of my observations on Art. 37 has evoked protest from Dr. Ambedkar. Since the point is non-justiciable, there is no chance of its being settled by judicial pronouncement, and the opinion of the Chairman of the Drafting Committee must be taken as the most authoritative. I hope, however, that his valuable criticism will give rise to a learned discussion amongst scholars and critics as to the general utility of the 'Directives' as 'principles fundamental in the governance of the country' and 'in making Laws'.

I take this opportunity of tendering my grateful thanks to Hon. Dr. Ambedkar, the architect of the Constitution, for contributing a Foreword to my work.

November 1, 1950.  
Diamond Harbour  
WEST BENGAL.

THE AUTHOR

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## ABBREVIATIONS

### II. REPORTS

#### *England.*

A.C.	.. (L.R.) Appeal Cases.
All.E.R. or A.E.R.	.. All England Reports.
B. & C.	.. Barnewall & Cresswell's Reports.
C.B.	.. Common Bench Reports.
C.B. (N.S.)	.. Do. (New Series).
Ch.D.	.. (L.R.) Chancery Divison.
Dods.	.. Dodswell's Reports.
H.L.C.	.. House of Lords Cases.
K.B.D.	.. (L.R.) King's Bench Division.
Knapp.	.. Knapp's Privy Council Reports.
Leach	.. Leach's Crown Cases.
L.J.	.. Law Journal.
L.R.	.. Law Reports.
M. & W..	.. Meeson & Welsby's Reports.
Mer.	.. Merivale's Reports.
Moo.P.C.	.. Moore's Privy Council Cases.
Q.B.	.. Queen's Bench Division.
S.T.	.. State Trials.
T.L.R.	.. Times Law Reports.

#### *U.S.A.*

Blatch.	.. Blatchford's Reports.
Cranch	.. Cranch's Reports (Supreme Court).
Dall.	.. Dallas' Reports.
F. (2nd)	.. Federal Reporter (2nd Series).
Fed. Rep.	.. Federal Reporter.
Gray	.. Gray's Reports.
How.	.. Howard's Reports.
Mass.	.. Massachussets Reports (Supreme Court).
N.Y.	.. New York (Court of Appeal).
Pet.	.. Peter's Reports (Supreme Court).
U.S.	.. United States (Supreme Court).
Wall.	.. Wallace's Reports (Supreme Court).
Wheat.	.. Wheaton's Reports (Supreme Court).

#### *Australia.*

A.L.J.	.. Australian Law Journal.
C.L.R.	.. Commonwealth Law Reports
N.S.W.	.. New South Wales Reports.

*Canada*

S.C.R. .. Canadian Supreme Court Reports.

*Ireland.*

I.R. .. Irish Reports.

*India.*

A.I.R.: .. All India Reporter :

P.C. .. Privy Council.

F.C. .. Federal Court.

S.C. .. Supreme Court.

All. .. Allahabad.

Bom. .. Bombay.

Cal. .. Calcutta.

Mad. .. Madras.

A.L.J. .. Allahabad Law Journal.

Bom. L.R. .. Bombay Law Reporter.

C.L.J. .. Calcutta Law Journal.

C.W.N. .. Calcutta Weekly Notes.

C.W.N. (F.R.) .. Calcutta Weekly Notes (Federal Court Reports).

C.W.N. (P.C.) .. Calcutta Law Reports (Privy Council).

D.L.R. .. Dominion Law Reporter.

I.L.R. .. Indian Law Reports.

All. .. Allahabad.

Bom. .. Bombay.

Cal. .. Calcutta.

Lah. .. Lahore.

Mad. .. Madras.

Nag. .. Nagpur.

Pat. .. Patna.

Rang. .. Rangoon.

M.L.J. .. Madras Law Journal.

F.C.R. .. Federal Court Reports.

F.L.J. .. Federal Law Journal.

S.C.J. .. Supreme Court Journal.

F.B. .. Full Bench.

S.B. .. Special Bench.

P.C. .. Privy Council.

F.C. .. Federal Court.

S.C. .. Supreme Court.

' Act of 1935 ' .. The Government of India Act, 1935.

' Existing Law ' .. The Law existing in India at the commence-

' Legislation by Parliament ' .. Laws made by the Parliament of India since the commencement of the Constitution.

' Our Constitution ' .. The Constitution of India.

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# THE CONSTITUTION OF INDIA

[26th November, 1949.]

WE, THE PEOPLE OF INDIA having solemnly resolved to constitute  
Preamble. India into ■ SOVEREIGN DEMOCRATIC RE-  
PUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

## PART I.

### THE UNION AND ITS TERRITORY.

Name and territory of the Union.

1. (1) India, that is Bharat, shall be ■ Union of States.

(2) The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

(3) The territory of India shall comprise—

(a) the territories of the States;

(b) the territories specified in Part D of the First Schedule; and

(c) such other territories as may be acquired.

Admission or establishment of new States.

2. Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

Formation of new States and alteration of areas, boundaries or names of existing States.

3. Parliament may by law—

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to ■ part of any State;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the boundaries of any State or States specified in Part A or Part B of the First Schedule or the name or names of any such State or States, the views of the Legislature of the State or, as the case may be, of each of the States both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President.

4. (1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

## PART II.

### CITIZENSHIP.

Citizenship at the commencement of the Constitution.

5. At the commencement of this Constitution, every person who has his domicile in the territory of India and—

- (a) who was born in the territory of India; or
- (b) either of whose parents was born in the territory of India; or
- (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

Rights of citizenship of certain persons who have migrated to India from Pakistan.

6. Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if—

(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

7. Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India;

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

8. Notwithstanding anything in article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

Rights of citizenship of certain persons of Indian origin residing outside India.

9. No person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State.

Persons voluntarily acquiring citizenship of a foreign State not to be citizens.

10. Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

Continuance of the rights of citizenship.

11. Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

Parliament to regulate the right of citizenship by law.

### PART III.

#### FUNDAMENTAL RIGHTS.

##### General.

12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Definition.

13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

##### Right to Equality.

14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Equality before law.

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

Equality of opportunity in matters of public employment.

16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, and requirement as to residence within that State prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Abolition of Untouchability.

17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Abolition of titles.

18. (1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

### *Right to Freedom.*

Protection of certain rights regarding freedom of speech, etc.

19. (1) All citizens shall have the right—



- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property; and
- (g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

20. (1) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

Protection of life and personal liberty.

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Protection against arrest and detention in certain cases.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

### *Right against Exploitation.*

23. (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Prohibition of traffic in human beings and forced labour.

Prohibition of employment of children in factories, etc.

*Right to Freedom of Religion.*

Freedom of conscience and free profession, practice and propagation of religion.

25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

*Explanation I.*—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

*Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Freedom to manage religious affairs.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

Freedom to payment of taxes for promotion of any particular religion.

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

*Cultural and Educational Rights.*

29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to con-

Protection of interests of minorities.

the



(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Right of minorities to establish and administer educational institutions.

30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

### *Right to Property.*

Compulsory acquisition of property.

31. (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

### *Right to Constitutional Remedies.*

Remedies for enforcement of rights conferred by this Part.

32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

33. Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Power to Parliament to modify the rights conferred by this Part in their application to Forces.

34. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

Restriction on rights conferred by this Part while martial law is in force in any area.

Legislation to give effect to the provisions of this Part.

35. Notwithstanding anything in this Constitution,—

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by parliament; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

*Explanation.*—In this article, the expression “law in force” has the meaning as in article 372.

#### PART IV.

##### DIRECTIVE PRINCIPLES OF STATE POLICY.

Definition.

36. In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.

37. The provisions contained in this Part shall not enforceable by any court, but the principles therein laid down nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Application of the principles contained in this Part.



State to secure a social order for the promotion of welfare of the people.

Certain principles of policy to be followed by the State.

(a) that the citizens, men and women equally, have the right to ■ adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

Organisation of village panchayats.

40. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Right to work, to education and to public assistance in certain cases.

41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Provision for just and humane conditions of work and maternity relief.

42. The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. The State shall

Living wage, etc., for workers.

endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural industrial or otherwise, work, a living wage conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Uniform civil code for the citizens.

44. The State shall endeavour to secure for the citizens ■ uniform civil code throughout the territory of India.

Provision for free and compulsory education for children.

45. The State shall endeavour to provide, within ■ period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

Organisation of agriculture and animal husbandry.

Protection of monuments and places and objects of national importance.

Separation of judiciary from executive.

Promotion of international peace and security.

47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48. The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle.

49. It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by Parliament by law to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export in the case may be.

50. The State shall take steps to separate the judiciary from the executive in the public services of the State.

51. The State shall endeavour to—

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.

## PART V.

### THE UNION.

#### Chapter I—The Executive.

##### *The President and Vice-President.*

The President of India.

52. There shall be a President of India.

53. (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall—

- (a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or
- (b) prevent Parliament from conferring by law functions on authorities other than the President.

Election of President.

54. The President shall be elected by the members of the electoral college consisting of—

- (a) the elected members of both Houses of Parliament; and
- (b) the elected members of the Legislative Assemblies of the States.

Manner of election of President.

55. (1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

(2) For the purposes of securing such uniformity among the States *inter se* as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner:—

(a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly; ,

(b) if, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one;

(c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of both Houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

*Explanation.*—In this article, the expression “population” means the population as ascertained at the last preceding census of which the relevant figures have been published.

Term of office of President.

56. (1) The President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that—

(a) the President may, by writing under his hand addressed to the Vice-President, resign his office;

(b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in article 61;

(c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

Eligibility for re-election.

57. A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.

Qualifications for election as President.

58. (1) No person shall be eligible for election as President unless he—

(a) is a citizen of India,

(b) has completed the age of thirty-five years, and

(c) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation.*—For the purposes of this article, ■ person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor or Rajpramukh or Uparajpramukh of any State or is a Minister either for the Union or for any State.

59. (1) The President shall not be ■ member of either House of Parliament or of ■ House of the Legislature of any State, and if ■ member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

Conditions of President's office.

(2) The President shall not hold any other office of profit.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges ■ are specified in the Second Schedule.

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

60. Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the seniormost Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

Oath or affirmation by the President.

“I, A. B., do— swear in the name of God

solemnly affirm

that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India.”

Procedure for impeachment of the President.

61. (1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

(2) No such charge shall be preferred unless—

(a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

(b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When ■ charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as ■ result of the investigation ■ resolution is passed by ■ majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

Time of holding election to fill vacancy in the office ■ President and the term of office of person elected to fill casual vacancy.

62. (1) An election to fill ■ vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.



(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after, and in no case later than six months from, the date of occurrence of the vacancy; and the person elected to fill the vacancy shall, subject to the provisions of article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

The Vice-President of India.

63. There shall be a Vice-President of India.

The Vice-President to be *ex-officio* Chairman of the Council of States.

64. The Vice-President shall be *ex-officio* Chairman of the Council of States and shall not hold any other office of profit:

Provided that during any period when the Vice-President acts as President or discharges the functions of the President under article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under article 97.

The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence of President.

65. (1) In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

66. (1) The Vice-President shall be elected by the members of both Houses of Parliament assembled at a joint meeting in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

(2) The Vice-President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice-President.

(3) No person shall be eligible for election as Vice-President unless he—

(a) is a citizen of India;

(b) has completed the age of thirty-five years; and

(c) is qualified for election as a member of the Council of States.

(4) A person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation.*—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor or Rajpramukh or Uparajpramukh of any State or is a Minister either for the Union or for any State.



67. The Vice-President shall hold office for a term of five years from the date on which he enters upon his office:

Term of office of Vice-President.

Provided that—

(a) ■ Vice-President may, by writing under his hand addressed to the President, resign his office;

(b) ■ Vice-President may be removed from his office by a resolution of the Council of States passed by ■ majority of all the then members of the Council and agreed to by the House of the People; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution;

(c) a Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.

68. (1) An election to fill ■ vacancy caused by the expiration of the term of office of Vice-President shall be completed before the expiration of the term.

(2) An election to fill ■ vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held ■ soon as possible after the occurrence of the vacancy, and the person elected to fill the vacancy shall, subject to the provisions of article 67, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

69. Every Vice-President shall before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him, ■ oath or affirmation in the following form, that is to say—

Oath or affirmation by the Vice-President.

“I, A.B., do

solemnly affirm

that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter.”

Discharge of President's functions in other contingencies.

70. Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.

Matters relating to or connected with the election of a President or Vice-President.

71. (1) All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.

(2) If the election of a person as President or Vice-President is declared void by the Supreme Court, acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.

(3) Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of ■ President or Vice-President.

Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

72. (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(a) in all cases where the punishment or sentence is by ■ Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is ■ sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by ■ Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor or Rajpramukh of a State under any law for the time being in force.

73. (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

Extent of executive power of the Union.

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction ■ are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State specified in Part A or Part B of the First Schedule to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

### *Council of Ministers.*

74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

75. (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

Other provisions as to Ministers.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not ■ member of either House of Parliament shall at the expiration of that period cease to be ■ Minister.

(6) The salaries and allowances of Ministers shall be such ■ Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

*The Attorney-General for India.*

Attorney-General for  
India.

76. (1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

*Conduct of Government Business.*

Conduct of business of  
the Government of India.

77. (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

Duties of Prime Minister as respects the furnishing of information to the President, etc.

78. It shall be the duty of the Prime Minister—

(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and

(c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

**CHAPTER II.—Parliament.***General.*

79. There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the people.

Composition of the Council of States.

80. (1) The Council of States shall consist of—

(a) twelve members to be nominated by the President in accordance with the provisions of clause (3); and

(b) not more than two hundred and thirty-eight representatives of the States.



(2) The allocation of seats in the Council of States to be filled by representatives of the States shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.

(3) The members to be nominated by the President under sub-clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art and social service.

(4) The representatives of each State specified in Part A or Part B of the First Schedule in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The representatives of the States specified in Part C of the First Schedule in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

Composition of the House of the People. 81. (1) (a) Subject to the provisions of clause (2) and of articles 82 and 331, the House of the People shall consist of not more than five hundred members directly elected by the voters in the States.

(b) For the purpose of sub-clause (a), the States shall be divided, grouped or formed into territorial constituencies and the number of members to be allotted to each such constituency shall be so determined as to ensure that there shall be not less than one member for every 750,000 of the population and not more than one member for every 500,000 of the population.

(c) The ratio between the number of members allotted to each territorial constituency and the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published shall, so far as practicable, be the same throughout the territory of India.

(2) The representation in the House of the People of the territories comprised within the territory of India but not included within any State shall be such as Parliament may by law provide.

(3) Upon the completion of each census, the representation of the several territorial constituencies in the House of the People shall be readjusted by such authority, in such manner and with effect from such date as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.

82. Notwithstanding anything in clause (1) of article 81, Parliament may by law provide for the representation in the House of the People of any State specified in Part C of the First Schedule or of any territories comprised within the territory of India but not included within any State on a basis or in a manner other than that provided in that clause.

Special provision as to representation of States in Part C and territories other than States.

83. (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Duration of Houses of Parliament.

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House:



Provided that the said period may, while ■ Proclamation of Emergency is in operation, be extended by Parliament by law for ■ period not exceeding one year at a time and not extending in any case beyond ■ period of six months after the Proclamation has ceased to operate.

Qualification for membership of Parliament.

84. A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

(a) is a citizen of India;

(b) is, in the case of ■ seat in the Council of States, not less than thirty years of age and, in the case of ■ seat in the Houses of the People, not less than twenty-five years of age; and

(c) possesses such other qualifications ■ may be prescribed in that behalf by or under any law made by Parliament.

Sessions of Parliament prorogation and dissolution.

85. (1) The Houses of Parliament shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of clause (1), the President may from time to time—

(a) summon the Houses or either House to meet at such time and place as he thinks fit;

(b) prorogue the Houses;

(c) dissolve the House of the People.

Right of President to address and send messages to Houses.

86. (1) The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.

(2) The President may send messages to either House of Parliament, whether with respect to ■ Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

Special address by the President at the commencement of every session.

87. (1) At the commencement of every session the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address and for the precedence of such discussion over other business of the House.

88. Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, any joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.

Rights of Ministers and Attorney-General as respects Houses.

#### *Officers of Parliament.*

The Chairman and Deputy Chairman of the Council of States.

89. (1) The Vice-President of India shall be *ex-officio* Chairman of the Council of States.

(2) The Council of States shall, as soon as may be, choose a member of the Council to be Deputy Chairman thereof and, so often ■ the office of Deputy Chairman becomes vacant, the Council shall choose another member to be Deputy Chairman thereof.

Vacation and resignation of, and removal from, the office of Deputy Chairman.

90. A member holding office as Deputy Chairman of the Council of States—

- (a) shall vacate his office if he ceases to be a member of the Council;
- (b) may at any time, by writing under his hand addressed to the Chairman, resign his office; and
- (c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

91. (1) While the office of Chairman is vacant, or during any period when the Vice-President is acting as, or discharging the functions of, President, the duties of the office shall be performed by the Deputy Chairman, or, if the office of Deputy Chairman is also vacant, by such member of the Council of States as the President may appoint for the purpose.

(2) During the absence of the Chairman from any sitting of the Council of States the Deputy Chairman, or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

92. (1) At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 91 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman, or, as the case may be, the Deputy Chairman, is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Council of States while any resolution for the removal of the Vice-President from his office is under consideration in the Council, but, notwithstanding anything in article 100, shall not be entitled to vote at all on such resolution or on any other matter during such proceedings.

93. The House of the People shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to be Speaker or Deputy Speaker, as the case may be.

The Speaker and Deputy Speaker of the House of the People.

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

94. A member holding office as Speaker or Deputy Speaker of the House of the People—

- (a) shall vacate his office if he ceases to be a member of the House of the People;
- (b) may at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and
- (c) may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution :

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as Speaker.

95. (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as Speaker.

96. (1) At any sitting of the House of the People, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 95 shall apply in relation to every such sitting ■ they apply in relation to a sitting from which the Speaker, or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the House of the People while any resolution for his removal from office is under consideration in the House and shall, notwithstanding anything in article 100, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

97. There shall be paid to the Chairman and the Deputy Chairman of the Council of States, and to the Speaker and the Deputy Speaker of the House of the People, such salaries and allowances as may be respectively fixed by Parliament by law and, until provision in that behalf is so made, such salaries and allowances ■ are specified in the Second Schedule.

Secretariat of Parliament.

98. (1) Each House of Parliament shall have ■ separate secretarial staff :

Provided that nothing in this clause shall be construed ■ preventing the creation of posts common to both Houses of Parliament.

(2) Parliament may by law regulate the recruitment, and the conditions of service of persons ■ppointed, to the secretarial staff of either House of Parliament.

(3) Until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People ■ the Council of States, and any rules ■ made shall have effect subject to the provisions of any law made under the said clause.



*Conduct of Business.*

99. Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Oath or affirmation by members.

Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

100. (1) Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker.

The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) Either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until Parliament by law otherwise provides, the quorum to constitute a meeting of either House of Parliament shall be one-tenth of the total number of members of the House.

(4) If at any time during a meeting of a House there is no quorum, it shall be the duty of the Chairman or Speaker, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

*Disqualifications of members.*

101. (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation of seats. the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State specified in Part A or Part B of the First Schedule, and if a person is chosen a member both of Parliament and of a House of the Legislature of such a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 102, or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be, his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

Disqualifications for membership.

102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—



(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

103. (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of article 102, the question shall be referred for the decision of the President and his decision shall be final.

Decision on questions as to disqualifications of members.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

104. If a person sits or votes as a member of either House of Parliament before he has complied with the requirements of article 99, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Union.

Penalty for sitting and voting before making oath or affirmation under article 99 or when not qualified or when disqualified

### *Powers, Privileges and Immunities of Parliament and its Members.*

Powers, Privileges, etc., of the Houses of Parliament and of the members and committees thereof.

105. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

106. Members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament by law and, until provision in that respect is so made, allowances at such

Salaries and allowances of members.

rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Dominion of India.

*Legislative Procedure.*

Provisions as to introduction and passing of Bills. 107. (1) Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

(2) Subject to the provisions of articles 108 and 109, ■ Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on ■ dissolution of the House of the People.

Joint sitting of both Houses in certain cases. 108. (1) If after ■ Bill has been passed by one House and transmitted to the other House—

(a) the Bill is rejected by the other House; or

(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or

(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it,

the President may, unless the Bill has lapsed by reason of ■ dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in ■ joint sitting for the purpose of deliberating and voting on the Bill:

Provided that nothing in this clause shall apply to ■ Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by ■ majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:

Provided that at a joint sitting—

(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;

(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are

relevant to the matters with respect to which the Houses have not agreed; and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

Special procedure in respect of Money Bills.

109. (1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

Definition of "Money Bills." 110. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:—

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India ■ the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account, of India or the custody or issue of such money or the audit of the accounts of the Union or of ■ State; or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be ■ Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by



reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

111. When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Assent to Bills.

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

*Procedure in financial matters.*

112. (1) The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of India; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India, and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of India—

(a) the emoluments and allowances of the President and other expenditure relating to his office;

(b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People;

(c) debt charges for which the Government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court;

(ii) the pensions payable to or in respect of Judges of the Federal Court;

(iii) the pensions payable to or in respect of Judges of any High Court which exercises jurisdiction in relation to any area included in the territory of India or which at any time before the commencement of this Constitution exercised jurisdiction in relation to any area included in a Province corresponding to a State specified in Part A of the First Schedule;



(e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India;

(f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(g) any other expenditure declared by this Constitution or by Parliament by law to be charged.

113. (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.

Procedure in Parliament with respect to estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and the House of the People shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the President.

114. (1) As soon as may be after the grants under article 113 have been made by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

Appropriation Bills.

(a) the grants so made by the House of the People; and

(b) the expenditure charged on the Consolidated Fund of India but not exceeding in any case the amount shown in the statement previously laid before Parliament.

(2) No amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 115 and 116, no money shall be withdrawn from the Consolidated Fund of India except under appropriation made by law passed in accordance with the provisions of this article.

Supplementary, additional or excess grants.

115. (1) The President shall—

(a) If the amount authorised by any law made in accordance with the provisions of article 114 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year, cause to be laid before both the Houses of Parliament another statement showing the estimated amount of that expenditure or cause to be presented to the House of the People a demand for such excess, as the case may be.

(2) The provisions of articles 112, 113 and 114 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or the grant in respect of such demand ■■ they have effect in relation to the annual financial statement and the expenditure mentioned therein or to ■ demand for ■ grant and the law to be made for

the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or grant.

Votes on account, votes of credit and exceptional grants. 116. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the House of the People shall have power—

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 113 for the voting of such grant and the passing of the law in accordance with the provisions of article 114 in relation to that expenditure;

(b) to make ■ grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement;

(c) to make an exceptional grant which forms no part of the current service of any financial year;

and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of India for the purposes for which the said grants are made.

(2) The provisions of articles 113 and 114 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of ■ grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure.

117. (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States:

Special provisions as to financial Bills. Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.

#### *Procedure Generally.*

118. (1) Each House of Parliament may make rules or regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

Rules of procedure

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations ■ may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.

(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Houses.

(4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside.

119. Parliament may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, each House of Parliament in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of India, and, if and so far as any provision of any law so made is inconsistent with any rule made by a House of Parliament under clause (1) of article 118 or with any rule or standing order having effect in relation to Parliament under clause (2) of that article, such provision shall prevail.

120. (1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in Parliament shall be transacted in Hindi or in English:

Provided that the Chairman of the Council of States or Speaker of the House of the People, or person acting as such, in the case may be, may permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother tongue.

(2) Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.

121. No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge hereinafter provided.

122. (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

### Chapter III.—Legislative Powers of the President.

123. (1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and



(b) may be withdrawn at any time by the President.

*Explanation.*—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the latter of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

#### Chapter IV.—The Union Judiciary.

124. (1) There shall be ■ Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes ■ larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States ■ the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that—

(a) ■ Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4).

(3) A person shall not be qualified for appointment as ■ Judge of the Supreme Court unless he is a citizen of India and—

(a) has been for at least five years ■ Judge of a High Court or of two or more such Courts in succession; or

(b) has been for at least ten years an advocate of ■ High Court or of two or more such Courts in succession; or

(c) is, in the opinion of the President, ■ distinguished jurist.

*Explanation I.*—In this clause “High Court” means ■ High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

*Explanation II.*—In computing for the purpose of this clause the period during which ■ person has been ■ advocate, any period during which a person has held judicial office not inferior to that of ■ district judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.



Salaries, etc., of Judges. 125. (1) There shall be paid to the Judges of the Supreme Court such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule:

Provided that neither the privileges nor the allowances of ■ Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Appointment of acting Chief Justice. 126. When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court ■ the President may appoint for the purpose.

Appointment of *ad hoc* Judges. 127. (1) If at any time there should not be ■ quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an *ad hoc* Judge, for such period as may be necessary, of ■ Judge of ■ High Court duly qualified for appointment ■ ■ Judge of the Supreme Court to be designated by the Chief Justice of India.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of ■ Judge of the Supreme Court.

Attendance of retired Judges at sittings of the Supreme Court. 128. Notwithstanding anything in this Chapter the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of ■ Judge of the Supreme Court or of the Federal Court to sit and act as ■ Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances ■ the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court.

Provided that nothing in this article shall be deemed to require any such person ■ aforesaid to sit and act as a Judge of that Court unless he consents ■ to do.

Supreme Court to be ■ court of record. 129. The Supreme Court shall be ■ court of record and shall have all the powers of such ■ court including the power to punish for contempt of itself.

Seat of Supreme Court. 130. The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

Original jurisdiction of the Supreme Court. 131. Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

- (a) between the Government of India and one or more States; or
  - (b) between the Government of India and any State or States on one side and one or more other States on the other; or
  - (c) between two or more States,
- if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of ■ legal right depends:

Provided that the said jurisdiction shall not extend to—

(i) a dispute to which ■ State specified in Part B of the First Schedule is a party, if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution and has, or has been, continued in operation after such commencement;

(ii) a dispute to which any State is ■ party, if the dispute arises out of any provision of treaty, agreement, covenant, engagement, *sanad* or other similar instrument which provides that the said jurisdiction shall not extend to such a dispute.

132. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in ■ civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law ■ to the interpretation of this Constitution.

Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.

(2) Where the High Court has refused to give such ■ certificate, the Supreme Court may, if it is satisfied that the case involves ■ substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

*Explanation.*—For the purposes of this article, the expression “final order” includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.

133. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Supreme Court; and, where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Appellate jurisdiction of Supreme Court in regard to criminal matters.

134. (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) certifies that the case is a fit one for appeal to the Supreme Court:

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

135. Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.

136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Special leave to appeal by the Supreme Court.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Review of judgments or orders by the Supreme Court.

137. Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

Enlargement of the jurisdiction of the Supreme Court.

138. (1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

139. Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for any purposes other than those mentioned in clause (2) of article 32.

Conferment on the Supreme Court of powers to issue certain writs.



140. Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

Ancillary powers of Supreme Court.  
Law declared by Supreme Court to be binding on all courts.

141. The law declared by the Supreme Court shall be binding on all courts within the territory of India.

142. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

143. (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

Power of President to consult Supreme Court.

(2) The President may, notwithstanding anything in clause (i) of the proviso to article 131, refer a dispute of the kind mentioned in the said clause to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

Civil and judicial authorities to act in aid of the Supreme Court.

144. All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

145. (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including—

Rules of Court, etc.

- (a) rules as to the persons practising before the Court;
- (b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;
- (c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;
- (d) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;
- (e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;



(f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;

(g) rules ■ to the granting of bail;

(h) rules as to stay of proceedings;

(i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

(j) rules as to the procedure for inquiries referred to in clause (1) of article 317.

(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

(3) The minimum number of Judges who are sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves ■ substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such ■ question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

Officers and servants and the expenses of the Supreme Court.

146. (1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct:

Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose:

Provided that the rules made under this clause shall, so far ■ they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

147. In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or of any Order in Council or order made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder.

Chapter V.—Comptroller and Auditor-General of India.

148. (1) There shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court.

(2) Every person appointed to be the Comptroller and Auditor-General of India shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(3) The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule:

Provided that neither the salary of ■ Comptroller and Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(4) The Comptroller and Auditor-General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.

(5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

(6) The administrative expenses of the office of the Comptroller and Auditor-General, including all salaries, allowances and pensions payable to or in respect of persons serving in that office, shall be charged upon the Consolidated Fund of India.

149. The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

Duties and powers of the Comptroller and Auditor-General.

150. The accounts of the Union and of the States shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe.

151. (1) The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

Audit reports.

before each House of Parliament.

(2) The reports of the Comptroller and Auditor-General of India relating to the accounts of a State shall be submitted to the Governor or Rajpramukh of the State, who shall cause them to be laid before the Legislature of the State.

## PART VI.

### THE STATES IN PART A OF THE FIRST SCHEDULE.

#### Chapter I.—General.

152. In this Part, unless the context otherwise requires, the expression "State" means a State specified in Part A of the First Schedule.

#### Chapter II.—The Executive.

##### *The Governor.*

Governors of States. 153. There shall be a Governor for each State.

154. (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Nothing in this article shall—

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

Appointment of Governor. 155. The Governor of a State shall be appointed by the President by warrant under his hand and seal.

Term of office of Governor. 156. (1) The Governor shall hold office during the pleasure of the President.

(2) The Governor may, by writing under his hand addressed to the President, resign his office.

(3) Subject to the foregoing provisions of this article, a Governor shall hold office for a term of five years from the date on which he enters upon his office:

Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

Qualifications for appointment of Governor. 157. No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years.

158. (1) The Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor.

(2) The Governor shall not hold any other office of profit.

(3) The Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is made, such emoluments, allowances and privileges as specified in the Second Schedule.

(4) The emoluments and allowances of the Governor shall not be diminished during his term of office.



159. Every Governor and every person discharging the functions of the Governor shall, before entering upon his office, make an oath or affirmation by and subscribe in the presence of the Chief Justice of the High Court exercising jurisdiction in relation to the State, or, in his absence, the seniormost Judge of that Court available, an oath or affirmation in the following form, that is to say—

"I, A.B., do swear in the name of God that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of                      (name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of                      (name of the State)."

Discharge of the functions of the Governor in certain contingencies.

Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

Extent of executive power of State.

160. The President may make such provision as he thinks fit for the discharge of the functions of the Governor of ■ State in any contingency not provided for in this Chapter.

161. The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

162. Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of the State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

*Council of Ministers.*

163. (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

164. (1) The Chief Minister shall be appointed by the Governor and the other ministers shall be appointed by the Governor on the advice of the Chief Minister, and the ministers shall hold office during the pleasure of the Governor.

Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.



(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule.

### *The Advocate-General for the State.*

165. (1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of the High Court to be Advocate-General for the State.

(2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

### *Conduct of Government Business.*

166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

Duties of Chief Minister  
a respects the furnishing  
of information to Governor,  
etc.

167. It shall be the duty of the Chief Minister of each State—

(a) to communicate to the Governor of the State all decisions of the Council of Ministers relating to the administration of the affairs of State and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for; and

(c) if the Governor requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

# Chapter III.—The State Legislature.

## General.

Constitution of Legislatures in States.

168. (1) For every State there shall be a Legislature which shall consist of the Governor, and

(a) in the States of Bihar, Bombay, Madras, Punjab, the United Provinces and West Bengal, two Houses;

(b) in other States, one House.

(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

169. (1) Notwithstanding anything in article 168, Parliament may by law provide for the abolition of the Legislative Council of ■ State having such ■ Council or for the creation of such ■ Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by ■ majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution ■ may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions ■ Parliament may deem necessary.

(3) No such law as aforesaid shall be deemed to be ■ amendment of this Constitution for the purposes of article 368.

Composition of the Legislative Assemblies.

170. (1) Subject to the provisions of article 333, the Legislative Assembly of each State shall be composed of members chosen by direct election.

(2) The representation of each territorial constituency in the Legislative Assembly of ■ State shall be on the basis of the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published and shall, save in the case of the autonomous districts of Assam and the constituency comprising the cantonment and municipality of Shillong, be on ■ scale of not more than one member for every seventy-five thousand of the population:

Provided that the total number of members in the Legislative Assembly of ■ State shall in no case be more than five hundred or less than sixty.

(3) The ratio between the number of members to be allotted to each territorial constituency in ■ State and the population of that constituency ■ ascertained at the last preceding census of which the relevant figures have been published shall, so far as practicable, be the same throughout the State.

(4) Upon the completion of each census, the representation of the several territorial constituencies in the Legislative Assembly of each State shall be readjusted by such authority, in such manner and with effect from such date as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly.

Composition of the Legislative Councils.

171. (1) The total number of members in the Legislative Council of ■ State having such ■ Council shall not exceed one-fourth of the total number of members in the Legislative Assembly of that State:

Provided that the total number of members in the Legislative Council of a State shall in no ■ be less than forty.

(2) Until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in clause (3).

(3) Of the total number of members of the Legislative Council of a State—

(a) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify;

(b) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;

(c) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;

(d) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly;

(e) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5).

(4) The members to be elected under sub-clauses (a), (b) and (c) of clause (3) shall be chosen in such territorial constituencies ■ may be prescribed by or under any law made by Parliament, and the elections under the said sub-clauses and under sub-clause (d) of the said clause shall be held in accordance with the system of proportional representation by means of the single transferable vote.

(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art, co-operative movement and social service.

172. (1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly.

Duration of State Legislatures.

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond ■ period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of ■ State shall not be subject to dissolution, but ■ nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Qualification for membership of the State Legislature.

173. A person shall not be qualified to be chosen to fill ■ seat in the Legislature of a State unless he—

(a) is ■ citizen of India;

(b) is, in the case of ■ seat in the Legislative Assembly, not less than twenty-five years of age and, in the ■ of a ■ at in the Legislative Council, not less than thirty years of age; and



(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

Sessions of the State  
Legislature, prorogation  
and dissolution.

174. (1) The House or Houses of the Legislature of the State shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of clause (1), the Governor may from time to time—

(a) summon the House or either House to meet at such time and place as he thinks fit;

(b) prorogue the House or Houses;

(c) dissolve the Legislative Assembly.

Right of Governor to address and send messages to the House or Houses.

175. (1) The Governor may address the Legislative Assembly or, in the case of a State having a Legislative Council, either House of the Legislature of the State, or both Houses assembled together, and may for that purpose require the attendance of members.

(2) The Governor may send messages to the House or Houses of the Legislature of the State, whether with respect to a Bill then pending in the Legislature or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

Special address by the Governor at the commencement of every session.

176. (1) At the commencement of every session, the Governor shall address the Legislative Assembly or, in the case of a State having a Legislative Council, both Houses assembled together and inform the Legislature of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of the House or either House for the allotment of time for discussion of the matters referred to in such address and for the precedence of such discussion over other business of the House.

177. Every Minister and the Advocate-General for a State shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly of the State or, in the case of a State having a Legislative Council, both Houses, and to speak in, and otherwise to take part in the proceedings of, any committee of the Legislature of which he may be named a member, but shall not, by virtue of this article, be entitled to vote.

Rights of Ministers and Advocate-General as respects the Houses.

### *Officers of the State Legislature.*

178. Every Legislative Assembly of a State shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be.

The Speaker and Deputy Speaker of the Legislative Assembly.



Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

179. A member holding office as Speaker or Deputy Speaker of an Assembly—

- (a) shall vacate his office if he ceases to be a member of the Assembly;
- (b) may at any time by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and
- (c) may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:

Provided further that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.

180. (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the Assembly as the Governor may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker.

181. (1) At any sitting of the Legislative Assembly, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 180 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

182. The Legislative Council of every State having such Council shall, as soon as may be, choose two members of the Council to be respectively Chairman and Deputy Chairman thereof and, so often as the office of Chairman or Deputy Chairman becomes vacant, the Council shall choose another member to be Chairman or Deputy Chairman, as the case may be.

The Chairman and Deputy Chairman of the Legislative Council.

Vacation and resignation of, and removal from, the offices of Chairman and Deputy Chairman.

183. A member holding office as Chairman or Deputy Chairman of a Legislative Council—

- (a) shall vacate his office if he ceases to be a member of the Council;
- (b) may at any time by writing under his hand addressed, if such member is the Chairman, to the Deputy Chairman, and if such member is the Deputy Chairman, to the Chairman, resign his office; and

(c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as Chairman.

184. (1) While the office of Chairman is vacant, the duties of the office shall be performed by the Deputy Chairman or, if the office of Deputy Chairman is also vacant, by such member of the Council as the Governor may appoint for the purpose.

(2) During the absence of the Chairman from any sitting of the Council the Deputy Chairman or, if he is also absent, such person may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

185. (1) At any sitting of the Legislative Council, while any resolution for the removal of the Chairman from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 184 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman or, as the case may be, the Deputy Chairman is absent.

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

(2) The Chairman shall have the right to speak in and otherwise to take part in the proceedings of, the Legislative Council while any resolution for his removal from office is under consideration in the Council and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

186. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly, and to the Chairman and the Deputy Chairman of the Legislative Council, such salaries and allowances as may be respectively fixed by the Legislature of the State by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

Salaries and allowances of the Speaker and Deputy Speaker and the Chairman and Deputy Chairman.

allowances as are specified in the Second Schedule.

187. (1) The House or each House of the Legislature of a State shall have a separate secretarial staff:

Secretariat of State Legislature.

Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such Legislature.

(2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State.

(3) Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

*Conduct of Business.*

188. Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make an oath or affirmation by and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

189. (1) Save as otherwise provided in this Constitution, all questions at any sitting of a House of the Legislature of a State shall be determined by a majority of votes of the members present and voting, other than the Speaker or Chairman, or person acting as such.

The Speaker or Chairman, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A House of the Legislature of a State shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature of a State shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until the Legislature of the State by law otherwise provides, the quorum to constitute a meeting of a House of the Legislature of a State shall be ten members or one-tenth of the total number of members of the House, whichever is greater.

(4) If at any time during a meeting of the Legislative Assembly or the Legislative Council of a State there is no quorum, it shall be the duty of the Speaker or Chairman, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

*Disqualifications of Members.*

190. (1) No person shall be a member of both Houses of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member of the Legislatures of two or more States specified in the First Schedule and if a person is chosen a member of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States.

(3) If a member of a House of the Legislature of a State—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 191; or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of a House of the Legislature of a State is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.



Disqualifications for membership.

191. (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of ■ State—

(a) if he holds any office of profit under the Government of India or the Government of any State, specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

Decision on questions as to disqualifications of members.

192. (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

Penalty for sitting and voting before making oath or affirmation under article 188 or when not qualified or when disqualified.

*Powers, Privileges and Immunities of State Legislatures and their Members.*

Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof.

194. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of ■ House of such ■ Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.



(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

195. Members of the Legislative Assembly and the Legislative Council of a State shall be entitled to receive such salaries and allowances as may from time to time be determined by the Legislature of the State by law and, until provision in that respect is so made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province.

*Legislative Procedure.*

196. (1) Subject to the provisions of articles 198 and 207 with respect to Money Bills and other financial Bills, a Bill may originate in either House of the Legislature of a State which has a Legislative Council.

(2) Subject to the provisions of articles 197 and 198, a Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in the Legislature of a State shall not lapse by reason of the prorogation of the House or Houses thereof.

(4) A Bill pending in the Legislative Council of a State which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Legislative Assembly of a State, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly.

197. (1) If after a Bill has been passed by the Legislative Assembly of a State having a Legislative Council and transmitted to the Legislative Council—

- (a) the Bill is rejected by the Council; or
  - (b) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it; or
  - (c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,
- the Legislative Assembly may, subject to the rules regulating its procedure, pass the Bill again in the same or in any subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the Legislative Council and then transmit the Bill as so passed to the Legislative Council.

(2) If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council—

- (a) the Bill is rejected by the Council; or
- (b) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it; or
- (c) the Bill is passed by the Council with amendments to which the legislative Assembly does not agree,

the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly.

(3) Nothing in this article shall apply to a Money Bill.

Special procedure in respect of Money Bills.

198. (1) A Money Bill shall not be introduced in a Legislative Council.

(2) After a Money Bill has been passed by the Legislative Assembly of a State having a Legislative Council, it shall be transmitted to the Legislative Council for its recommendations, and the Legislative Council shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the Legislative Assembly with its recommendations, and the Legislative Assembly may thereupon either accept or reject all or any of the recommendations of the Legislative Council.

(3) If the Legislative Assembly accepts any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Legislative Council and accepted by the Legislative Assembly.

(4) If the Legislative Assembly does not accept any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly without any of the amendments recommended by the Legislative Council.

(5) If a Money Bill passed by the Legislative Assembly and transmitted to the Legislative Council for its recommendations is not returned to the Legislative Assembly within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the Legislative Assembly.

199. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely—

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State;

(c) the custody of the Consolidated Fund or the Contingency Fund of the State, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of the State;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of the State or the public account of the State or the custody or issue of such money, or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under article 198, and when it is presented to the Governor for assent under article 200, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.

200. When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom:

Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.

201. When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom:

Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration.

#### *Procedure in Financial Matters.*

202. (1) The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that year, in this part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of the State; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State;



and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State—

(a) the emoluments and allowances of the Governor and other expenditure relating to his office;

(b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and, in the case of a State having ■ Legislative Council, also of the Chairman and the Deputy Chairman of the Legislative Council;

(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(d) expenditure in respect of the salaries and allowances of Judges of any High Court;

(e) any sums required to satisfy any judgment, decree or award of any Court or arbitral tribunal;

(f) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged.

203. (1) So much of the estimates ■ relates to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly, but nothing in this clause shall be construed ■ preventing the discussion in the Legislature of any of those estimates.

(2) So much of the said estimates ■ relates to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to ■ reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Governor.

204. (1) As soon as may be after the grants under article 203 have been made by the Assembly, there shall be introduced ■ Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet—

(a) the grants ■ made by the Assembly; and

(b) the expenditure charged ■ the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the House or Houses.

(2) No amendment shall be proposed to any such Bill in the House or either House of the Legislature of the State which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this article.

Supplementary, additional or excess grants.

205. (1) The Governor shall—

(a) if the amount authorised by any law made in accordance with the provisions of article 204 to be expended for ■ particular service for the current financial year is found to be insufficient for the purposes of that year or when



■ need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year, cause to be laid before the House or the Houses of the Legislature of the State another statement showing the estimated amount of that expenditure or cause to be presented to the Legislative Assembly of the State a demand for such excess, as the case may be.

(2) The provisions of articles 202, 203 and 204 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or grant.

Votes on account, votes of credit and exceptional grants. 206. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the Legislative Assembly of a State shall have power—

(a) to make any grant in advance in respect of the estimated expenditure for ■ part of any financial year pending the completion of the procedure prescribed in article 203 for the voting of such grant and the passing of the law in accordance with the provisions of article 204 in relation to that expenditure;

(b) to make a grant for meeting an unexpected demand upon the resources of the State when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement;

(c) to make an exceptional grant which forms no part of the current service of any financial year;

and the Legislature of the State shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which the said grants are made.

(2) The provisions of articles 203 and 204 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure.

207. (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 199 shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in ■ Legislative Council:

Special provisions as to financial Bills. Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of ■ State shall not be passed by a

House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill.

*Procedure Generally.*

208. (1) A House of the Legislature of ■ State may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

Rules of procedure.

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the corresponding Province shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly, or the Chairman of the Legislative Council, as the case may be.

(3) In a State having a Legislative Council the Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, may make rules as to the procedure with respect to communications between the two Houses.

209. The Legislature of ■ State may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, the House or Houses of the Legislature of the State in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of the State, and, if and so far as any provision of any law so made is inconsistent with any rule made by the House or either House of the Legislature of the State under clause (1) of article 208 or with any rule or standing order having effect in relation to the Legislature of the State under clause (2) of that article, such provision shall prevail.

Regulation by law of procedure in the Legislature of the State in relation to financial business.

210. (1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in the Legislature of a State shall be transacted in the official language or languages of the State or in Hindi or in English:

Language to be used in Legislature.

Provided that the Speaker of the Legislative Assembly or Chairman of the Legislative Council, or person acting ■ such, as the case may be, may permit any member who cannot adequately express himself in any of the languages aforesaid to address the House in his mother-tongue.

(2) Unless the Legislature of the State by law otherwise provides, this article shall, after the expiration of ■ period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.

211. No discussion shall take place in the Legislature of ■ State with respect to the conduct of any Judge of the Supreme Court or of ■ High Court in the discharge of his duties.

Restriction on discussion in the Legislature.

212. (1) The validity of any proceedings in the Legislature of ■ State shall not be called in question on the ground of any alleged irregularity of procedure.

Courts not to inquire into proceedings of the Legislature.

(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

**Chapter IV.—Legislative Power of the Governor.**

213. (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

Power of Governor to promulgate Ordinances during recess of Legislature.

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

(a) ■ Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve ■ Bill containing the same provisions for the consideration of the President; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the ■■■■■ force and effect as ■■■ Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

(a) shall be laid before the Legislative Assembly of the State, or where there is ■ Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, ■ the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

*Explanation.*—Where the Houses of the Legislature of a State having ■ Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

**Chapter V.—The High Courts in the States.**

High Courts for States.

214. (1) There shall be ■ High Court for each State.

(2) For the purposes of this Constitution the High Court exercising jurisdiction in relation to any Province immediately before the commencement of this Constitution shall be deemed to be the High Court for the corresponding State.

(3) The provisions of this Chapter shall apply to every High Court referred to in this article.



High Courts to be courts of record.

215. Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

Constitution of High Courts.

216. Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint:

Provided that the Judges so appointed shall at no time exceed in number such maximum number as the President may, from time to time, by order fix in relation to that Court.

217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office until he attains the age of sixty years:

Provided that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court in any State specified in the First Schedule or of two or more such Courts in succession.

*Explanation.*—For the purposes of this clause—

(a) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office after he became an advocate;

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

Application of certain provisions relating to Supreme Court to High Courts.

218. The provisions of clauses (4) and (5) of article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

219. Every person appointed to be a Judge of a High Court in a State shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.



Prohibition of practising in courts or before any authority by Judges.

220. No person who has held office as a Judge of a High Court after the commencement of this Constitution shall plead or act in any court or before any authority within the territory of India.

Salaries, etc., of Judges.

221. (1) There shall be paid to the Judges of each High Court such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Transfer of ■ Judge from one High Court to another.

222. (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court within the territory of India.

(2) When ■ Judge is so transferred, he shall, during the period he serves as a Judge of the other Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

223. When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

224. Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances ■ the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, ■ Judge of that High Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act ■ a Judge of that High Court unless he consents so to do.

225. Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

226. (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

Power of superintendence over all courts by the High Court.

227. (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

228. If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

(a) either dispose of the case itself, or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

229. (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:

Officers and servants and the expenses of High Courts.

Provided that the Governor of the State in which the High Court has its principal seat may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State in which the High Court has its principal seat.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

Extension of or exclusion from the jurisdiction of High Courts.

230. Parliament may by law—

(a) extend the jurisdiction of a High Court to, or  
(b) exclude the jurisdiction of a High Court from, any State specified in the First Schedule other than, or any area not within, the State in which the High Court has its principal seat.

Restrictions on the powers of the Legislatures of States to make laws with respect to jurisdiction of a High Court in State having jurisdiction outside that State.

231. Where a High Court exercises jurisdiction in relation to any area outside the State in which it has its principal seat, nothing in this Constitution shall be construed—

(a) as empowering the Legislature of the State in which the Court has its principal seat to increase, restrict or abolish that jurisdiction;

(b) as empowering the Legislature of a State specified in Part A or Part B of the First Schedule in which any such area is situate, to abolish that jurisdiction; or

(c) as preventing the Legislature having power to make laws in that behalf for any such area, from passing, subject to the provisions of clause (b), such laws with respect to the jurisdiction of the Court in relation to that area as it would be competent to pass if the principal seat of the Court were in that area.

232. Where ■ High Court exercises jurisdiction in relation to more than one State specified in the First Schedule or in relation to ■ State and an area not forming part of the State.

Interpretation.

(a) references in this Chapter to the Governor in relation to the Judges of ■ High Court shall be construed as references to the Governor of the State in which the Court has its principal seat;

(b) the reference to the approval by the Governor of rules, forms and tables for subordinate courts shall be construed ■ ■ reference to the approval thereof by the Governor or the Rajpramukh of the State in which the subordinate court is situate, or if it is situate in an area not forming part of any State specified in Part A or Part B of the First Schedule, by the President; and

(c) references to the Consolidated Fund of the State shall be construed as references to the Consolidated Fund of the State in which the Court has its principal seat.

#### Chapter VI.—Subordinate Courts.

233. (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising Jurisdiction in relation to such State.

Appointment of district judges.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed ■ district judge if he has been for not less than seven years an advocate or ■ pleader and is recommended by the High Court for appointment.



234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Interpretation.

236. In this Chapter—

(a) the expression “district judge” includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;

(b) the expression “judicial service” means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial post inferior to the post of district judge.

237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State ■ they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

## PART VII.

### THE STATES IN PART B OF THE FIRST SCHEDULE.

238. The provisions of Part VI shall apply in relation to the States specified in Part B of the First Schedule as they apply in relation to the States specified in Part A of that Schedule subject to the following modifications and omissions, namely:—

(1) For the word “Governor” wherever it occurs in the said Part VI, except where it occurs for the second time in clause (b) of article 232, the word “Rajpramukh” shall be substituted.

(2) In article 152, for the word and letter “Part A” the word and letter “Part B” shall be substituted.

(3) Articles 155, 156 and 157 shall be omitted.

(4) In article 158,—

(i) in clause (1), for the words “be appointed” the word “becomes” shall be substituted;

(ii) for clause (3), the following clause shall be substituted, namely:—

“(3) The Rajpramukh shall, unless he has his own residence in the principal seat of Government of the State, be entitled without payment of rent to the use of an official residence and shall be also entitled to such allowances and privileges as the President may, by general or special order, determine.”;

(iii) in clause (4), the words “emoluments and” shall be omitted.

(5) In article 159, after the words “seniormost Judge of that Court available” the words “or in such other manner as may be prescribed in that behalf by the President” shall be inserted.



(6) In article 164, for the proviso to clause (1) the following proviso shall be substituted, namely:—

“Provided that in the State of Madhya Bharat there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.”

(7) In article 168, for clause (1) the following shall be substituted, namely:—

“(1) For every State there shall be a Legislature which shall consist of the Rajpramukh and—

(a) in the State of Mysore, two Houses;

(b) in other States, one House.”

(8) In article 186, for the words “as are specified in the Second Schedule” the words “as the Rajpramukh may determine” shall be substituted.

(9) In article 195, for the words “as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province” the words “as the Rajpramukh may determine” shall be substituted.

(10) In clause (3) of article 202—

(i) for sub-clause (a), the following sub-clause shall be substituted, namely:—

“(a) the allowances of the Rajpramukh and other expenditure relating to his office as determined by the President by general or special order;”

(ii) for sub-clause (f) the following sub-clauses shall be substituted, namely:—

“(f) in the case of the State of Travancore-Cochin, a sum of fifty-one lakhs of rupees required to be paid annually to the Devaswom fund under the covenant entered into before the commencement of this Constitution by the Rulers of the Indian States of Travancore and Cochin for the formation of the United State of Travancore and Cochin;

(g) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged.”

(11) In article 208, for clause (2), the following clause shall be substituted, namely:—

“(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the State or, where no House of the Legislature for the State existed, the rules of procedure and standing orders in force immediately before such commencement with respect to the Legislative Assembly of such Province as may be specified in that behalf by the Rajpramukh of the State, shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be.”

(12) In clause (2) of article 214, for the word “Province” the words “Indian State” shall be substituted.

(13) For article 221, the following article shall be substituted, namely:—

Salary, etc., of Judges.	“221. (1) There shall be paid to the Judges of each High Court such salaries as may be determined by the President after consultation with the Rajpramukh.
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(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as may be determined by the President after consultation with the Rajpramukh:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

## PART VIII.

### THE STATES IN PART C OF THE FIRST SCHEDULE.

239. (1) Subject to the other provisions of this Part, a State specified in Part C of the First Schedule shall be administered by the President acting, to such extent as he thinks fit, through a Chief Commissioner or Lieutenant-Governor to be appointed by him or through the Government of a neighbouring State:

Administration of States in Part C of the First Schedule.

Provided that the President shall not act through the Government of a neighbouring State save after—

(a) consulting the Government concerned; and

(b) ascertaining in such manner as the President considers most appropriate the views of the people of the State to be so administered.

(2) In this article, references to a State shall include references to a part of a State.

Creation or continuance of local Legislatures or Council of Advisers or Ministers.

240. (1) Parliament may by law create or continue for any State specified in Part C of the First Schedule and administered through a Chief Commissioner or Lieutenant-Governor—

(a) a body, whether nominated, elected or partly nominated and partly elected, to function as a Legislature for the State; or

(b) a Council of Advisers or Ministers, or both with such constitution, powers and functions, in each case, as may be specified in the law.

(2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending the Constitution.

241. (1) Parliament may by law constitute a High Court for a State specified in Part C of the First Schedule or declare any Court in any such State to be a High Court for all or any of the purposes of this Constitution.

High Courts for States in part C of the first Schedule.

(2) The provisions of Chapter V of Part VI shall apply in relation to every High Court referred to in clause (1) as they apply in relation to a High Court referred to in article 214 subject to such modifications or exceptions as Parliament may by law provide.

(3) Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by or under this Constitution, every High Court exercising jurisdiction immediately before the commencement of this Constitution in relation to any State specified in Part C of the First Schedule or any area included therein shall continue to exercise such jurisdiction in relations to that State or area after such commencement.

(4) Nothing in this article derogates from the power of Parliament to extend or to exclude the jurisdiction of a High Court in any State specified in Part A or Part B of the First Schedule to, or from, any State specified in Part C of that Schedule or any area included within that State.

242. (1) Until Parliament by law otherwise provides, the constitution, powers and functions of the Coorg Legislative Council shall be the same as they were immediately before the commencement of this Constitution.

Coorg.

(2) The arrangements with respect to revenues collected in Coorg and expenses in respect of Coorg shall, until other provision is made in that behalf by the President by order, continue unchanged.

### PART IX.

#### THE TERRITORIES IN PART D OF THE FIRST SCHEDULE AND OTHER TERRITORIES NOT SPECIFIED IN THAT SCHEDULE.

Administration of territories specified in Part D of the First Schedule and other territories not specified in that Schedule.

243. (1) Any territory specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule shall be administered by the President acting, to such extent as he thinks fit, through a Chief Commissioner or other authority to be appointed by him.

(2) The President may make regulations for the peace and good government of any such territory and any regulation so made may repeal or amend any law made by Parliament or any existing law which is for the time being applicable to such territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to such territory.

### PART X.

#### THE SCHEDULED AND TRIBAL AREAS.

Administration of Scheduled Areas and tribal areas.

244. (1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State specified in Part A or Part B of the First Schedule other than the State of Assam.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam.

### PART XI.

#### RELATIONS BETWEEN THE UNION AND THE STATES.

##### Chapter I.—Legislative Relations.

##### *Distribution of Legislative Powers.*

Extent of laws made by Parliament and by the Legislatures of States.

245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Subject-matter of laws made by Parliament and by the Legislatures of States.

246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State specified in Part A or Part B of the First Schedule also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").



(3) Subject to clauses (1) and (2), the Legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in Part A or Part B of the First Schedule notwithstanding that such matter is a matter enumerated in the State List.

Power of Parliament to provide for the establishment of certain additional Courts.

247. Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

Residuary powers of legislation.

248. (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

249. (1) Notwithstanding anything in the foregoing provisions of this

Power of Parliament to legislate with respect to a matter in the State List in the national interest.

Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any

matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.

250. (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.



251. Nothing in articles 249 and 250 shall restrict the power of the Legis-

Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States.

lature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by a Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

252. (1) If it appears to the Legislatures of two or more States to be

Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.

desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, ■ respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

253. Notwithstanding anything in the foregoing provisions of this

Legislation for giving effect to international agreements.

Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

254. (1) If any provision of a law made by the Legislature of a State

Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

is repugnant to any provision of ■ law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where ■ law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including ■ law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.

255. No Act of Parliament or of the Legislature of a State specified in Part A or Part B of the First Schedule, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—

(a) where the recommendation required was that of the Governor, either by the Governor or by the President;

(b) Where the recommendation required was that of the Rajpramukh either by the Rajpramukh or by the President;

(c) where the recommendation or previous sanction required was that of the President, by the President.

## Chapter II.—Administrative Relations.

### *General.*

256. The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

257. (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

258. (1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

Power of the Union to confer powers, etc., on States in certain cases.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

259. (1) Notwithstanding anything in this Constitution, a State specified in Part B of the First Schedule having any Armed Forces immediately before the commencement of this Constitution may, until Parliament by law otherwise provides, continue to maintain the said Forces after such commencement subject to such general or special orders as the President may from time to time issue in that behalf.

(2) Any such Armed Forces as are referred to in clause (1) shall form part of the Armed Forces of the Union.

260. The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

261. (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

#### *Disputes relating to Waters.*

Adjudication of disputes relating to waters of inter-State rivers or river valleys.

262. (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

#### *Co-ordination between States.*

Provisions with respect to Inter-State Council.

263. If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—

(a) inquiring into and advising upon disputes which may have arisen between States;

(b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest;



(c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,  
it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

## PART XII.

### FINANCE, PROPERTY, CONTRACTS AND SUITS.

#### Chapter I.—Finance.

##### *General.*

Interpretation.

264. In this Part, unless the context otherwise requires,—

(a) “Finance Commission” means a Finance Commission constituted under article 280;

(b) “State” does not include a State specified in Part C of the First Schedule;

(c) references to States specified in Part C of the First Schedule shall include references to any territory specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule.

Taxes not to be imposed save by authority of law.

265. No tax shall be levied or collected except by authority of law.

266. (1) Subject to the provisions of article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled “the Consolidated Fund of India”, and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled “the Consolidated Fund of the State”.

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

267. (1) Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled “the Contingency Fund of India” into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under article 115 or article 116.

(2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled “the Contingency Fund of the State” into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor or Rajpramukh of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation.



tion of such expenditure by the Legislature of the State by law under article 205 or article 206.

*Distribution of Revenues between the Union and the States.*

Duties levied by the Union but collected and appropriated by the States.

268. (1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected—

(a) in the case where such duties are leviable within any State specified in Part C of the First Schedule, by the Government of India, and

(b) in other cases, by the States within which such duties are respectively leviable.

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

Taxes levied and collected by the Union but assigned to the States.

269. (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely:—

(a) duties in respect of succession to property other than agricultural land;

(b) estate duty in respect of property other than agricultural land;

(c) terminal taxes on goods or passengers carried by railway, sea or air;

(d) taxes on railway fares and freights;

(e) taxes other than stamp duties on transactions in stock-exchanges and futures markets;

(f) taxes on the sale or purchase of newspapers and on advertisements published therein.

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

Taxes levied and collected by the Union and distributed between the Union and the States.

270. (1) Taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule or to taxes payable in respect of Union emoluments, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed.

(3) For the purposes of clause (2), in each financial year such percentage may be prescribed of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Union emoluments shall be deemed to represent proceeds attributable to States specified in Part C of the First Schedule.

(4) In this article—

(a) "taxes on income" does not include corporation tax;

(b) "prescribed" means—

(i) until a Finance Commission has been constituted, prescribed by the President by order, and

(ii) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission;

(c) "Union emoluments" includes all emoluments and pensions payable out of the Consolidated Fund of India in respect of which income-tax is chargeable.

271. Notwithstanding anything in articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

272. Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India, but, if Parliament by law so provides there shall be paid out of the Consolidated Fund of India to the States to which the law imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among those States in accordance with such principles of distribution as may be formulated by such law.

273. (1) There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Orissa and West Bengal, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of ten years from the commencement of this Constitution, whichever is earlier.

(3) In this article, the expression "prescribed" has the same meaning as in article 270.

274. (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression "tax or duty in which States are interested" means—

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

275. (1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States ■ Parliament may determine to be in need of assistance, and different sums may be fixed for different States:

Grants from the union to certain States.  
 Provided that there shall be paid out of the Consolidated Fund of India ■ grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State:

Provided further that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to—

(a) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule; and

(b) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that State.

(2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament:

Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission.

276. (1) Notwithstanding anything in article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to ■ tax on income.

Taxes on professions, trades, callings and employments.  
 (2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum:

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on profession, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities.

(3) The power of the Legislature of ■ State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.



277. Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.

Agreement with States in Part B of the first Schedule with regard to certain financial matters.

278. (1) Notwithstanding anything in this Constitution, the Government of India may, subject to the provisions of clause (2), enter into an agreement with the Government of a State specified in Part B of the First Schedule with respect to—

(a) the levy and collection of any tax or duty leviable by the Government of India in such State and for the distribution of the proceeds thereof otherwise than in accordance with the provisions of this Chapter;

(b) the grant of any financial assistance by the Government of India to such State in consequence of the loss of any revenue which that State used to derive from any tax or duty leviable under this Constitution by the Government of India or from any other sources;

(c) the contribution by such State in respect of any payment made by the Government of India under clause (1) of article 291, and, when an agreement is so entered into, the provisions of this Chapter shall in relation to such State have effect subject to the terms of such agreement.

(2) An agreement entered into under clause (1) shall continue in force for a period not exceeding ten years from the commencement of this Constitution:

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if after consideration of the report of the Finance Commission he thinks it necessary to do so.

279. (1) In the foregoing provisions of this Chapter, “net proceeds” means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Comptroller and Auditor-General of India, whose certificate shall be final.

(2) Subject as aforesaid, and to any other express provision of this Chapter, a law made by Parliament or an order of the President may, in any case where under this Part the proceeds of any duty or tax are, or may be, assigned to any State, provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

280. (1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to—



(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;

(c) the continuance or modification of the terms of any agreement entered into by the Government of India with the Government of any State specified in Part B of the First Schedule under clause (1) of article 278 or under article 306; and

(d) any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

281. The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

#### *Miscellaneous Financial Provisions.*

282. The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.

283. (1) The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of India, their payment into the public account of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by Parliament, and, until provision in that behalf is so made, shall be regulated by rules made by the President.

(2) The custody of the Consolidated Fund of a State and the Contingency Fund of a State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of the State, their payment into the public account of the State and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature of the State, and, until provision in that behalf is so made, shall be regulated by rules made by the Governor or Rajpramukh of the State.

284. All moneys received by or deposited with—

(a) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be, or

(b) any court within the territory of India to the credit of any cause, matter, account or persons,

shall be paid into the public account of India or the public account of the State as the case may be.

Exemption of property of the Union from State taxation.

285. (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

Restrictions as to imposition of tax on the sale or purchase of goods.

286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

*Explanation.*—For the purposes of sub-clause (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

287. Save in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(a) consumed by the Government of India, or sold to the Government of India for consumption by that Government; or

(b) consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway, and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as aforesaid for consumption in the construction, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.

288. (1) Save in ■ far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, ■ tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Exemption from taxation by States in respect of water or electricity in certain cases.

*Explanation.*—The expression “law of a State in force” in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

Exemption of property and income of a State from Union taxation.

289. (1) The property and income of ■ State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government.

290. Where under the provisions of this Constitution the expenses of any Court or Commission, or the pension payable to or in respect of a person who has served before the commencement of this Constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State, are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if—

(a) in the case of ■ charge on the Consolidated Fund of India, the court or Commission serves any of the separate needs of a state, or the person has served wholly or in part in connection with the affairs of ■ State; or

(b) in the case of ■ charge on the Consolidated Fund of a State, the court or Commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State,

there shall be charged on and paid out of the Consolidated Fund of the State or, as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or ■ may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

291. (1) Where under any covenant or agreement entered into by the Privy purse ■ of Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free



of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India; and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income.

(2) Where the territories of any such Indian State as aforesaid are comprised within a State specified in Part A or Part B of the First Schedule, there shall be charged on, and paid out of, the Consolidated Fund of that State such contribution, if any, in respect of the payments made by the Government of India under clause (1) and for such period as may, subject to any agreement entered into in that behalf under clause (1) of article 278, be determined by order of the President.

## Chapter II.—Borrowing.

292. The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

293. (1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

## Chapter III.—Property, Contracts, Rights, Liabilities, Obligations and Suits.

Succession to property, assets, rights, liabilities and obligations in certain cases. 294. As from the commencement of this Constitution—

(a) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

(b) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State.



subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

Succession to property,  
assets, rights, liabilities  
and obligations in other  
cases.

295. (1) As from the commencement of this Constitution—

(a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities and obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List, subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject ■ aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

296. Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of ■ rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:

Property accruing by escheat or lapse or as *bona vacantia*.  
Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of ■ State, vest in the Union or in that State.

*Explanation.*—In this article, the expressions “Ruler” and “Indian State” have the same meanings ■ in article 363.

Things of value lying within territorial waters to vest in the Union.

297. All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest in the Union and be held for the purposes of the Union.

298. (1) The executive power of the Union and of each State shall extend, subject to any law made by the appropriate Legislature, to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts.

Power to acquire property.

(2) All property acquired for the purposes of the Union or of a State shall vest in the Union or in such State, ■ the case may be.

299. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor or the Rajpramukh of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor or the Rajpramukh by such persons and in such manner as he may direct or authorise.

Contracts.

(2) Neither the President nor the Governor nor the Rajpramukh shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

300. (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

Suits and proceedings.

(2) If at the commencement of this Constitution—

(a) any legal proceedings are pending to which the Dominion of India is ■ party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

## PART XIII.

### TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA.

Freedom of trade, commerce and intercourse.

301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Power of Parliament to impose restrictions on trade, commerce and intercourse.

302. Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce.

303. (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of ■ State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists

in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or autho-

rising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

Restrictions on trade, commerce and intercourse among States.

304. Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

Effect of articles 301 and 303 on existing laws.

305. Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise provide.

Power of certain States in Part B of the First Schedule to impose restrictions on trade and commerce.

306. Notwithstanding anything in the foregoing provisions of this Part or in any other provisions of this Constitution, any State specified in Part B of the First Schedule which before the commencement of this Constitution was levying any tax or duty on the import of goods into the State from other States or on the export of goods from the State to other States may, if an agreement in that behalf has been entered into between the Government of India and the Government of that State, continue to levy and collect such tax or duty subject to the terms of such agreement and for such period not exceeding ten years from the commencement of this Constitution as may be specified in the agreement:

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if, after consideration of the report of the Finance Commission constituted under article 280, he thinks it necessary to do so.

Appointment of authority for carrying out the purposes of articles 301 to 304.

307. Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.

## PART XIV.

### SERVICES UNDER THE UNION AND THE STATES.

#### Chapter I—Services.

Interpretation.

308. In this Part, unless the context otherwise requires, the expression “State” means a State specified in Part A or Part B of the First Schedule.

Recruitment and conditions of service of persons serving the Union or State.

309. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:



Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor or Rajpramukh of a State or such person ■ he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and post until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

310. (1) Except as expressly provided by this Constitution, every Tenure of office of persons serving the Union or a State. person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor or Rajpramukh of the State, any contract under which ■ person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor or the Rajpramukh, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

311. (1) No person who is a member of ■ civil service of the Union or an all-India service or ■ civil service of a State or holds a civil post under the Union or ■ State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

(b) where an authority empowered to dismiss or remove ■ person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or Governor or Rajpramukh, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give that person such an opportunity.

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final.

312. (1) Notwithstanding anything in Part XI, if the Council of States All-India services. has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by



law provide for the creation of one or more all-India services common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

313. **Transitional provisions.** Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

314. **Provision for protection of existing officers of certain services.** Except as otherwise expressly provided by this Constitution, every person who having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India continues on and after the commencement of this Constitution to serve under the Government of India or of a State shall be entitled to receive from the Government of India and the Government of the State, which he is from time to time serving, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or rights as similar thereto as changed circumstances may permit as that person was entitled to immediately before such commencement.

## Chapter II.—Public Service Commissions.

315. (1) **Public Service Commissions for the Union and for the States.** Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.

(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a Joint State Public Service Commission (referred to in this Chapter as Joint Commission) to serve the needs of those States.

(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.

(4) The Public Service Commission for the Union, if requested so to do by the Governor or Rajpramukh of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.

(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State in respects the particular matter in question.

316. (1) **Appointment and term of office of members.** The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor or Rajpramukh of the State:

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said

period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission, or a Joint Commission, the age of sixty years, whichever is earlier:

Provided that—

(a) a member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor or Rajpramukh of the State, resign his office;

(b) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of article 317.

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office.

317. (1) Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor or Rajpramukh, in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in clause (1), the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, as the case may be,—

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment outside the duties of his office; or

(c) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehaviour.

Power to make regulations as to conditions of service of members and staff of the Commission.

318. In the case of the Union Commission or a Joint Commission, the President and, in the case of a State Commission, the Governor or Rajpramukh of the State may by regulations—

(a) determine the number of members of the Commission and their conditions of service; and

(b) make provision with respect to the number of members of the staff of the Commission and their conditions of service:

Provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment.

Prohibition ■ to the holding of offices by members of Commission on ceasing to be such members.

319. On ceasing to hold office—

(a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(c) ■ member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of ■ State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of ■ State.

Functions of Public Service Commissions.

320. (1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, ■ the case may be, shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on all disciplinary matters affecting ■ person serving under the Government of India or the Government of ■ State in ■ civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of ■ person who is serving or has served under the Government of India or the Government of ■ State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) ■ any claim for the award of a pension in respect of injuries sustained by ■ person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award, and it shall be the duty of a Public Service Commission to advise on any matter ■ referred to them and on any other matter which the President, or, ■ the ■ may be, the Governor ■ Rajpramukh of the State, may refer to them:



Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union and the Governor or Rajpramukh, as the case may be, ■ respects other services and posts in connection with the affairs of ■ State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require ■ Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.

(5) All regulations made under the proviso to clause (3) by the President or the Governor or Rajpramukh of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, ■ the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

321. An Act made by Parliament or, ■ the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

322. The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, ■ the case may be, the Consolidated Fund of the State.

323. (1) It shall be the duty of the Union Commission to present annually to the President ■ report ■ to the work done by the Commission and on receipt of such report the President shall cause ■ copy thereof together with a memorandum explaining, ■ respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of Parliament.

(2) It shall be the duty of a State Commission to present annually to the Governor or Rajpramukh of the State ■ report as to the work done by the Commission, and it shall be the duty of ■ joint commission to present annually to the Governor or Rajpramukh of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor or Rajpramukh, as the case may be, shall, on receipt of such report, cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature of the State.

## PART XV.

### ELECTIONS.

324. (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including appointment of election tribunals for the deci-

Superintendence, direction and control of elections to be vested in ■ Election Commission.



sion of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor or Rajpramukh of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

325. There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

No person to be ineligible for inclusion in or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

326. The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.

327. Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimita-

Power of Parliament to make provision with respect to elections to Legislatures.

tion of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

328. Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses.

Bar to interference by courts in electoral matters.

329. Notwithstanding anything in this Constitution—

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

## PART XVI.

### SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES.

Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.

330. (1) Seats shall be reserved in the House of the People for—

(a) the Scheduled Castes;

(b) the Scheduled Tribes except the Scheduled Tribes in the tribal areas of Assam; and

(c) the Scheduled Tribes in the autonomous district of Assam.

(2) The number of seats reserved in any State for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State in the House of the People as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

331. Notwithstanding anything in article 81, the President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People.

Representation of the Anglo-Indian community in the House of the People.

Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.

332. (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in the Legislative Assembly of every State specified in Part A or Part B of the First Schedule.

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in

respect of which seats are so reserved, bears to the total population of the State.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district except in the case of the constituency comprising the cantonment and municipality of Shillong.

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district except from the constituency comprising the cantonment and municipality of Shillong.

333. Notwithstanding anything in article 170, the Governor or Rajpramukh of a State may, if he is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate such number of members of the community to the Assembly as he considers appropriate.

Representation of the Anglo-Indian community in the Legislative Assemblies of the States.

Reservation of seats and special representation to cease after ten years.

334. Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to—

(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States; and

(b) the representation of the Anglo-Indian Community in the House of the People and in the Legislative Assemblies of the States by nomination, shall cease to have effect on the expiration of a period of ten years from the commencement of this Constitution:

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

Claims of Scheduled castes and Scheduled Tribes to services and posts.

336. (1) During the first two years after the commencement of this Constitution, appointments of members of the Anglo-Indian community to posts in the railway, customs, postal and telegraph services of the Union shall be made on the same basis as immediately before the fifteenth day of August, 1947.

Special provision for Anglo-Indian community in certain services.

During every succeeding period of two years, the number of posts reserved for the members of the said community in the said services shall, as nearly as possible, be less by ten per cent. than the numbers so reserved during the immediately preceding period of two years:

Provided that at the end of ten years from the commencement of this Constitution all such reservation shall cease.

(2) Nothing in clause (1) shall bar the appointment of members of the Anglo-Indian community to posts other than, or in addition to, those reserved



for the community under that clause if such members are found qualified for appointment on merit as compared with the members of other communities.

337. During the first three financial years after the commencement of this Constitution, the same grants, if any, shall be made by the Union and by each State specified in Part A or Part B of the First Schedule for the benefit of the Anglo-Indian community in respect of education as were made in the financial year ending on the thirty-first day of March, 1948.

Special provision with respect to educational grants for the benefit of Anglo-Indian community.

During every succeeding period of three years the grants may be less by ten per cent. than those for the immediately preceding period of three years:

Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community, shall cease:

Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent. of the annual admissions therein are made available to members of communities other than the Anglo-Indian community.

Special Officer for Scheduled Castes, Scheduled Tribes, etc.

338. (1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

(3) In this article, references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also to the Anglo-Indian community.

339. (1) The President may at any time and shall at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States specified in Part A and Part B of the First Schedule.

Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes.

The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable.

(2) The executive power of the Union shall extend to the giving of directions to any such State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

340. (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order ap-

Appointment of a Commission to investigate the conditions of backward classes.



pointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

341. (1) The President may, after consultation with the Governor or Rajpramukh of a State, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

342. (1) The President may, after consultation with the Governor or Rajpramukh of a State, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

## PART XVII.

### OFFICIAL LANGUAGE.

#### Chapter I. Language of the Union.

Official language of the Union. 343. (1) The official language of the Union shall be Hindi in Devanagari script.

The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement:

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of—

(a) the English language, or

(b) the Devanagari form of numerals,

for such purposes as may be specified in the law.

344. (1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the Presi-

Commission and Committee of Parliament on official language.

dent may appoint, and the order shall define the procedure to be followed by the Commission.

(2) It shall be the duty of the Commission to make recommendations to the President as to—

(a) the progressive use of the Hindi language for the official purposes of the Union;

(b) restrictions on the use of the English language for all or any of the official purposes of the Union;

(c) the language to be used for all or any of the purposes mentioned in article 348;

(d) the form of numerals to be used for any one or more specified purposes of the Union;

(e) any other matter referred to the Commission by the President ■ regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

## Chapter II.—Regional Languages.

345. Subject to the provisions of articles 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State:

Official language or languages of a State.  
Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

346. The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between ■ State and the Union.

Official language for communication between one State and another or between ■ State and the Union.  
Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication.

347. On a demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

Special provision relating to language spoken by a section of the population of a State.

### Chapter III.—Language of the Supreme Court. High Courts, Etc.

Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.

348. (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

(a) all proceedings in the Supreme Court and in every High Court,

(b) the authoritative texts—

(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,

(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor or Rajpramukh of a State, and

(iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State, shall be in the English language.

(2) Notwithstanding anything in sub-clause (a) of clause (1), the Governor or Rajpramukh of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State:

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor or Rajpramukh of the State or in any order, rule, regulation or by-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor or Rajpramukh of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.

349. During the period of fifteen years from the commencement of this Constitution, no Bill or amendment making provision for the language to be used for any of the purposes mentioned in clause (1) of article 348 shall be introduced or moved in either House of Parliament without the previous sanction of the President, and the President shall not give his sanction to the introduction of any such Bill or the moving of any such amendment except after he has taken into consideration the recommendations of the Commission constituted under clause (1) of article 344 and the report of the Committee constituted under clause (4) of that article.

Special procedure for enactment of certain laws relating to language.

### Chapter IV.—Special Directives.

350. Every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

Language to be used in representations for redress of grievances.



351. It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.

Directive for development of the Hindi Language.

## PART XVIII.

### EMERGENCY PROVISIONS.

352. (1) If the President is satisfied that a grave emergency exist whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

Proclamation of Emergency.

- (2) A Proclamation issued under clause (1)—
- (a) may be revoked by a subsequent Proclamation;
  - (b) shall be laid before each House of Parliament;
  - (c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

Effect of Proclamation of Emergency.

353. While a Proclamation of Emergency is in operation, then—

(a) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;

(b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

354. (1) The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions of articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation.



(2) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

Duty of the Union to protect States against external aggression and internal disturbance.

355. It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.

356. (1) If the President on receipt of a report from the Governor or Rajpramukh of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

Provisions in case of failure of constitutional machinery in States.

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or Rajpramukh, as the case may be, or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the people is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3):

Provided that if and so often as a resolution approving the continuance in force of such Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have

ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

Exercise of legislative powers under Proclamation issued under article 356.

357. (1) Where by ■ Proclamation issued under clause (1) of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

(a) for Parliament to confer on the President the Power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf:

(b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;

(c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.

(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of ■ Proclamation under article 356, have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period, unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by Act of the appropriate Legislature.

358. While a Proclamation of Emergency is in operation nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency cease to have effect as soon as the Proclamation ceases to operate except as respects things done or omitted to be done before the law so ceases to have effect.

359. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

Suspension of the enforcement of the rights conferred by Part III during emergencies.

(2) An order made ■ aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

360. (1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

Provisions ■ to finan-  
cial emergency.

(2) The provisions of clause (2) of article 352 shall apply in relation to a Proclamation issued under this article as they apply in relation to a Proclamation of Emergency issued under article 352.

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this Constitution—

(a) any such direction may include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) ■ provision requiring all Money Bills or other Bills to which the provisions of article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State;

(b) it shall be competent for the President during the period any Proclamation issued under this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

## PART XIX.

### MISCELLANEOUS.

361. (1) The President, or the Governor or Rajpramukh of ■ State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:

Protection of President  
and Governors and Raj-  
pramukhs.

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61:

Provided further that nothing in this clause shall be construed as restricting the right ■ of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor or Rajpramukh of ■ State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor or Rajpramukh of ■ State, shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor or Rajpramukh of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor or Rajpramukh of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor or the Rajpramukh, ■ the case may be, or left at his



office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

362. In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in clause (1) of article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State.

363. (1) Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or other similar instrument.

(2) In this article—

(a) “Indian State” means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) “Ruler” includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

364. (1) Notwithstanding anything in this Constitution, the President may by public notification direct that as from such date as may be specified in the notification—

(a) any law made by Parliament or by the Legislature of a State shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification, or

(b) any existing law shall cease to have effect in any major port or aerodrome except as respects things done or omitted to be done before the said date, or shall in its application to such port or aerodrome have effect subject to such exceptions or modifications as may be specified in the notification.

(2) In this article—

(a) “major port” means a port declared to be a major port by or under any law made by Parliament or any existing law and includes all areas for the time being included within the limits of such port;

(b) “aerodrome” means aerodrome as defined for the purposes of the enactments relating to airways, aircraft and air navigation.

365. Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.



366. In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

Definitions.

(1) "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;

(2) "an Anglo-Indian" means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only;

(3) "article" means an article of this Constitution;

(4) "borrow" includes the raising of money by the grant of annuities, and "loan" shall be construed accordingly;

(5) "clause" means a clause of the article in which the expression occurs;

(6) "corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled:—

(a) that it is not chargeable in respect of agricultural income;

(b) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals;

(c) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals;

(7) "corresponding Province", "corresponding Indian State" or "corresponding State" means in cases of doubt such Province, Indian State or State ■ may be determined by the President to be the corresponding Province, the corresponding Indian State or the corresponding State, as the case may be, for the particular purpose in question;

(8) "debt" includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and "debt charges" shall be construed accordingly;

(9) "estate duty" means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws made by Parliament or the Legislature of a State relating to the duty, of all property passing upon death or deemed, under the provisions of the said laws, so to pass;

(10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such law, Ordinance, order, bye-law, rule or regulation;

(11) "Federal Court" means the Federal Court constituted under the Government of India Act, 1935;

(12) "goods" includes all materials, commodities, and articles;

(13) "guarantee" includes any obligation undertaken before the commencement of this Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount;

(14) "High Court" means any court which is deemed for the purposes of this Constitution to be a High Court for any State and includes—

(a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and

(b) any other Court in the territory of India which may be declared by Parliament by law to be ■ High Court for all or any of the purposes of this Constitution;

(15) "Indian State" means any territory which the Government of the Dominion of India recognised ■ such a State;

(16) "Part" means a Part of this Constitution;

(17) "pension" means ■ pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund;

(18) "Proclamation of Emergency" means a Proclamation issued under clause (1) of article 352;

(19) "public notification" means ■ notification in the Gazette of India, or, as the case may be, the Official Gazette of ■ State;

(20) "railway" does not include—

(a) a tramway wholly within ■ municipal area, or

(b) any other line of communication wholly situate in one State and declared by Parliament by law not to be ■ railway;

(21) "Rajpramukh" means—

(a) in relation to the State of Hyderabad, the person who for the time being is recognised by the President as the Nizam of Hyderabad;

(b) in relation to the State of Jammu and Kashmir or the State of Mysore, the person who for the time being is recognised by the President as the Maharaja of that State; and

(c) in relation to any other State specified in Part B of the First Schedule, the person who for the time being is recognised by the President ■ the Rajpramukh of that State,

and includes in relation to any of the said States any person for the time being recognised by the President ■ competent to exercise the powers of the Rajpramukh in relation to that State;

(22) "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President ■ the successor of such Ruler;

(23) "Schedule" means a Schedule to this Constitution;

(24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution;

(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;

(26) "securities" includes stock;

(27) "sub-clause" means a sub-clause of the clause in which the expression occurs;

(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;

(29) "tax on income" includes a tax in the nature of ■ excess profits tax;

(30) "Uparajpramukh" in relation to any State specified in Part B of the First Schedule means the person who for the time being is recognised by the President as the Uparajpramukh of that State.

367. (1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications

Interpretation.

that may be made therein under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.

(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of ■ State specified in Part A or Part B of the First Schedule, shall be construed as including ■ reference to an Ordinance made by the President or, to an Ordinance made by ■ Governor or Rajpramukh, as the case may be.

(3) For the purposes of this Constitution "foreign State" means any State other than India:

Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order.

## PART XX.

### AMENDMENT OF THE CONSTITUTION.

368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by ■ majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162 or article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

## PART XXI.

### TEMPORARY AND TRANSITIONAL PROVISIONS.

Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List.

369. Notwithstanding anything in this Constitution, Parliament shall, during ■ period of five years from the commencement of this Constitution, have power to make laws with respect to the following matters ■ if they were enumerated in the Concurrent List, namely:—

(a) trade and commerce within ■ State in, and the production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or *kapas*), cotton seed, paper (including news-print), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil-cakes and other concentrates), coal (including coke and derivatives of coal), iron, steel and mica;

(b) offences against laws with respect to any of the matters mentioned in clause (a), jurisdiction and powers of all courts except the Supreme Court with respect to any of those matters, and fees in respect of any of those matters but not including fees taken in any court;



but any law made by Parliament, which Parliament would not but for the provisions of this article have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of the said period, except as respects things done or omitted to be done before the expiration thereof.

Temporary provisions  
with respect to the State  
of Jammu and Kashmir.

370. (1) Notwithstanding anything in this Constitution,—

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

*Explanation.*—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

371. Notwithstanding anything in this Constitution, during a period of ten years from the commencement thereof, or during such longer or shorter period as Parliament may

Temporary provisions  
with respect to States in  
Part B of the First Schedule.

by law provide in respect of any State, the Government of every State specified in Part B of the First Schedule shall be under the general control of, and

comply with such particular directions, if any, as may from time to time be given by the President:



Provided that the President may by order direct that the provisions of this article shall not apply to any State specified in the order.

372. (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of two years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

*Explanation I.*—The expression “law in force” in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

*Explanation II.*—Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

*Explanation III.*—Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

*Explanation IV.*—An Ordinance promulgated by the Governor of a Province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

373. Until provision is made by Parliament under clause (7) of article 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in clauses (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President.

Continuance in force of existing laws and their adaptation.

Power of President to make order in respect of persons under preventive detention in certain cases.

**374. (1)** The Judges of the Federal Court holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the Supreme Court and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under article 125 in respect of the Judges of the Supreme Court.

Provisions ■ to Judges of the Federal Court and proceedings pending in the Federal Court or before His Majesty in Council.

(2) All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court.

(3) Nothing in this Constitution shall operate to invalidate the exercise of jurisdiction by His Majesty in Council to dispose of appeals and petitions from, or in respect of, any judgment, decree or order of any court within the territory of India in so far ■ the exercise of such jurisdiction is authorised by law, and any order of His Majesty in Council made on any such appeal or petition after the commencement of this Constitution shall for all purposes have effect as if it were ■ order or decree made by the Supreme Court in the exercise of the jurisdiction conferred on such Court by this Constitution.

(4) On and from the commencement of this Constitution the jurisdiction of the authority functioning ■ the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.

(5) Further provision may be made by Parliament by law to give effect to the provisions of this article.

**375.** All courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of this Constitution.

Courts, authorities and officers to continue to function subject to the provisions of the Constitution.

**376. (1)** Notwithstanding anything in clause (2) of article 217, the Judges of ■ High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension ■ are provided for under article 221 in respect of the Judges of such High Court.

Provisions as to Judges of High Courts.

(2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in clauses (1) and (2) of article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.

(3) In this article, the expression "Judge" does not include an acting Judge or an additional Judge.

377. The Auditor-General of India holding office immediately before the commencement of this Constitution shall, unless he has elected otherwise, become on such commencement the Comptroller and Auditor-General of India and shall thereupon be entitled to such salaries and such rights in respect of leave of absence and pension as are provided for under clause (3) of article 148 in respect of the Comptroller and Auditor-General of India and be entitled to continue to hold office until the expiration of his term of office as determined under the provisions which were applicable to him immediately before such commencement.

378. (1) The members of the Public Service Commission for the Dominion of India holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the Union and shall, notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

(2) The members of a Public Service Commission of a Province or of a Public Service Commission serving the needs of a group of Provinces holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the corresponding State or the members of the Joint State Public Service Commission serving the needs of the corresponding States, as the case may be, and shall, notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

379. (1) Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution shall be the provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament.

*Explanation.*—For the purposes of this clause, the Constituent Assembly of the Dominion of India includes—

(i) the members chosen to represent any State or other territory for which representation is provided under clause (2), and

(ii) the members chosen to fill casual vacancies in the said Assembly.

(2) The President may by rules provide for—

(a) the representation in the provisional Parliament functioning under clause (1) of any State or other territory which was not represented in the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution,

(b) the manner in which the representatives of such States or other territories in the provisional Parliament shall be chosen, and

(c) the qualifications to be possessed by such representatives.

(3) If a member of the Constituent Assembly of the Dominion of India was, on the sixth day of October, 1949, or thereafter at any time before the commencement of this Constitution, a member of a House of the Legislature



of a Governor's Province or of an Indian State corresponding to any State specified in Part B of the First Schedule or a Minister for any such State, then, from the commencement of this Constitution the seat of such member in the Constituent Assembly shall, unless he has ceased to be a member of that Assembly earlier, become vacant and every such vacancy shall be deemed to be a casual vacancy.

(4) Notwithstanding that any such vacancy in the Constituent Assembly of the Dominion of India as is mentioned in clause (3) has not occurred under that clause, steps may be taken before the commencement of this Constitution for the filling of such vacancy, but any person chosen before such commencement to fill the vacancy shall not be entitled to take his seat in the said Assembly until after the vacancy has so occurred.

(5) Any person holding office immediately before the commencement of this Constitution as Speaker or Deputy Speaker of the Constituent Assembly when functioning as the Dominion Legislature under the Government of India Act, 1935, shall on such commencement be the Speaker or, as the case may be, the Deputy Speaker of the provisional Parliament functioning under clause (1).

380. (1) Such person as the Constituent Assembly of the Dominion of India shall have elected in that behalf shall be the President of India until a President has been elected in accordance with the provisions contained in Chapter I of Part V and has entered upon his office.

(2) In the event of the occurrence of any vacancy in the office of the President so elected by the Constituent Assembly of the Dominion of India by reason of his death, resignation, or removal, or otherwise, it shall be filled by a person elected in that behalf by the provisional Parliament functioning under article 379, and until a person is so elected, the Chief Justice of India shall act as President.

381. Such person as the President may appoint in that behalf shall become members of the Council of Ministers of the President under this Constitution, and, until appointments are so made, all persons holding office as Ministers for the Dominion of India immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of the President under this Constitution.

382. (1) Until the House or Houses of the Legislature of each State specified in Part A of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the House or Houses of the Legislature of the corresponding Province functioning immediately before the commencement of this Constitution shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of such state.

(2) Notwithstanding anything in clause (1), where a general election to reconstitute the Legislative Assembly of a Province has been ordered before the commencement of this Constitution, the election may be completed after such commencement as if this Constitution had not come into operation, and the Assembly so reconstituted shall be deemed to be the Legislative Assembly of that Province for the purposes of that clause.

(3) Any person holding office immediately before the commencement of this Constitution as Speaker or Deputy Speaker of the Legislative Assembly or President or Deputy President of the Legislative Council of a Province shall on such commencement be the Speaker or Deputy Speaker of the Legislative Assembly or the Chairman or Deputy Chairman of the Legislative Council, ■



the case may be, of the corresponding State specified in Part A of the First Schedule while such Assembly or Council functions under clause (1):

Provided that where ■ general election has been ordered for the reconstitution of the Legislative Assembly of ■ Province before the commencement of this Constitution and the first meeting of the Assembly as so reconstituted is held after such commencement, the provisions of this clause shall not apply and the Assembly ■ reconstituted shall elect two members of the Assembly to be respectively the Speaker and Deputy Speaker thereof.

383. Any person holding office as Governor in any Province immediately before the commencement of this Constitution shall on such commencement be the Governor of the corresponding State specified in Part A of the First Schedule until ■ new Governor has been appointed in accordance with the provisions of Chapter II of Part VI and has entered upon his office.

384. Such persons ■ the Governor of a State may appoint in that behalf shall become members of the Council of Ministers of the Governor under this Constitution, and, until appointments are so made, all persons holding office ■ Ministers for the corresponding Province immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of the Governor of the State under this Constitution.

385. Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body or authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding Indian State shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified.

386. Such persons as the Rajpramukh of a State specified in Part ■ of the First Schedule may appoint in that behalf shall become members of the Council of Ministers of such Rajpramukh under this Constitution, and, until appointments are so made, all persons holding office ■ Ministers for the corresponding Indian State immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of such Rajpramukh under this Constitution.

387. For the purposes of elections held under any of the provisions of this Constitution during a period of three years from the commencement of this Constitution, the population of India or of any part thereof may, notwithstanding anything in this Constitution, be determined in such manner as the President may by order direct, and different provisions may be made for different States and for different purposes by such order.

388. (1) Casual vacancies in the seats of members of the provisional Parliament functioning under clause (1) of article 379, including vacancies referred to in clauses (3) and (4) of that article, shall be filled, and all matters in connection with the filling of such vacancies (including the decision of doubts and disputes arising out of, or in connection with, elections to fill such vacancies) shall be regulated—

(a) in accordance with such rules as may be made in that behalf by the President, and

(b) until rules are so made, in accordance with the rules relating to the filling of casual vacancies in the Constituent Assembly of the Dominion of India and matters connected therewith in force at the time of the filling of such vacancies or immediately before the commencement of this Constitution, as the case may be, subject to such exceptions and modifications as may be made therein before such commencement by the President of that Assembly and thereafter by the President of India:

Provided that where any such seat as is mentioned in this clause was, immediately before it became vacant, held by a person belonging to the Scheduled Castes or to the Muslim or the Sikh Community and representing a Province or, as the case may be, a State specified in Part A of the First Schedule, the person to fill such seat shall, unless the President of the Constituent Assembly or the President of India, as the case may be, considers it necessary or expedient to provide otherwise, be of the same community:

Provided further that at an election to fill any such vacancy in the seat of a member representing a Province or a State specified in Part A of the First Schedule, every member of the Legislative Assembly of that Province or of the corresponding State or of that State, as the case may be, shall be entitled to participate and vote.

*Explanation.*—For the purposes of this clause—

(a) all such castes, races or tribes or parts of or groups within castes, races or tribes as are specified in the Government of India (Scheduled Castes) Order, 1936, to be Scheduled Castes in relation to any Province shall be deemed to be Scheduled Castes in relation to that Province or the corresponding State until a notification has been issued by the President under clause (1) of article 341 specifying the Scheduled Castes in relation to that corresponding State;

(b) all the Scheduled Castes in any Province or State shall be deemed to be a single community.

(2) Casual vacancies in the seats of members of a House of the Legislature of a State functioning under article 382 or article 385 shall be filled, and all matters in connection with the filling of such vacancies (including the decision of doubts and disputes arising out of, or in connection with, elections to fill such vacancies) shall be regulated in accordance with such provisions governing the filling of such vacancies and regulating such matters as were in force immediately before the commencement of this Constitution subject to such exceptions and modifications as the President may by order direct.

389. A Bill which immediately before the commencement of this Constitution was pending in the Legislature of the

Provision as to Bills pending in the Dominion Legislature and in the Legislatures of Provinces and Indian States.

Dominion of India or in the Legislature of any Province or Indian State may, subject to any provision to the contrary which may be included in rules made by Parliament or the Legislature of the corresponding State under this Constitution, be continued in Parliament or the Legislature of the corresponding State, in the case may be, as if the proceedings taken with reference to the Bill in the Legislature of the Dominion of India or in the Legislature of the Province or Indian State had been taken in Parliament or in the Legislature of the corresponding State.

390. The provisions of this Constitution relating to the Consolidated Fund of India or the Consolidated Fund of any State and the appropriation of moneys out of either of such Funds shall not apply in relation to moneys received or raised or expenditure incurred by the Government of India or the Government of any State between the commencement of this Constitution and the thirty-first day of March, 1950, both days inclusive, and any expenditure incurred during that period shall be deemed to be duly authorised if the expenditure was specified in a schedule of authorised expenditure authenticated in accordance with the provisions of the Government of India Act, 1935, by the Governor-General of the Dominion of India or the Governor of the corresponding Province or is authorised by the Rajpramukh of the State in accordance with such rules as were applicable to the authorisation of expenditure from the revenues of the corresponding Indian State immediately before such commencement.

391. (1) If at any time between the passing of this Constitution and its commencement any action is taken under the provisions of the Government of India Act, 1935, which in the opinion of the President requires any amendment in the First Schedule and the Fourth Schedule, the President may, notwithstanding anything in this Constitution, by order, make such amendments in the said Schedules ■ may be necessary to give effect to the action so taken, and any such order may contain such supplemental, incidental and consequential provisions as the President may deem necessary.

(2) When the First Schedule or the Fourth Schedule is so amended, any reference to that Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

392. (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, ■ he may deem to be necessary or expedient:

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

(2) Every order made under clause (1) shall be laid before Parliament.

(3) The powers conferred on the President by this article, by article 324, by clause (3) of article 367 and by article 391 shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India.

## PART XXII.

### SHORT TITLE, COMMENCEMENT AND REPEALS.

Short title.

393. This Constitution may be called the Constitution of India.

394. This article and articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 shall come into force at once, and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.



395. The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed.

### FIRST SCHEDULE.

(Articles 1, 4 and 391.)

*The States and territories of India.*

#### PART A.

<i>Names of States.</i>	<i>Names of corresponding Provinces.</i>
1. Assam	Assam
2. Bihar	Bihar
3. Bombay	Bombay
4. Madhya Pradesh	The Central Provinces and Berar
5. Madras	Madras
6. Orissa	Orissa
7. Punjab	East Punjab
8. The United Provinces	The United Provinces
9. West Bengal	West Bengal

#### TERRITORIES OF STATES.

The territory of the State of Assam shall comprise the territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas.

The territory of the State of West Bengal shall comprise the territory which immediately before the commencement of this Constitution was comprised in the Province of West Bengal.

The territory of each of the other States in this Part shall comprise the territories which immediately before the commencement of this Constitution were comprised in the corresponding Province and territories which, by virtue of an order made under section 290-A of the Government of India Act, 1935, were immediately before such commencement being administered ■ if they formed part of that Province.

#### PART B.

##### NAMES OF STATES.

	<i>States Union.</i>
1. Hyderabad.	6. Rajasthan.
2. Jammu and Kashmir.	7. Saurashtra.
3. Madhya Bharat.	8. Travancore-Cochin.
4. Mysore.	9. Vindhya Pradesh.
5. Patiala and East Punjab	

#### TERRITORIES OF STATES.

The territory of each of the States in this Part shall comprise the territory which immediately before the commencement of this Constitution was comprised in the corresponding Indian State, and—

(a) in the case of each of the States of Rajasthan and Saurashtra, shall also comprise the territories which immediately before such commence-



ment were being administered by the Government of the corresponding Indian State, whether under the provisions of the Extra-Provincial Jurisdiction Act, 1947, or otherwise; and

(b) in the case of the State of Madhya Bharat, shall also comprise the territory which immediately before such commencement was comprised in the Chief Commissioner's Province of Panth Piploda.

### PART C.

#### NAMES OF STATES.

- |                 |                      |
|-----------------|----------------------|
| 1. Ajmer.       | 6. Delhi.            |
| 2. Bhopal.      | 7. Himachal Pradesh. |
| 3. Bilaspur.    | 8. Kutch.            |
| 4. Cooch-Behar. | 9. Manipur.          |
| 5. Coorg.       | 10. Tripura.         |

#### TERRITORIES OF STATES.

The territory of each of the States of Ajmer, Coorg and Delhi shall comprise the territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioners' Provinces of Ajmer-Merwara, Coorg and Delhi, respectively.

The territory of each of the other States in this Part shall comprise the territories which, by virtue of an order made under section 290-A of the Government of India Act, 1935, were immediately before the commencement of this Constitution being administered ■ if they were ■ Chief Commissioner's Province of the same name.

### PART D.

The Andaman and Nicobar Islands.

## SECOND SCHEDULE.

[Articles 59 (3), 65 (3), 75 (6), 97, 125, 148 (3), 158 (3), 164 (5), 186 and 221.]

### PART A.

PROVISIONS AS TO THE PRESIDENT AND THE GOVERNORS OF STATES SPECIFIED IN PART A OF THE FIRST SCHEDULE.

1. There shall be paid to the President and to the Governors of the States specified in Part A of the First Schedule the following emoluments per mensem, that ■ to say:—

The President	.. 10,000 rupees
The Governor of ■ State	.. 5,500 rupees

2. There shall also be paid to the President and to the Governors of the States so specified such allowances as were payable respectively to the Governor-General of the Dominion of India and to the Governors of the corresponding Provinces immediately before the commencement of this Constitution.

3. The President and the Governors of such States throughout their respective terms of office shall be entitled to the ~~same~~ privileges to which the Governor-General and the Governors of the corresponding Provinces were respectively entitled immediately before the commencement of this Constitution.

4. While the Vice-President or any other person is discharging the functions of, or is acting as, President, or any person is discharging the functions of the Governor, he shall be entitled to the same emoluments, allowances and privileges as the President or the Governor whose functions he discharges or for whom he acts, as the case may be.

## PART B.

### PROVISIONS AS TO THE MINISTERS FOR THE UNION AND FOR THE STATES IN PART A AND PART B OF THE FIRST SCHEDULE.

5. There shall be paid to the Prime Minister and to each of the other Ministers for the Union such salaries and allowances as were payable respectively to the Prime Minister and to each of the other Ministers for the Dominion of India immediately before the commencement of this Constitution.

6. There shall be paid to the Ministers for any State specified in Part A or Part B of the First Schedule such salaries and allowances as were payable to such Ministers for the corresponding Province or the corresponding Indian State, as the case may be, immediately before the commencement of this Constitution.

## PART C.

### PROVISIONS AS TO THE SPEAKER AND THE DEPUTY SPEAKER OF THE HOUSE OF THE PEOPLE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE COUNCIL OF STATES AND THE SPEAKER AND THE DEPUTY SPEAKER OF THE LEGISLATIVE ASSEMBLY OF A STATE IN PART A OF THE FIRST SCHEDULE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE LEGISLATIVE COUNCIL OF ANY SUCH STATE.

7. There shall be paid to the Speaker of the House of the People and the Chairman of the Council of States such salaries and allowances ~~■~~ were payable to the Speaker of the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution, and there shall be paid to the Deputy Speaker of the House of the People and to the Deputy Chairman of the Council of States such salaries and allowances as were payable to the Deputy Speaker of the Constituent Assembly of the Dominion of India immediately before such commencement.

8. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly of a State specified in Part A of the First Schedule and to the Chairman and the Deputy Chairman of the Legislative Council of such State such salaries and allowances as were payable respectively to the Speaker and the Deputy Speaker of the Legislative Assembly and the President and the Deputy President of the Legislative Council of the corresponding Province immediately before the commencement of this Constitution and, where the corresponding Province had no Legislative Council immediately before such commencement, there shall be paid to the Chairman and the Deputy Chairman of the Legislative Council of the State such salaries and allowances as the Governor of the State may determine.

## PART D.

## PROVISIONS AS TO THE JUDGES OF THE SUPREME COURT AND OF THE HIGH COURTS IN STATES IN PART A OF THE FIRST SCHEDULE.

9. (1) There shall be paid to the Judges of the Supreme Court, in respect of time spent on actual service, salary at the following rates per mensem, that is to say:—

The Chief Justice	.. 5,000 rupees
Any other Judge	.. 4,000 rupees

Provided that if ■ Judge of the Supreme Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the Supreme Court shall be reduced by the amount of the pension.

(2) Every Judge of the Supreme Court shall be entitled without payment of rent to the use of an official residence.

(3) Nothing in sub-paragraph (2) of this paragraph shall apply to a Judge who, immediately before the commencement of this Constitution,—

(a) was holding office as the Chief Justice of the Federal Court and has become on such commencement the Chief Justice of the Supreme Court under clause (1) of article 374, or

(b) was holding office as any other Judge of the Federal Court and has on such commencement become ■ Judge (other than the Chief Justice) of the Supreme Court under the said clause, during the period he holds office ■ such Chief Justice or other Judge, and every Judge who so becomes the Chief Justice or other Judge of the Supreme Court shall, in respect of time spent on actual service ■ such Chief Justice or other Judge, ■ the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay ■■ amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(4) Every Judge of the Supreme Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling ■ the President may from time to time prescribe.

(5) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the Supreme Court shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the Federal Court.

10. (1) There shall be paid to the Judges of the High Court of each State specified in Part A of the First Schedule, in respect of time spent on actual service, salary at the following rates per mensem, that is to say:—

The Chief Justice	.. 4,000 rupees
Any other Judge	.. 3,500 rupees

(2) Every person who immediately before the commencement of this Constitution—

(a) was holding office as the Chief Justice of a High Court in any Province and has on such commencement become the Chief Justice of the High Court in the corresponding State under clause (1) of article 376, or

(b) was holding office as any other Judge of a High Court in any Province and has on such commencement become a Judge (other than the Chief Justice) of the High Court in the corresponding State under the said clause, shall, if he was immediately before such commencement drawing ■ salary at ■ rate higher than that specified in sub-paragraph (1) of this paragraph, be entitled to receive in respect of time spent on actual service as such Chief Justice

or other Judge, as the case may be, in addition to the salary specified in the said sub-paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(3) Every Judge of a High Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(4) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the High Court of any State shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the High Court in the corresponding Province.

11. In this Part, unless the context otherwise requires,—

(a) the expression “Chief Justice” includes an acting Chief Justice, and a “Judge” includes an *ad hoc* Judge;

(b) “actual service” includes—

(i) time spent by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the President undertake to discharge;

(ii) vacations, excluding any time during which the Judge is absent on leave; and

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

## PART E

### PROVISIONS AS TO THE COMPTROLLER AND AUDITOR-GENERAL OF INDIA.

12. (1) There shall be paid to the Comptroller and Auditor-General of India a salary at the rate of four thousand rupees per mensem.

(2) The person who was holding office immediately before the commencement of this Constitution as Auditor-General of India and has become on such commencement the Comptroller and Auditor-General of India under article 377 shall in addition to the salary specified in sub-paragraph (1) of this paragraph be entitled to receive as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing as Auditor-General of India immediately before such commencement.

(3) The rights in respect of leave of absence and pension and the other conditions of service of the Comptroller and Auditor-General of India shall be governed or shall continue to be governed, as the case may be, by the provisions which were applicable to the Auditor-General of India immediately before the commencement of this Constitution and all references in those provisions to the Governor-General shall be construed as references to the President.

## THIRD SCHEDULE.

[Articles 75 (4), 99, 124 (6), 148 (2), 164 (3), 188 and 219.]

### Forms of Oaths or Affirmations.

#### I

Form of oath of office for a Minister for the Union:—

swear in the name of God

“I, A.B., do \_\_\_\_\_ that I will bear true faith and

solemnly affirm

allegiance to the Constitution of India as by law established, that I will faith-



fully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or illwill."

## II

Form of oath of secrecy for ■ Minister for the Union:—

"I, A.B., do swear in the name of God that I will not directly or indirectly  
solemnly affirm  
communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister."

## III

Form of oath or affirmation to be made by ■ member of Parliament:—

"I, A.B., having been elected (or nominated) ■ member of the Council of States (or the House of the People) do swear in the name of God that I will  
solemnly affirm  
bear true faith and allegiance to the Constitution of India ■ by law established and that I will faithfully discharge the duty upon which I am about to enter."

## IV

Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India:—

"I, A.B., having been appointed Chief Justice (or ■ Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do swear in the name of God that I will bear true faith and allegiance  
solemnly affirm  
to the Constitution of India ■ by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws.

## V

Form of oath of office for ■ Minister for ■ State:—

"I, A.B., do swear in the name of God that I will bear true faith and  
solemnly affirm  
allegiance to the Constitution of India as by law established, that I will faithfully and conscientiously discharge my duties ■ ■ Minister for the State of .....and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or illwill."

## VI

Form of oath of secrecy for a Minister for a State:—

swear in the name of God

“I, A.B., do \_\_\_\_\_ that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the State of.....except as may be required for the due discharge of my duties as such Minister.”

solemnly affirm

## VII

Form of oath or affirmation to be made by a member of the Legislature of a State:—

swear in the name of God

“I, A.B., having been elected (or nominated) as member of the Legislative Assembly (or Legislative Council), do \_\_\_\_\_ that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter.”

solemnly affirm

## VIII

Form of oath or affirmation to be made by the Judges of a High Court:—

swear in the name of God

“I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of).....do \_\_\_\_\_that I will bear true faith and allegiance to the Constitution of India as by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws.”

solemnly affirm

## FOURTH SCHEDULE.

[Articles 4 (1), 80 (2) and 391.]

*Allocation of seats in the Council of States.*

To each State or group of States specified in the first column of the table of seats appended to this Schedule there shall be allotted the number of seats specified in the second column of the said table opposite to that State or group of States, as the case may be.

**TABLE OF SEATS.**  
**THE COUNCIL OF STATES.**

*Representatives of States specified in Part A of the First Schedule.*

1	2
States	Total Seats
1. Assam	6
2. Bihar	21
3. Bombay	17
4. Madhya Pradesh	12
5. Madras	27
6. Orissa	9
7. Punjab	■
8. The United Provinces	31
9. West Bengal	14
<b>TOTAL .. 145</b>	

*Representatives of States specified in Part B of the First Schedule.*

1	2
States	Total Seats
1. Hyderabad	11
2. Jammu and Kashmir	4
3. Madhya Bharat	6
4. Mysore	6
5. Patiala and East Punjab States Union	3
6. Rajasthan	9
7. Saurashtra	4
8. Travancore-Cochin	6
9. Vindhya Pradesh	4
<b>TOTAL .. 53</b>	

*Representatives of States specified in Part C of the First Schedule.*

1	2
States and Groups of States	Total Seats
1. Ajmer }	1
2. Coorg }	1
3. Bhopal	1
4. Bilaspur }	1
5. Himachal Pradesh }	1
6. Cooch-Behar	1
7. Delhi	1
8. Kutch	1
9. Manipur }	1
10. Tripura }	
TOTAL .. 7	
TOTAL OF ALL SEATS .. 205	

## FIFTH SCHEDULE.

[Article 244 (1).]

*Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes.*

## PART A.

## GENERAL.

1. *Interpretation.*—In this Schedule, unless the context otherwise requires, the expression “State” means ■ State specified in Part A or Part B of the First Schedule but does not include the State of Assam.

2. *Executive power of a State in Scheduled Areas.*—Subject to the provisions of this Schedule, the executive power of ■ State extends to the Scheduled Areas therein.

3. *Report by the Governor or Rajpramukh to the President regarding the administration of Scheduled Areas.*—The Governor or Rajpramukh of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State ■ to the administration of the said areas.



## PART B.

## ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES.

4. *Tribes Advisory Council.*—(1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State:

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor or Rajpramukh, as the case may be.

(3) The Governor or Rajpramukh may make rules prescribing or regulating, as the case may be,—

(a) the number of members of the Council, the mode of their appointment and the appointment of the Chairman of the Council and of the officers and servants thereof;

(b) the conduct of its meetings and its procedure in general; and

(c) all other incidental matters.

5. *Law applicable to Scheduled Areas.*—(1) Notwithstanding anything in this Constitution, the Governor or Rajpramukh, as the case may be, may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor or Rajpramukh, as the case may be, may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;

(b) regulate the allotment of land to members of the Scheduled Tribes in such area;

(c) regulate the carrying on of business as moneylender, by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor or Rajpramukh may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor or the Rajpramukh making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

## PART C.

## SCHEDULED AREAS.

6. *Scheduled Areas.*—(1) In this Constitution, the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order—

(a) direct that the whole or any specified part of a Scheduled Area shall cease to be ■ Scheduled Area or ■ part of such an area;

(b) alter, but only by way of rectification of boundaries, any Scheduled Area;

(c) on any alteration of the boundaries of ■ State or on the admission into the Union or the establishment of ■ new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area; and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

## PART D.

### AMENDMENT OF THE SCHEDULE.

7. *Amendment of the Schedule.*—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule, is so amended, any reference to this Schedule in this Constitution shall be construed ■ a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of the Constitution for the purposes of article 368.

## SIXTH SCHEDULE.

[Articles 244 (2) and 275 (1).]

### *Provisions as to the Administration of Tribal Areas in Assam.*

1. *Autonomous districts and autonomous regions.*—(1) Subject to the provisions of this paragraph, the tribal areas in each item of Part A of the table appended to paragraph 20 of this Schedule shall be ■■ autonomous district.

(2) If there are different Scheduled Tribes in ■■ autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification,—

(a) include any area in Part A of the said table,

(b) exclude any area from Part A of the said table,

(c) create a new autonomous district,

(d) increase the area of any autonomous district,

(e) diminish the area of any autonomous district,

(f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,

(g) define the boundaries of any autonomous district:

Provided that no order shall be made by the Governor under clauses (c) (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule.

2. *Constitution of District Councils and Regional Councils.*—(1) There shall be a District Council for each autonomous district consisting of not more than twenty-four members, of whom not less than three-fourths shall be elected on the basis of adult suffrage.

(2) There shall be a separate Regional Council for each area constituted an autonomous region under sub-paragraph (2) of paragraph 1 of this Schedule.

(3) Each District Council and each Regional Council shall be a body corporate by the name respectively of “the District Council of (name of dis-

trict)" and "the Regional Council of (*name of region*)", shall have perpetual succession and a common seal and shall by the said name sue and be sued.

(4) Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in any Regional Council within such district, be vested in the District Council for such district and the administration of an autonomous region shall be vested in the Regional Council for such region.

(5) In an autonomous district with Regional Councils, the District Council shall have only such powers with respect to the areas under the authority of the Regional Council as may be delegated to it by the Regional Council in addition to the powers conferred on it by this Schedule with respect to such areas.

(6) The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other representative tribal organisations within the autonomous districts or regions concerned, and such rules shall provide for—

(a) the composition of the District Councils and Regional Councils and the allocation of seats therein;

(b) the delimitation of territorial constituencies for the purpose of elections to those Councils;

(c) the qualifications for voting at such elections and the preparation of electoral rolls therefor;

(d) the qualifications for being elected at such elections as members of such Councils;

(e) the term of office of members of such Councils;

(f) any other matter relating to or connected with elections or nominations to such Councils;

(g) the procedure and the conduct of business in the District and Regional Councils;

(h) the appointment of officers and staff of the District and Regional Councils.

(7) The District or the Regional Council may after its first constitution make rules with regard to the matters specified in sub-paragraph (6) of this paragraph and may also make rules regulating—

(a) the formation of subordinate local Councils or Boards and their procedure and the conduct of their business; and

(b) generally all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be:

Provided that until rules are made by the District or the Regional Council under this sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council:

Provided further that the Deputy Commissioner or the Sub-Divisional Officer, as the case may be, of the North Cachar and Mikir Hills shall be the Chairman *ex-officio* of the District Council in respect of the territories included in items 5 and 6 respectively of Part A of the table appended to paragraph 20 of this Schedule and shall have power for a period of six years after the first constitution of the District Council, subject to the control of the Governor, to annul or modify any resolution or decision of the District Council or to issue such instructions to the District Council, as he may consider appropriate, and the District Council shall comply with every such instruction issued.

3. *Powers of the District Councils and Regional Councils to make laws.*  
—(1) The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in res-



pect of all areas within the district except those which are under the authority of Regional Councils, if any, within the district shall have power to make laws with respect to—

(a) the allotment, occupation or use, or the setting apart, of land, other than any land which is a reserved forest, for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town:

Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes by the Government of Assam in accordance with the law for the time being in force authorising such acquisition;

(b) the management of any forest not being a reserved forest;

(c) the use of any canal or water-course for the purpose of agriculture;

(d) the regulation of the practice of *jhum* or other forms of shifting cultivation;

(e) the establishment of village or town committees or councils and their powers;

(f) any other matter relating to village or town administration, including village or town police and public health and sanitation;

(g) the appointment or succession of Chiefs or Headmen;

(h) the inheritance of property;

(i) marriage;

(j) social customs.

(2) In this paragraph, ■ “reserved forest” means any area which is ■ reserved forest under the Assam Forest Regulation, 1891, or under any other law for the time being in force in the area in question.

(3) All laws made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

4. *Administration of justice in autonomous districts and autonomous regions.*—(1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be members of such village Councils or presiding officers of such courts, and may also appoint such officers as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any court constituted in that behalf by the Regional Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district, or any court constituted in that behalf by the District Council, shall exercise the powers of a Court of appeal in respect of all suits and cases triable by a village council or court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, and no other court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

(3) The High Court of Assam shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of this paragraph apply as the Governor may from time to time by order specify.



(4) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating—

(a) the constitution of village councils and courts and the powers to be exercised by them under this paragraph;

(b) the procedure to be followed by village councils or courts in the trial of suits and cases under sub-paragraph (1) of this paragraph;

(c) the procedure to be followed by the Regional or District Council or any court constituted by such Council in appeals and other proceedings under sub-paragraph (2) of this paragraph;

(d) the enforcement of decisions and orders of such Councils and courts;

(e) all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1) and (2) of this paragraph.

5. *Conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences.*

—(1) The Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being ■ law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate, and thereupon the said Council, court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

(2) The Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, court or officer under sub-paragraph (1) of this paragraph.

(3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

6. *Powers of the District Council to establish primary schools, etc.*—The District Council for an autonomous district may establish, construct, or manage primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads and water-ways in the district and, in particular, may prescribe the language and the manner in which primary education shall be ■ imparted in the primary schools in the district.

7. *District and Regional Funds.*—(1) There shall be constituted for each autonomous district, a District Fund and for ■ each autonomous region, a Regional Fund to which shall be credited all moneys received respectively by the District Council for that district and the Regional Council for that region in the course of the administration of such district or region, as the case may be, in accordance with the provisions of this Constitution.

(2) Subject to the approval of the Governor, rules may be made by the District Council and by the Regional Council for the management of the District Fund or, ■ the case may be, the Regional Fund, and the rules so made may prescribe the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and ■ any other matter connected with or ancillary to the matters aforesaid.

8. *Powers to assess and collect land revenue and to impose taxes.*—(1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being followed by the Government of Assam in assessing lands for the purpose of land revenue in the State of Assam generally.

(2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any, within the district, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within such areas.

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say—

- (a) taxes on professions, trades, callings and employments;
- (b) taxes on animals, vehicles and boats;
- (c) taxes on the entry of goods into ■ market for sale therein, and tolls on passengers and goods carried in ferries; and
- (d) taxes for the maintenance of schools, dispensaries or roads.

(4) A Regional Council or District Council, as the case may be, may make regulations to provide for the levy and collection of any of the taxes specified in sub-paragraphs (2) and (3) of this paragraph.

9. *Licences or leases for the purpose of prospecting for, or extraction of, minerals.*—(1) Such share of the royalties accruing each year from licences or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of Assam in respect of any area within an autonomous district as may be agreed upon between the Government of Assam and the District Council of such district shall be made over to that District Council.

(2) If any dispute arises as to the share of such royalties to be made over to ■ District Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

10. *Power of District Council to make regulations for the control of money-lending and trading by non-tribals.*—(1) The District Council of ■ autonomous district may make regulations for the regulation and control of money-lending or trading within the district by persons other than Scheduled Tribes resident in the district.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prescribe that no one except the holder of ■ licence issued in that behalf shall carry on the business of money-lending;

(b) prescribe the maximum rate of interest which may be charged or be recovered by ■ money-lender;

(c) provide for the maintenance of accounts by money-lenders and for the inspection of such accounts by officers appointed in that behalf by the District Council;

(d) prescribe that no person who is not ■ member of the Scheduled Tribes resident in the district shall carry on wholesale or retail business in any commodity except under a licence issued in that behalf by the District Council:

Provided that no regulations may be made under this paragraph unless

they are passed by a majority of not less than three-fourths of the total membership of the District Council:

Provided further that it shall not be competent under any such regulations to refuse the grant of a licence to a money-lender or a trader who has been carrying on business within the district since before the time of the making of such regulations.

(3) All regulations made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

11. *Publication of laws, rules and regulations made under the Schedule.*—All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.

12. *Application of Acts of Parliament and of the Legislature of the State to autonomous districts and autonomous regions.*—(1) Notwithstanding anything in this Constitution—

(a) no Act of the Legislature of the State in respect of any of the matters specified in paragraph 3 of this Schedule as matters with respect to which a District Council or a Regional Council may make laws, and no Act of the Legislature of the State prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications as it thinks fit;

(b) the Governor may, by public notification, direct that any Act of Parliament or of the Legislature of the State to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.

(2) Any direction given under sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

13. *Estimated receipts and expenditure pertaining to autonomous districts to be shown separately in the annual financial statement.*—The estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated Fund of the State of Assam shall be first placed before the District Council for discussion and then after such discussion be shown separately in the annual financial statement of the State to be laid before the Legislature of the State under article 202.

14. *Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions.*—(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

(a) the provision of educational and medical facilities and communications in such districts and regions;

(b) the need for any new or special legislation in respect of such districts and regions; and

(c) the administration of the laws, rules and regulations made by the District and Regional Councils;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of



the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of autonomous districts and autonomous regions in the State.

15. *Annulment or suspension of acts and resolutions of District and Regional Councils.*—(1) If at any time the Governor is satisfied that an act or resolution of a District or a Regional Council is likely to endanger the safety of India, he may annul or suspend such act or resolution and take such steps as he may consider necessary (including the suspension of the Council and the assumption to himself of all or any of the powers vested in or exercisable by the Council) to prevent the commission or continuance of such act, or the giving of effect to such resolution.

(2) Any order made by the Governor under sub-paragraph (1) of this paragraph together with the reasons therefor shall be laid before the Legislature of the State as soon as possible and the order shall, unless revoked by the Legislature of the State, continue in force for a period of twelve months from the date on which it was so made:

Provided that if and so often as a resolution approving the continuance in force of such order is passed by the Legislature of the State, the order shall unless cancelled by the Governor continue in force for a further period of twelve months from the date on which under this paragraph it would otherwise have ceased to operate.

16. *Dissolution of a District or a Regional Council.*—The Governor may on the recommendation of a Commission appointed under paragraph 14 of this Schedule by public notification order the dissolution of a District or a Regional Council and—

(a) direct that a fresh general election shall be held immediately for the reconstitution of the Council, or

(b) subject to the previous approval of the Legislature of the State assume the administration of the area under the authority of such Council himself or place the administration of such area under the Commission appointed under the said paragraph or any other body considered suitable by him for a period not exceeding twelve months:

Provided that when an order under clause (a) of this paragraph has been made, the Governor may take the action referred to in clause (b) of this paragraph with regard to the administration of the area in question pending the reconstitution of the Council on fresh general election:

Provided further that no action shall be taken under clause (b) of this paragraph without giving the District or the Regional Council, as the case may be, an opportunity of placing its views before the Legislature of the State.

17. *Exclusion of areas from autonomous districts in forming constituencies in such districts.*—For the purposes of elections to the Legislative Assembly of Assam, the Governor may by order declare that any area within an autonomous district shall not form part of any constituency to fill a seat or seats in the Assembly reserved for any such district but shall form part of a constituency to fill a seat or seats in the Assembly not so reserved to be specified in the order.

18. *Application of the provisions of this Schedule to areas specified in Part B of the table appended to paragraph 20.*—(1) The Governor may—

(a) subject to the previous approval of the President, by public notification, apply all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to paragraph 20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provisions, and



(b) with like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.

(2) Until ■ notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in Part B of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam ■ his agent and the provisions of Part IX shall apply thereto as if such area or part thereof were a territory specified in Part D of the First Schedule.

(3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion.

19. *Transitional provisions.*—(1) As soon as possible after the commencement of this Constitution the Governor shall take steps for the constitution of a District Council for each autonomous district in the State under this Schedule and, until ■ District Council is so constituted for an autonomous district, the administration of such district shall be vested in the Governor and the following provisions shall apply to the administration of the areas within such district instead of the foregoing provisions of this Schedule, namely:—

(a) no Act of Parliament or the Legislature of the State shall apply to any such area unless the Governor by public notification so directs; and the Governor in giving such ■ direction with respect to any Act may direct that the Act shall, in its application to the area or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit;

(b) the Governor may may make regulations for the peace and good government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

(2) Any direction given by the Governor under clause (a) of sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

(3) All regulations made under clause (b) of sub-paragraph (1) of this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

20. *Tribal areas.*—(1) The areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem:

Provided that for the purposes of clauses (e) and (f) of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8, and clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

(3) Any reference in the table below to any district (other than the United Khasi-Jaintia Hills District) or administrative area shall be construed as a reference to that district or area at the commencement of this Constitution:

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf.

## TABLE.

## PART A.

1. The United Khasi-Jaintia Hills District.
2. The Garo Hills District.
3. The Lushai Hills District.
4. The Naga Hills District.
5. The North Cachar Hills.
6. The Mikir Hills.

## PART B.

1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

2. The Naga Tribal Area.

21. *Amendment of the Schedule.*—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule ■ so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368.

## SEVENTH SCHEDULE.

[Article 246.]

*List I—Union List.*

1. Defence of India and every part thereof including preparation for defence and all such acts ■ may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

2. Naval, military and air forces; any other armed forces of the Union.

3. Delimitation of cantonment areas, local self-Government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

4. Naval, military and air force works.

5. Arms, firearms, ammunition and explosives.

6. Atomic energy and mineral resources necessary for its production.

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

8. Central Bureau of Intelligence and Investigation.

9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.

10. Foreign Affairs; all matters which bring the Union into relation with any foreign country.

11. Diplomatic, consular and trade representation.

12. United Nations Organisation.

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

15. War and peace.

16. Foreign jurisdiction.

17. Citizenship, naturalisation and aliens.

18. Extradition.
19. Admission into, and emigration and expulsion from, India; passports and visas.
20. Pilgrimages to places outside India.
21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.
22. Railways.
23. Highways declared by or under law made by Parliament to be national highways.
24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, ■ regards mechanically propelled vessels; the rule of the road on such waterways.
25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.
26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.
27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.
28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.
29. Airways; air craft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.
30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.
31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.
32. Property of the Union and the revenue therefrom, but ■ regards property situated in a State specified in part A or Part B of the First Schedule subject to legislation by the State, save in so far ■ Parliament by law otherwise provides.
33. Acquisition or requisitioning of property for the purposes of the Union.
34. Courts of wards for the estates of Rulers of Indian States.
35. Public debt of the Union.
36. Currency, coinage and legal tender; foreign exchange.
37. Foreign loans.
38. Reserve Bank of India.
39. Post Office Savings Bank.
40. Lotteries organised by the Government of India or the Government of ■ State.
41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.
42. Inter-State trade and commerce.
43. Incorporations, regulation and winding up of trading corporations including banking, insurance and financial corporations but not including co-operative societies.
44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

45. Banking.
46. Bills of exchange, cheques, promissory notes and other like instruments.
47. Insurance.
48. Stock exchanges and futures markets.
49. Patents, inventions and designs; copyright; trade-marks and merchandise marks.
50. Establishment of standards of weight and measure.
51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.
52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
53. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.
54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.
55. Regulation of labour and safety in mines and oil fields.
56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.
57. Fishing and fisheries beyond territorial waters.
58. Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.
59. Cultivation, manufacture, and sale for export, of opium.
60. Sanctioning of cinematograph films for exhibition.
61. Industrial disputes concerning Union employees.
62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be ■ institution of national importance.
63. The institution known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.
64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.
65. Union agencies and institutions for—
  - (a) professional, vocational or technical training, including the training of police officers; or
  - (b) the promotion of special studies or research; or
  - (c) scientific or technical assistance in the investigation or detection of crime.
66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.
67. Ancient and historical monuments and records, and archaeological sites and remains, declared by Parliament by law to be of national importance.
68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India; Meteorological organisations.
69. Census.



70. Union public services; all-India services; Union Public Service Commission.

71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.

73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commission appointed by Parliament.

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court) and the fees taken therein; persons entitled to practise before the Supreme Court.

78. Constitution and organisation of the High Courts except provisions ■ to officers and servants of High Courts; persons entitled to practise before the High Courts.

79. Extension of the jurisdiction of a High Court having its principal seat in any State to, and exclusion of the jurisdiction of any such High Court from, any area outside that State.

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so ■ to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

81. Inter-State migration; inter-State quarantine.

82. Taxes on income other than agricultural income.

83. Duties of customs including export duties.

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

85. Corporation tax.

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land.

89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

92. Taxes on the sale or purchase of news-papers and on advertisements published therein.

93. Offences against laws with respect to any of the matters in this List.

94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List, admiralty jurisdiction.

96. Fees in respect of any of the matters in this List, but not including fees taken in any court.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

### *List II—State List.*

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power).

2. Police, including railway and village police.

3. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

6. Public health and sanitation; hospitals and dispensaries.

7. Pilgrimages, other than pilgrimages to places outside India.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

9. Relief of the disabled and unemployable.

10. Burials and burial grounds; cremations and cremation grounds.

11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III.

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by Parliament by law to be of national importance.

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.

16. Pounds and the prevention of cattle trespass.

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

19. Forests.

20. Protection of wild animals and birds.

21. Fisheries.

22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

24. Industries subject to the provisions of entry 52 of List I.

25. Gas and gas-works.

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

28. Markets and fairs.

29. Weights and measures except establishment of standards.

30. Money-lending and money-lenders; relief of agricultural indebtedness.

31. Inns and inn-keepers.

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

33. Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.

34. Betting and gambling.

35. Works, lands and buildings vested in or in the possession of the State.

36. Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III.

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

40. Salaries and allowances of Ministers for the State.

41. State public services; State Public Service Commission.

42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

43. Public debt of the State.

44. Treasure trove.

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

46. Taxes on agricultural income.

47. Duties in respect of succession to agricultural land.



48. Estate duty in respect of agricultural land.
49. Taxes on lands and buildings.
50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.
51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—
  - (a) alcoholic liquors for human consumption;
  - (b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.
52. Taxes on the entry of goods into a local area for consumption, use or sale therein.
53. Taxes on the consumption or sale of electricity.
54. Taxes on the sale or purchase of goods other than newspapers.
55. Taxes on advertisements other than advertisements published in the newspapers.
56. Taxes on goods and passengers carried by road or on inland waterways.
57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.
58. Taxes on animals and boats.
59. Tolls.
60. Taxes on professions, trades, callings and employments.
61. Capitation taxes.
62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.
63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.
64. Offences against laws with respect to any of the matters in this List.
65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.
66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

*List III—Concurrent List.*

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.
2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.
3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.
4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.
5. Marriage and divorce; infants and minors; adoption; wills; intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
6. Transfer of property other than agricultural land; registration of deeds and documents.



7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

8. Actionable wrongs.

9. Bankruptcy and insolvency.

10. Trust and Trustees.

11. Administrators-general and official trustees.

12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

14. Contempt of court, but not including contempt of the Supreme Court.

15. Vagrancy; nomadic and migratory tribes.

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

17. Prevention of cruelty to animals.

18. Adulteration of foodstuffs and other goods.

19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

20. Economic and social planning.

21. Commercial and industrial monopolies, combines and trusts.

22. Trade Unions; industrial and labour disputes.

23. Social security and social insurance; employment and unemployment.

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

25. Vocational and technical training of labour.

26. Legal, medical and other professions.

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

30. Vital statistics including registration of births and deaths.

31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

33. Trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union is declared by Parliament by law to be expedient in the public interest.

34. Price control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.

39. Newspapers, books and printing presses.

40. Archaeological sites and remains other than those declared by Parliament by law to be of national importance.

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

42. Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of ■ State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given.

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable ■ such arrears, arising outside that State.

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

47. Fees in respect of any of the matters in this List, but not including fees taken in any court.

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### EIGHTH SCHEDULE.

[Articles 344 (1) and 351.]

#### *Languages.*

1. Assamese.
  2. Bengali.
  3. Gujarati.
  4. Hindi.
  5. Kannada.
  6. Kashmiri.
  7. Malayalam.
  8. Marathi.
  9. Oriya.
  10. Punjabi.
  11. Sanskrit.
  12. Tamil.
  13. Telugu.
  14. Urdu.
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# THE CONSTITUTION OF INDIA

## INTRODUCTORY

### A SHORT HISTORY OF THE CONSTITUTION.

Though the object of this work is to present a juridical study of the Constitution of India, a short reference to the historical setting in which the Constitution came into being may not be altogether out of place inasmuch as, as we shall see, a reference to the history may sometimes be permissible in interpreting the terms of the Constitution, in cases of ambiguity.<sup>1</sup>

The demand that India's political destiny should be determined by the Indians themselves had been put forward by Mahatma Gandhi as early as 1922 and in 1935, the National Congress officially asserted the 'right of self-determination' of the Indian people, *viz.*, to frame their own constitution through a Constituent Assembly, elected by adult suffrage, and without outside interference. The demand was reiterated by each subsequent session of Congress but the demand was resisted by the British Government, till the outbreak of World War II when the pressure of external circumstances forced them to realise the urgency of solving the Indian constitutional problem.

In 1940, the Coalition Government recognised the principle that Indians should themselves frame a new Constitution for autonomous India, and in March 1942, when the Japanese were at the doors of India, they sent Sir Stafford Cripps, a member of the Cabinet, with a draft declaration of the proposals of the British Government which would be adopted provided the two major political parties (Congress and the Muslim League) could come to an agreement to accept them, *viz.* :—

(a) that the future Constitution of India was to be framed by an elected Constituent Assembly of the Indian people ;

(b) that the Constitution should give India *Dominion status*,—equal partnership of the British Commonwealth of Nations ;

(c) that there should be an Indian Union comprising all the Provinces and Indian States.

But, the two parties failed to come to an agreement to accept the proposals, and the Muslim League urged—

(a) that India should be divided into two autonomous States on communal lines, and that some of the Provinces earmarked by Mr. Jinnah, should form an independent Muslim State, to be known as Pakistan;

(b) that instead of one Constituent Assembly, there should be two Constituent Assemblies, *i.e.*, a separate Constituent Assembly for building Pakistan.

After the rejection of the Cripps proposals, various attempts to reconcile the two parties were made, including the Simla Conference held at the instance of the Governor-General, Lord Wavell. These having failed, the British Cabinet sent three of its members, including Cripps himself, to make another serious attempt, with altered proposals, which were announced simultaneously in India and in England on the 16th May, 1946.

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(1) See under 'Rules of Interpretation,—Historical Setting'; 'History of the Enactment', *post*.

The proposals of the Cabinet Delegation sought to effect a compromise between the union of India and its division.

While the Cabinet Delegation definitely rejected the claim for a separate Constituent Assembly and a separate State for the Muslims, the scheme which they recommended involved a virtual acceptance of the principle of the claim of the Muslim League,—by grouping the Provinces in the lines suggested by the Muslim League while the Centre was to have *narrow* and enumerated powers relating to three subjects only, *viz.*, Foreign Affairs, Defence and communications.

The scheme laid down by the Cabinet Mission was, however, *recommendatory*, and it was contemplated by the Mission that it would be adopted by agreement between the two major parties. A curious situation, however, arose after an election for forming the Constituent Assembly was held. The Muslim League joined this election and its candidates were returned. But a difference of opinion had in the meantime arisen between the Congress and the League regarding the interpretation of the Grouping clauses of the proposals of the Cabinet Mission.

The British Government intervened at this stage, and explained to the leaders in London that they upheld the contention of the League as correct, and on the 6th December, 1946, the British Government published the following statement:—

“Should a constitution come to be framed by the Constituent Assembly in which a large section of the Indian population had not been represented, His Majesty’s Government would not contemplate forcing such a constitution upon any unwilling part of the country.”

For the first time thus, British Government acknowledged the possibility of two Constituent Assemblies and two States. The result was that on the 9th December, 1946, when the Constituent Assembly first met, the Muslim League members did not attend, and the Constituent Assembly began to function with the non-Muslim members.

The Muslim League next urged for the dissolution of the Constituent Assembly of India on the ground that it was not fully representative of all sections of the people of India. On the other hand, the British Government, by their Statement of the 20th February, 1947, declared—

(a) that British rule in India would in any case end by June, 1948, after which the British would certainly transfer authority to Indian hands ;

(b) that if a fully representative Constituent Assembly failed to work out a constitution in accordance with the proposals made by the Cabinet Delegation,—

“H. M. G. will have to consider to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Governments, or in such other way as seem most reasonable and in the best interests of the Indian people.”

The result was inevitable and the League did not consider it necessary to join this Assembly, and went on pressing for another Constituent Assembly for “Muslim India.”

British Government next sent Lord Mountbatten to India as the Governor-General, in place of Lord Wavell, in order to expedite the preparations for the transfer of power, for which they had fixed a rigid time-limit.

Lord Mountbatten brought the Congress and the League into a definite agreement that the two ‘problem’ provinces of the Punjab and Bengal would be *partitioned* so as to form absolute Hindu and Muslim majority blocks within these Provinces. The League would then get its Pakistan which the Cabinet Mission had so ruthlessly denied it,—minus Assam, East Punjab and West Bengal, while the Congress which was taken as the representative of the whole of India less the Muslims, was given the rest of India, where the Muslims were in a minority. British



Parliament lost no time to draft the Indian Independence Bill upon the basis of the above agreement, and this Bill was passed and placed on the Statute Book, with amazing speed. It was to have effect from the 15th August, 1947, which was referred to in the Act as 'the appointed day'.

The most outstanding characteristic of the Indian Independence Act, 1947, was that while other Acts of Parliament relating to the governance of India (such as the Government of India Acts from 1858 down to 1935) sought to lay down a constitution for the administration of India by the legislative will of the British Parliament, this Act of 1947 did not lay down any such Constitution. It simply set up two independent Dominions,—India and Pakistan, by dividing the territory of British India, and gave unlimited powers to the Constituent Assembly of each Dominion to frame and adopt any Constitution and to supersede the Indian Independence Act without any further legislation on the part of the British Parliament. It also directed that the Constituent Assembly which had its first sitting on the 9th December, 1946, was to be the Constituent Assembly of 'India', while Pakistan would set up a fresh Constituent Assembly for herself.

So, the Constituent Assembly which had first sat on the 9th December, 1946, re-assembled after the midnight of the 14th August, 1947, as the sovereign Constituent Assembly for India. Of its achievements prior to that date, we should mention the introduction on the 13th December, 1946, and the adoption on the 22nd January, 1947, of the historic Objectives Resolution of Pandit Nehru, which is worth reproduction :

“ This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution ;

(2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all ; and

(3) WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom ; and

(4) WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of Government, are derived from the people ; and

(5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political ; equality of status of opportunity, and before the law ; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality ; and

(6) WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes ; and

(7) WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilised nations ; and

(8) this ancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind.”

The Constituent Assembly next considered the salient principles of the proposed Constitution as outlined by various Committees of the Assembly, such as the Union Constitution Committee, the Union Powers Committee, the Provincial Constitution Committee, and thereafter appointed a Drafting Committee on the 29th August, 1947. The Drafting Committee embodied the decisions of the Assembly with alternative and additional proposals in the form of a 'Draft Constitution' which was published in February, 1948. One important departure of the Draft from the Objectives Resolution was that while the latter declared that the residuary powers under the Union of India would vest in the units, viz., the States, and the Union was to exercise only enumerated powers,—the Draft, in pursuance of the recommendations of the Union Powers Committee, proposed that the residuary powers should reside in

the Union (except as regards the Indian States). The original idea of autonomy of the States was substituted by that of a strong Centre, owing to the change in the situation that had been caused by the partition of the country and the creation of a foreign State within the very compound of India.

The Draft was presented to the Constituent Assembly on the 4th of November, 1948, and after a brief general discussion (which may be called the first reading of the Constitution), there commenced a second reading or a consideration of the clauses of the Draft, which commenced on the 15th November, 1948, and terminated on the 17th October, 1949.

The Constituent Assembly again sat on the 14th November, 1949, for the third reading which was finished on the 26th November, 1949, on which date the Constitution received the signature of the President of the Assembly and was declared as passed.

#### SOURCES OF THE CONSTITUTION.

The above historical survey makes it clear that our Constitution is not the product of any agreement between the component units, nor the result of any revolution: it is the deliberate and cool-headed product of a group of eminent men assembled in the Constituent Assembly who prepared a Draft after 'ransacking all the known constitutions of the world.' They had the experience of the Government of India Act, 1935, and almost 75 per cent. of the Constitution, therefore, owes its origin to that Act, subject, of course, to modifications in the light of experience. The ideological portion, namely, the Fundamental Rights, is inspired by the Constitution of the United States, coloured by the provisions of later Constitutions, such as that of Eire. The federal form, as the framers themselves explain, is shaped mostly in the light of the Canadian Constitution Act, though at places, there are Australian touches as well. The principles of responsible government, on the other hand, have been borrowed from British system. The Constitution, therefore, is a unique document drawn from many sources,<sup>1</sup> and the interpretation given by foreign Courts upon the borrowed provisions will accordingly be admissible in interpreting many of the provisions of our Constitution,—subject to modifications, as may be necessary.<sup>2</sup>

#### COMMENCEMENT OF THE CONSTITUTION.

See under article 394, *post*. The bulk of the Constitution came into force on the 26th January, 1950, which day is referred to in the Constitution as 'the commencement of the Constitution.' 15 articles of a provisional and transitional nature were, however, given effect to, immediately on the passing of the Constitution, *i.e.*, 26th November, 1949. These 15 articles are enumerated in Art. 394.

#### RULES FOR INTERPRETATION.<sup>3</sup>

##### INTERPRETATION AND CONSTRUCTION.

In a loose sense, the terms 'interpretation' and 'construction' are used as identical, referring to—

"the process by which the Courts seek to ascertain the meaning of the Legislature through the medium of the authoritative forms in which it is expressed"<sup>4</sup>.

Constitutional writers, however, draw a distinction between the two.

(1) See Constituent Assembly Debates, Vol. VII, pages 37 ff.

(2) In this Commentary, the parallel or analogous provisions of 'Other Constitutions' have been reproduced under each article, to

indicate the source.

(3) On this subject, generally, see my article on 'Interpreting the Constitution' in (1950) F.L.J. pp. 2-36 (Jour.).

(4) Salmond's Jurisprudence, 1948, p. 169.

Thus, *Cooley*,<sup>1</sup> says—

“ Interpretation differs from construction in that the former is the art of finding out the *true sense* of any form of words. Construction, on the other hand, is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text ; conclusions which are in the *spirit*, though not within the letter of the law. ”<sup>2</sup>

Thus, in short, interpretation means the ascertainment of the true meaning of that which is expressed by the words *used* ; while construction means the ascertainment of what the framers intended to express and the application of the text to subjects *lying beyond* the direct expressions of that text,—which the framers would have dealt with had they been gifted with the power of foresight.

### GENERAL AND PARTICULAR RULES FOR INTERPRETATION.

There are certain general rules which are guides for the interpretation of *all statutes*, or rather all written documents (whether they are Acts of the Legislature or the acts of parties) ; for, the object of interpretation in all cases is the same, *viz.*, the ascertainment of the intention sought to be expressed.<sup>3</sup>

It would therefore, be useful to review, in brief, the general rules of interpretation of ordinary statutes, which would be applicable in the interpretation of the Constitution as well.

On the other hand, there are some special rules for the interpretation of a Constitution, by reason of its special nature as being the fundamental law, just as there are some special rules for interpreting laws having a particular object such as fiscal, penal, emergency, laws and the like, which would not be applicable to other statutes.

Let us, therefore, first discuss the general rules of interpretation which are applicable to a Constitution in common with other statutes, and then take up the particular rules relating to the Constitution.

### (A) GENERAL RULES OF INTERPRETATION.

#### 1. THE RULE OF EXPRESSED INTENTION.

The fundamental rule of interpretation of all enactments to which all other rules are subordinate is that “ they should be construed according to the intent of the parliament which passed the law ”.<sup>4</sup>

For the purpose of interpretation, however, ‘ intent ’ or ‘ intention ’ does *not* mean what the Legislature *meant* to say, but what the meaning of the words employed by the Legislature is. In other words, Courts have to find out the *expressed* intention of the Legislature, from the words of the enactment itself. It is not at liberty to give—

“ a speculative opinion as to what the Legislature *probably would have meant*, although there has been an omission to enact it. In a Court of law, or Equity what the Legislature intended to be done, not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication ”.<sup>5</sup>

(1) *Cooley*, Constitutional Limitations p. 70.

(2) Quoted by the Judicial Committee in *Webb v. Outrim*, (1907) A.C. 31.

See also Wynes, Legislative and Executive “ Powers ”, p. 9.

(3) *Kerr*, Law of the Australian Constitu-

tion, p. 45. *Newell v. People*, 7 N. Y. 9.

(4) *Sussex Peerage Case*, (1844) 65 R. R. 11 ; *Maxwell*, Interpretation of Statutes, 9th Edition, p. 1.

(5) *Salomon v. Saloman*, (1897) A. C. (38).



In other words,—

“When the meaning of words is plain, it is not the duty of Courts to busy themselves with *supposed* intentions”<sup>1</sup>.

The above rule has been followed in interpreting the American Constitution<sup>2</sup> as well as the Dominion Constitutions<sup>3</sup>. Thus, observed the Privy Council,—

“In the interpretation of a completely self-governing Constitution, founded upon a written organic instrument such as the British North America Act, and the Constitution of the Commonwealth of Australia, if the text is *explicit*, it is conclusive alike in what it directs and what it forbids”<sup>4</sup>.

So, a Constitution is to be interpreted in the *same manner* as any other statute, namely, by reference to its terms alone, and nothing is to be read into it on grounds of policy<sup>4</sup>; expediency or political exigency<sup>5</sup>; motives of the framers or possibility of abuse of power<sup>6</sup>, and the like.

Thus, in determining the validity of the Income-tax (War-Time Arrangements) Act of 1942, the Australian High Court observed that once they were satisfied that the legislation was within the powers of the Commonwealth Parliament, they had nothing to do with the wisdom or expediency of the legislation :

“The controversy before the Court is a legal controversy . . . . . The Court is not authorized to consider whether the Acts are fair and just as between States—whether some States are being forced, by a political combination against them, to pay an undue share of Commonwealth expenditure or to provide money which other States ought fairly to provide. These are arguments to be used in Parliament and before the people. They raise questions of policy which it is not for the Court to determine or even to consider”<sup>7</sup>.

From the above primary rule, several sub-rules follow :

1. If the words of the enactment are themselves precise and *unambiguous*, no more is necessary than to expound those words in their *natural* and *ordinary* sense.<sup>8</sup>

Thus, in interpreting the word ‘resident’ in section 75 (iv) of the Australian Constitution Act, the majority of the Australian High Court followed the literal and popular meaning of the word and held that it meant only natural persons and did not include a body corporate<sup>9</sup>. The majority assumed that by ‘plain’ and ‘natural’ meaning is meant the *literal* and *popular*, as opposed to a figurative or technical meaning.<sup>9</sup>

Hence, when a word is capable of being construed either in a popular sense or as a word of art, it is for those who assert that it is used in a technical sense, to establish that fact.<sup>10</sup>

If, on the other hand, the words have acquired a technical meaning either by usage or judicial decisions, they should in the first instance to be taken as used by the Legislature in that technical sense.<sup>11</sup>

“Where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a *similar context*, must be construed ■ that the word or phrase is interpreted according to the meaning that has previously been assigned to it”<sup>12</sup>.

So, when technical terms are employed in a Constitution, they are to be given that meaning which they had at the time the instrument was framed and adopted,

(1) *Pakala Narayana v. Emperor*, A.I.R. 1939 P.C. 47 (51).

(2) Cooley, Constitutional Limitations, p. 124.

(3) *Attorney-General for Ontario v. Attorney-General for Canada*, (1912) A.C. 571 (583).

(4) *Vacher and Sons v. London Society of Compositors*, (1913) A.C. 107 (118).

(5) *Amalgamated Society of Engineers v. Adelaide Steamship Company*, (1920) C.L.R. 129 (142).

(6) *Bank of Toronto*, (1887) 12 A.C. 575 (586).

(7) *South Australia v. Commonwealth*, (1942) 65 C.L.R. 373 (408).

(8) *Sussex Peerage Case*, (1844) 65 R. R. 11 : Maxwell, p. 1.

(9) *Mutual Life Assurance Society v. Howe*, (1922) 31 C.L.R. 329 affirmed in *Cox v. Journeaux* (1934) 52 C.L.R. 282.

(10) *Inland Revenue Commissioner v. Gribble*, (1913) 3 K.B. 212.

*Maqbal v. Khodaija*, (1949) 4 D.L.R. (Pat.) 1 (F.B.).

(11) *R. v. Commissioners of Income-tax* (1888) 22 Q.B.D. 296 (300).

*Lalit v. Chukkan*, (1897) 24 Cal. 834 (P.C.).

(12) *Barras v. Aberdeen Steam Company*, (1933) A.C. 402.



*e.g.*, technical terms of English law.<sup>1</sup> Such words, *e.g.*, in our Constitution are—'territory,' 'property,' 'domicile,' 'libel,' 'slander,' '*habeas corpus*,' 'mandamus,' 'pardon,' 'reprieve,' and so on.

Again, if the *context* plainly shows that the words or phrases are being used in a *special* sense, the literal meaning of the words should be qualified in that sense.<sup>2</sup>

"In all cases, the object is to see what is the intention expressed by the words used. But from the imperfections of language, it is impossible to know that intention without enquiring further and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used".<sup>3</sup>

Thus, in an Australian case<sup>4</sup> it was held that though the literal meaning of the word 'square' is perfectly clear, meaning a rectangular quadrilateral, yet when the word is used in an electoral law to describe the shape of the ballot paper, an elector cannot be disenfranchised because the printer of the ballot paper has failed to print an accurate geometrical square.

"But when the words of a statute are clear and unambiguous, and they are not unfamiliar or uncommon words as may be aptly described as 'terms of art' it is unnecessary to travel beyond the Act for the purpose of construing them".<sup>5</sup>

Thus, the Federal Court refused to interpret item 42 of List II, of the Government of India Act, 1935, *i.e.*, "taxes on lands and buildings, hearths and windows" as meaning a consumption tax payable by the occupier (and not the owner) on the ground that a tax on buildings is so understood in British legislative practice.<sup>6</sup> It is to be noted that entry 49 of List II of the new Constitution (Schedule VII) also relates to "taxes on lands and buildings" and is to be interpreted as in the above case.<sup>5</sup>

2. Phrases and sentences are to be construed according to *rules of grammar*<sup>7</sup>, and according to their 'simple' and 'literal' meaning.<sup>7</sup>

To the above rule, however, there are a number of *exceptions* :

(a) When the grammatical and literal construction would lead to some *absurdity, repugnance or inconsistency* with the rest of the instrument, the grammatical and ordinary sense of the words may be *modified* to avoid that difficulty, *but no further*<sup>8</sup>.

But even in such a case, in order to depart from the literal construction, the absurdity or repugnance must be such as manifested itself to the mind of the law-maker, and not such as may appear to the Court.<sup>9</sup> The absurdity may be manifest: (a) from the section or clause itself; or (b) from the fact of its repugnance to some other provision of the same statute.<sup>10</sup>

(b) If the language of an enactment is ambiguous and susceptible of *two meanings*, one of which is consonant with *justice and good sense*, while the other would lead to extravagant results, a Court of law would adopt the former and reject the latter, even though the latter may correspond more closely with the literal meaning of the words employed<sup>11</sup>. Similarly, when two constructions are open, the Court may adopt the *more reasonable* of the two.<sup>12</sup>

(1) Cf. Willoughby, Constitutional Law, I, p. 53.

(2) *Altrincham E. S. Ltd. v. Sale Urban Council*, (1936) 154 L.T. 379 (H.L.).

(3) *Weir Commissioners v. Adamson*, (1877) 1 A.C. 763.

(4) *Chanter v. Blackwood*, 1 C.L.R. 39.

(5) *Ralla Ram v. East Punjab*, (1949) 12 F.L.J. 3 (11) (F.C.).

(6) Maxwell, 9th Ed., p. 3.

(7) *Caledonian Ry. v. North British Ry.*, (1881) 6 A.C. 114 (121).

(8) *Grey v. Pearson*, (1857) 1 H.L.C. 61 (106).

(9) *Cox v. Hakes*, (1890) A.C. 506 (542) (H.L.).

(10) *Nuth v. Tamplin*, (1881) 8 Q.B.D. 247 (253).

(11) *Altrincham E. S., Ltd. v. Sale Urban Council*, (1936) 154 L.T. 379 (H.L.).

(12) *Countess of Rothes v. Kircaldy Waterworks*, (1882) 7 A.C. 694 (702) (H.L.).

In other words, when alternative constructions are open, the Court will adopt that construction by which the intention of the Legislature will be *better* effectuated<sup>1</sup> or which will be consistent with the *smooth working* of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system<sup>2</sup>.

Applied to a *Constitution*, the rule means that in case of an ambiguity, that construction will be adopted which is in harmony with the 'general scheme' of the Constitution<sup>3</sup>, and for this recourse may be had to the history of the Constitution<sup>4</sup>.

"The words of a statute are to be construed so as to ascertain the mind of the Legislature from the natural and grammatical meaning of the words which it had used, and in so construing them, the existing state of the law, the *mischiefs to be remedied* and the *defects to be amended*, may legitimately be looked at together with the general scheme of the Act."<sup>5</sup>

So, where through imperfections of human language there are any doubts respecting the extent and scope of any power conferred by the Constitution, the *objects* for which such power were bestowed are to be considered in the interpretation of the Constitution.<sup>6</sup>

On the other hand, the Court cannot supply suppressed omissions (or *casus omissus*) of the Legislature, for that would be making laws. The general rule is "not to import into statutes words which are not to be found there".<sup>7</sup>

"We cannot aid the Legislature's defective phrasing of an Act, we cannot add and amend, and, by construction, make up deficiencies which are left there".<sup>8</sup>

The words of a statute should never be added to or subtracted, without almost ■ necessity.<sup>9</sup>

But where the alternative lies between either supplying by implication words 'which appear to have been *accidentally* omitted', or adopting a construction which deprives certain existing words of *all meaning*, it is permissible to supply the words.<sup>10</sup> Again, where a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some *detail* which is of great importance to the proper and effectual performance of the work which the statute has in contemplation, the Courts are at liberty to infer that the statute by implication empowers the detail to be carried out.<sup>11</sup> In short,—

"It is a very serious matter to hold that when the main *object* of a statute is clear it should be reduced to a nullity, by the *draftsman's unskilfulness* or ignorance of law. It may be necessary to a Court of justice to come to such ■ conclusion, but nothing can justify it except *necessity*, or the absolute intractability of the language used".<sup>12</sup>

3. When the language is plain and admits of *one* meaning only, that meaning, and that meaning alone, must be given to it, however absurd<sup>13</sup>, harsh, unjust,

(1) *R. v. Halliday*, (1917) A.C. 260.  
 (2) *Shannon Realities v. St. Michael*, (1924) A.C. 185.  
 (3) *Murray v. Collector*, 1 C.L.R. 32.  
 (4) *Tasmania v. Commonwealth*, (1904) 1 C.L.R. 329.  
 (5) *Re Viscount Rhondda's Claim*, (1922) ■ A.C. 339.  
 (6) *Gibbons v. Ogden*, (1824) 9 Wh. 168.  
 (7) *King v. Burrell*, (1840) 12 A. & E. 460

(468).  
 (8) *Crawford v. Spooner*, (1846) 6 Moo. P.C. 9.  
 (9) *Cowper-Essex v. Acton*, (1889) 14 A.C. 153  
 (169).  
 (10) *Jubb v. Hull Dock Co.*, (1846) 9 Q.B. 455.  
 (11) *Craies*, Statute Law, p. 104.  
 (12) *Salmon v. Duncombe*, (1886) 11 A.C. 627  
 (634).  
 ((13) *Astor v. Perry*, (1935) A.C. 398 (416).

arbitrary or inconvenient the consequences may be<sup>1</sup>. The reason is plain, *viz.*, that in interpreting a statute the Court cannot assume the function of the legislator<sup>2</sup> and so it is not the province of ■ Court to scan the wisdom or reasonableness<sup>3</sup> of the policy behind a statute<sup>4</sup>.

## II. A STATUTE MUST BE READ AS A WHOLE.

The meaning of the words of a statute and the intention of the Legislature in enacting them can be properly understood only by a consideration of the whole instrument and every part of it.<sup>5</sup>

"Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible to make a *consistent* enactment of the whole statute . . . . ."<sup>6</sup>.

A *Constitution*, likewise, must be read as a whole. The whole Constitution is to be examined, with a view to determining the intention of each part, and the construction must be uniform. A Constitution does not mean one thing at one time and another subsequently.<sup>7</sup>

"The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper and indeed imperative, to construe one part in the light of the provision of the other parts."<sup>8</sup>

Thus, "when the text is *ambiguous*, as for example, when the words establishing two mutually exclusive jurisdictions (*i.e.*, regarding distribution of powers) are wide enough to bring a "particular power" within either, recourse must be had to the context and the scheme of the Act".<sup>9</sup>

From the above rule follow several sub-rules :

(i) A statute ought to be so interpreted that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. A construction which will leave without effect any part of the language of ■ statute will be rejected, unless justified on similar grounds.<sup>10</sup>

So, effect must be given to every clause of the Constitution.<sup>11</sup>

An *exception* to the above sub-rule is that if there is any word or phrase to which no *sensible* meaning may possible be given, it must be rejected ■ a mere surplusage.<sup>12</sup>

In such cases, the Court acts on the maxim "*ut res magis valeat quam pereat*", *i.e.*, a statute should be construed in ■ manner that will give it validity rather than invalidity and the Court starts with a presumption against absurdity or nullity.

(ii) When the *same* words or phrases are used in different parts of the same statute, they would *ordinarily* receive the same meaning, unless the context or the object requires otherwise.<sup>13</sup> So, if the meaning of a word cannot be ascertained from the section itself, other sections may be looked into to fix the sense in which the word is there.<sup>14</sup>

But the general presumption would give way when there is sufficient reason from the context to construe the same word in ■ sense different from that which it bears in another part of the act.<sup>15</sup>

(1) *Buzloor v. Shamsoonissa*, (1867) 11 M.I.A. 604.

(2) *King-Emperor v. Benoarilal*, (1944) 49 C.W.N. 178 (P.C.).

(3) *Jagannath v. United Provinces*, (1946) 50 C.W.N. 674 (679) (P.C.).

(4) *Cooke v. Charles*, (1901) A.C. 102 (107).

(5) *Leader v. Duffey*, (1888) 4 A.C. 294 (301).

(6) *Canada Sugar Refining Co. v. R.*, (1898) A.C. 735 (741).

(7) Cooley, *Constitutional Law*, page 427.

(8) Wilboughly *Constitutional Law*, Part I, p. 65.

(9) *A. G. for Ontario v. A.G. for Canada*,

(1912) A.C. 571 (583).

(10) *R. v. Bishop of Oxford*, (1879) 4 Q.B.D. 245 (261).

(11) *Marbury v. Madison*, (1803) 1 Cr. 173 (174).

(12) *Stone v. Corporation of Yeovil*, 1876) ■ C.P.D. 691 (701); *R. v. Eltridge*, (1909) ■ K.B. 24.

(13) *Knightsbridge v. Byrne*, (1940) A.C. 613 (621).

(14) *Spencer v. Metropolitan Board*, (1882) 22 Ch.D. 142.

(15) In ■ *National Savings Bank*, (1866) ■ Ch. A. 547.

In other words, the same words may convey a different intention of the Legislature in different circumstances, according to the context.<sup>1</sup> A most conspicuous example of this is to be found in the use of the word 'State' in the Indian Constitution :

(a) Mostly, it refers to the Units of the Indian Union (*e.g.*, in Parts I, XI).

(b) In Parts III and IV it is given an extended meaning, practically meaning any political or administrative authority as opposed to the citizen who is given the rights included in these Parts (*cf.* Art. 12) the words 'unless the context otherwise requires' (in Art. 12) however, reserve that the word 'State' may have a different meaning in some provisions of these Parts. Thus, 'a State' in Article 34 refers to a Unit of the Union and not to servants of any local authority.

(c) The word 'State' is also used in the ordinary political meaning as referring to an independent political community, *e.g.*, the words 'foreign State' in Article 18 (2) or Article 9, as defined by Article 367 (3).

(iii) When *analogous* words are used, each may be presumed to be susceptible of a separate and distinct meaning, for the Legislature is not supposed to use words without a meaning. A difference of phraseology is not therefore to be considered as accidental<sup>2</sup>. A change of language suggests a change of intention.<sup>3</sup>

(iv) When a *general* intention is expressed and also a *particular* intention which is incompatible with the general one, the particular intention is considered an *exception* to the general one, even when the general intention is expressed in a negative language. Hence, general provisions in a statute are not to be taken as controlling or repealing the special provisions : the latter are to be treated as exceptions.<sup>4</sup>

The *limitations* to the rule should also be noted carefully :

(a) The provisions of one section cannot be used to defeat those of another unless it is *impossible* to effect reconciliation between them.<sup>5</sup>

(b) When the words of a section themselves carry a *clear meaning*,—

"no rule of construction can require that . . . it shall be necessary to introduce another part of the statute which speaks with less perspicuity and of which the words may be capable of such construction as by possibility to diminish the efficacy of the provisions of the Act".<sup>6</sup>

## AIDS TO CONSTRUCTION.

Every statute seeks to explain its own meaning by its different contents, and the duty of the Court is to find out the meaning of any particular section or clause with reference to these *internal aids*, apart from the rules of interpretation so far discussed. Such internal aids, for example, are supplied by the Title, the Preamble, Headings, Interpretation Clauses and the like.

Apart from these aids supplied by the statute itself, it is also permissible, in particular circumstances and within limits, to take *external evidence* in order to ascertain the intention of the Legislature.

The limits within which these internal and external aids may be applied should therefore be carefully borne in mind.

### (a) INTERNAL AIDS.

*Title.*—The title is nowadays regarded as a part of the Act itself and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining

(1) *Edinburgh St. Tramways v. Torbain*, 3 A.C. 58 (H.L.).

(2) *Martin v. Hunter's Lessee*, (1816) 1 Wh. 304.

(3) Maxwell, 9th Ed., page, 324.

(4) *Taylor v. Corporation of Oldham*, (1876) 4

Ch.D. 410.

(5) *Sher Khan v. Swami Dayal*, (1921) 28 C. W.N. 79 (85) (P.C.).

(6) *Wharburton v. Loveland*, 1 H. & B. 448 (500).



its scope.<sup>1</sup> Of course, the title is to be used in aid of interpretation only where the words of an enacting section is not clear; and not to control the express provisions of the Act.<sup>2</sup>

The title of our Constitution being very simple, *viz.*, 'Constitution of India,' (Art. 393) its use in interpreting the Constitution will not be much called for, except for indicating that the Constitution will govern all the territory that will for the time being be included in 'India' as defined in Art. 1 of the Constitution.

*Preamble.*—This is being separately dealt with, under the Preamble of the Constitution (*see post*).

*Headings.*—Headings and sub-headings prefixed to sections or groups of sections indicate the general object of the provisions immediately following.<sup>3</sup> Thus, the Chapter on the Fundamental Rights of our Constitution is divided under several headings, such as, General, Rights of Equality, Rights relating to Religion, Cultural and Educational Rights, Right to constitutional Remedies. In the matter of interpretation, headings and sub-headings are treated as similar to Preambles.<sup>4</sup> That is to say, they may be usefully referred to, to determine the sense of any *doubtful* expression ranged under a particular heading.<sup>5</sup> But they cannot be used to give a different effect to *clear* words in the section, where there is no doubt as to the ordinary meaning of the words.<sup>6</sup>

*Marginal Notes.*—Contrary to the Preamble and headings,—marginal notes to the sections or articles are *not* regarded as parts of the statute and cannot, therefore, be referred to for the purpose of construing the enacting clauses.<sup>6</sup> The contrary decisions in India<sup>7</sup> are not good law.

*Punctuation.*—Similarly, punctuation marks cannot control the meaning of a section. They are regarded as *no* part of the enactment. "In an Act of Parliament there is no such thing as brackets any more than there are such things as stops."<sup>8</sup> In construing the Constitution, therefore, the Court is to read it without the commas and other punctuation marks inserted in the print.<sup>9</sup>

*Provisos.*—The proper function of a Proviso is to except and deal with a case which would otherwise fail within the general language of the main enactment, and its effect is confined to that case. The proviso leaves the generality of the substantive enactment in the section unqualified except in so far as it concerns the particular subjects to which the Proviso relates.<sup>10</sup>

Of course, a section must be read as a whole, each portion throwing light on the rest.<sup>11</sup>

But when the language of the main enactment is *clear* and *unambiguous*, a proviso can have no repurcussion on the interpretation of the main enactment, so ■ to *exclude* from it by implication what clearly falls within its express terms.<sup>10, 12</sup> A proviso may be used for guidance in the selection of one or other of *two* possible constructions of the main section but not as an enacting provision in itself modifying the clear effect of the main section, even if without such latter use the proviso would be found meaningless.<sup>12</sup>

(1) *Vacher v. Society of Compositors*, (1913) A.C. 106 (128).

(2) *Fenton v. Thorley*, (1903) A.C. 447.

(3) *Fletcher v. Birkenhead Corporation*, (1907) 1 K.B. 205 (218).

(4) *Martins v. Fowler*, (1926) A.C. 746 (P.C.).

(5) *R. v. Surrey*, (1947) 2 All E.R. 276.

(6) *Balraj v. Jagatpat*, (1904) 26 All. 393 (P.C.).

*K. Emperor v. Sadasiv*, (1947) 51 C.W.N. 769 (P.C.).

(7) *Ramsaran v. Bhagwat* A.I.R. 1929 All. 53

(F.B.);

*Abdul Hakim v. Fozu*, A.I.R. 1935 Cal. 287.

(8) *Duke of Devonshire v. O'Connor*, (1890) 24 Q.B.D. 468.

(9) *Pugh v. Ashutosh*, A.I.R. 1929 P.C. 69 (71).

(10) *M. & S. M. Ry. v. Bezwada Municipality*, (1945) Mad. 1 (P.C.).

(11) *Jennings v. Kelly*, (1940) A.C. 206.

(12) *West Derby Union v. Metropolitan Society* (1897) A.C. 647.

Similarly, unless of necessity, a Proviso is never construed as *enlarging* the scope of the enacting words.<sup>1</sup> Thus, if the language of the enacting part does not contain the provisions which are said to occur in it, those provisions cannot be derived by implication from a proviso.<sup>2</sup>

On the other hand, where the Proviso is *directly repugnant* to the enacting clause, the Proviso shall stand and be a repeal of the enacting part, as it speaks of the last intention of the maker.<sup>3</sup> Again, the natural presumption is that, but for the Proviso, the enacting part would have included the subject-matter of the Proviso.<sup>4</sup> For the same reason, an exception contained in the proviso must be assumed to be *necessary* unless it appears from the language employed.<sup>5</sup>

The scope of the Proviso itself must be determined with reference to the *context*, i.e., the main enactment which it seeks to limit or define.<sup>6</sup>

*Interpretation Clause.*—The Constitution, like other statutes, includes an Interpretation clause, defining certain terms, such as ‘agricultural income,’ ‘corporation tax,’ ‘existing law,’ ‘taxation,’ ‘foreign State,’ and the like (Article 366).

The object of the interpretation clause, however, is not to take away the *ordinary* meaning of a word. It simply declares what *may be included* within the meaning of the term when the circumstances require that it should bear that meaning or have that ambit.<sup>7</sup>

“An interpretation clause is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act, when there is nothing in the *context* or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable”.<sup>8</sup>

This is made clear in the Interpretation clause of our Constitution (Art. 366) by the use of the words “*unless the context otherwise requires.*” These mean that words take colour from the context and need not have the same meaning in every article or clause.<sup>9</sup>

Again, a definition clause ought not to be construed as cutting down or modifying the main enacting section unless it contains clear language to that effect.<sup>10</sup>

*Schedules.*—The Constitution of India, following the Government of India Act, 1935, contains a number (8) of Schedules. Schedules are as much a part of the statute as any other part.<sup>11</sup> Usually, however, schedules contain only matters of form or examples as to the manner in which the enacting portion is to be carried out in practice. Hence, the rule as to such schedules is that if there is any conflict between the enacting part and the Schedules, the former shall prevail.<sup>12</sup>

But most of the Schedules of the Indian Constitution deal with substantive provisions, e.g., as to the administration of Scheduled Areas and Tribal Areas (5th and 6th Schedules) and it may be expected that these provisions will be regarded to be as important as the enacting portion of the Constitution.

### (b) EXTERNAL AIDS.

When the words of a statute are plain and unambiguous, the intention of the Legislature is to be ascertained from the language of the statute itself and no external evidence is admissible to construe the meaning of those words. But

(1) Odgers, Construction of Deeds and Statutes, 1946, p. 213.

(2) *Governor-General v. Municipal Council*, A.I.R. 1949 P.C. 39.

(3) *A. G. v. Chelsea Waterworks*, (1731) 9 Fitz. 195.

(4) *Mullins v. Treasurer of Surrey*, (1880) 5 Q.B.D. 173.

(5) *Province of Bombay v. Hormusji*, A.I.R. 1947 P.C. 200.

(6) *No-Nail Cases v. No-Nail Boxes*, (1903) 1

All E.R. 528 (A.C.).

(7) Odgers, Construction of Deeds and Statutes, 1946, p. 213.

(8) *Robinson v. Barton*, (1883) B. A. C. 801.

(9) *Knightsbridge Estates v. Byrns*, (1940) A.C. 613.

(10) *Jobbins v. Middlesex County Council*, (1948) 2 All E.R. 610 (620) (C.A.).

(11) *A. G. v. Lamplough*, (1878) 3 E. D. 214 (229).

(12) *Deen v. Green*, (1882) 1 P.D. 79 (89).

when the language is *ambiguous* or susceptible of various meanings or shades of meaning, external circumstances may be referred to, in order to gather the intention of the Legislature, such ■ the historical setting behind the enactment, its own parliamentary history and so on.

*Historical setting.*—Thus, in the case of ambiguity in the meaning of words, the circumstances which led to the passing of the statute or the surrounding circumstances in which it was passed, may be looked into to see what the object of the Legislature was, and what the words used relate to<sup>1</sup>.

Thus, in interpreting the Slave Clause [Art. IV, section ■ (3)] of the United States Constitution, the Supreme Court resorted to the history of the times in order to decide between two possible constructions<sup>2</sup>.

Similarly, in interpreting sections 91-92 of the Br. North America Act, the Judicial Committee observed :

" The process of interpretation as the years go on ought not to be allowed to dim or whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of sections 91, 92 should impose ■ new and different contract upon the federating bodies "<sup>3</sup>.

*Parliamentary history of the enactment.*—What is to be interpreted by the Court is the statute ■ it has been finally passed by the Legislature and placed on the Statute Book. Hence, *debates* in the Legislature, reports of Committees of the Legislature<sup>4</sup>, or Statements of Objects and Reasons annexed to a Bill may not be referred to in construing this Act.<sup>5</sup> No statment made on the introduction of the measure or of the framers of the Act can be looked at as affording a guide as to the meaning of the words actually used in the Statute<sup>6</sup> unless, of course, the statute itself refers to some external material.<sup>7</sup> So debates in the Constituent Assembly would not ordinarily be admissible in the interpretation of the Constitution<sup>8</sup>.

Thus, where ■ particular construction is raised by the express words of the Constitution or by necessary implication, such construction cannot be rejected on the ground that a provision to the same effect was *discarded* by the Constituent Assembly which passed the Constitution. A most crucial illustration of the above is offered by the celebrated case of *McCulloch v. Maryland*.<sup>9</sup> The Constitution of the United States did not expressly include the power to establish corporations in the list of powers given to Congress. On the other hand, such a power had been included in the Draft but was rejected by the National Convention. Nevertheless, the Supreme Court held that there was nothing in the Constitution to exclude 'incidental or implied' powers. If the end be legitimate and within the scope

(1) *Holme v. Guy*, (1877) 5 Ch. D. 901 (905).

*Herron v. Rathmines Commissioners*, (1892) A.C. 498.

(2) *Prigg v. Pennsylvania*, 16 Pet. 539.

(3) *Re Aeronautics*, (1932) A.C. 54 (70).

(4) It may be submitted in this connection that the view of Sulaiman, J., in *Re C. P. Motor Spirit Act*, (A.I.R. 1939 F.C. 1 (23)), to the effect that in interpreting the phraseology used in the Government of India Act, 1935, it was not permissible to refer ■ the language used in the White Paper ■ the J.P.C. Report, is ■ founded ■ authority than the opinion of Gwyer, C.J. and Jayakar, J. [at p. 9 (*ibid.*)], if the latter suggests anything to the contrary. The ground upon which the Hon'ble Chief Justice held that the above constitutional documents could be

referred to is that " they contain historical fact and their relation to the Constitution is a matter of common knowledge. "

(5) *Administrator-General v. Premal*, (1895) 22 Cal. 788 (P.C.).

(6) *Krishna v. Nella Perumal*, (1920) 43 Mad. 550 (P.C.).

*A ■ Rys. v. C.I. Ry.*, (1935) A.C. 445 (458) (P.C.).

(7) *Deputy Federal Commissioner v. Moran*, (1939) 61 C.L.R. 735 (754), ■ ■ ■ in 63 C.L.R. 338 (P.C.).

(8) Cf. *Municipal Council of Sydney v. Commonwealth* (1904) ■ C.L.R. ■ 08 ; 213 ; *South Australia v. Commonwealth*, (1942) 65 C.L.R. 373 (410).

(9) (1819) 4 Wh. 432.



of the Constitution, all the *means* which are appropriate, and are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

But, as in the case of all external evidence, debates in the Constituent Assembly as well as other historical facts that led to the adoption of any particular provision may be admissible where there is a latent *ambiguity* in the terms used in the Constitution.<sup>1</sup>

*Previous legislation.*—Previous statutes are usually not admissible in interpreting an enactment, unless where the previous statute is *in pari materia* when they refer to the same subject-matter.<sup>2</sup>

Constitutions do not, in general, arise without some pre-existing legal or constitutional foundation which must necessarily affect the framers in their creation.<sup>3</sup> Hence, a reference to the pre-existing system is permissible when a term is ambiguous but was used in the pre-existing law.

Thus, in determining whether the word 'person' in the British North America Act included the female sex, the Judicial Committee referred to previous statutes of Parliament with these observations :

" In coming to a determination of a particular word in a particular Act of Parliament, it is permissible to consider two points—(i) The external evidence derived from the extraneous circumstances such as previous legislation and decided case. (ii) The internal evidence derived from the Act itself".<sup>4</sup>

Similarly, in determining the scope of the Dominion Parliament of Canada to legislate in respect of 'bankruptcy and insolvency' [S. 91 (21) of the British North America Act], the Privy Council considered it relevant to refer to the usual contents of bankruptcy statutes in England.<sup>5</sup>

Similarly, in the interpretation of the *Government of India Act, 1935*, a reference to the legislative practice in England and India at the time when the Act was passed, has been held to be permissible.<sup>6</sup>

Thus, in the *C. P. and Berar Taxation Case*,<sup>6</sup> the Federal Court held that in interpreting the language of the *Government of India Act, 1935*, the Court was entitled to refer to the previous practice of the Indian Legislature, for—

" Parliament must surely be presumed to have Indian legislative practice in mind, unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply. "<sup>6</sup>

Similarly, in *Ralli Ram v. Province of East Punjab*<sup>7</sup>, it was held that a 'tax on lands and buildings' in List II of the Act should be interpreted to embrace a tax upon the *owner* of such lands and buildings, because in municipal areas in India such a tax on owners had been well-recognised for many years before the passing of the *Government of India Act, 1935*.

The pages of this Commentary will show, at which different places, a reference to the *Government of India Act* will be permissible to interpret the provisions of this Constitution.

*Previous decisions.*—Not only preceding statutes *in pari materia* but also judicial decisions thereon are useful in interpreting the words of a later statute which

(1) Willoughby, Constitutional Law, Vol. I, P.C. 120 (121).  
P. 53.  
(2) Cooley, Constitutional Limitations, 7th Ed., p. 101.  
(3) *R. v. Loxdale* (1758), 1 Burr. 445.  
(4) Wynnes, Legislative and Executive Power, P. 16.  
(5) *Croft v. Dunphy*, A.I.R. 1933 (P.C.) 16 (19).  
(6) *Wallace v. Income-tax Commissioner*, (1948) 2 D.L.R. (P.C.) 849.  
Re *C. P. and Berar Motor Spirit Taxation Act*, (1938) 2 F.L.J. 6.  
(7) (1949) F.L.J. 8.



incorporates the very same words which have received a particular meaning in the Courts.

"When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been put upon them."<sup>1</sup>

Great care must, however, be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced.<sup>2</sup>

Again, though—

" . . . . . resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import or uses language which had previously acquired a technical meaning, appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some special ground."<sup>3</sup>

The present rule will be of particular application in the interpretation of the Constitution of India, inasmuch as much of its contents have been adopted from the Government of India Act, 1935, and in many clauses the provisions of that Act have been reproduced *in toto*. So, unless there is anything in the context to indicate that the framers of the Constitution sought to depart from or improve upon the result arrived at by judicial decision under the Act of 1935, the same interpretation should be given to the words of the Constitution.

An example will make this clear.

Thus, in distributing the legislative powers between the Federation and the Provinces, the Act of 1935 used the expression '*with respect to*' and the same words have been used also in the Constitution and for the same purpose. Hence, the interpretation which this expression received under that Act, *viz.*, that it refers to any matter which is 'directly and substantially' related to or connected with the several entries,<sup>4</sup> and the doctrine of 'pith and substance' applied to it,<sup>5</sup> will be applicable also in interpreting the distribution of legislative powers between the Union and the States under the Constitution.

**Dictionaries.**—The general rule is that in the *absence* of any judicial guidance, dictionaries may be consulted, to find out the ordinary sense of a word.<sup>6</sup> But if there is any previous judicial interpretation of the term which is of high authority, that would be a safer guide than a Dictionary definition, for the purpose of interpretation.<sup>7</sup> Further, when the *context* in which a word is used gives a particular meaning to the word, the etymological or popular meaning of the word cannot be taken with reference to the Dictionary.<sup>8</sup>

**Text-Books and Books of authority.**—If the statute contains no interpretation clause of its own as regards a term, the opinion of well-known text-books may be taken in aid of construction<sup>9</sup>; but the value of the opinion will depend upon the weight of the authority of the writer.<sup>10</sup> In particular, a book whose author is *living* cannot be cited as an authority for the law propounded therein, though the Court may obtain assistance from it.<sup>11</sup>

"The definitions given by eminent text book writers, like Mill, have a value even in the elucidation of legal questions, because such definitions embody the common understanding of those who knew the subject and were therefore to that extent, likely to have been present to the minds of those who passed the Constitution Act"<sup>12</sup>.

(1) *Webb v. Outrim*, (1907) A.C. 81.

(2) *A.G. of Canada v. A.G. of Ontario*, A.I.R. 1932 P.C. 36 (40).

(3) *Robinson v. Canadian Pacific Ry.*, (1892) A.C. 481.

(4) *United Provinces v. Atiq Begum*, A.I.R. 1941 F.C. 16 (35).

(5) *Prafulla v. Bank of Commerce*, (1947) 74 I.A. 13.

(6) *McVittie v. Bolton Corporation*, (1945) 1 All. E.R. 379 (384) (C.A.).

(7) *Midland Ry. v. Robinson*, (1889) 15 A.C. 91 (34).

(8) *R. v. Hall*, (1822) 1 B. & C. 123.

(9) *Bank of Toronto v. Lambe* (1), 12 A.C. 575 (581).

(10) Odgers, *Construction of Deeds and Statutes*, 1946, p. 218.

(11) *Nawazish v. Ali Raza*, A.I.R. 1948 P.C. 134 (139).

(12) *In re G.P. Motor Spirit Act*, A.I.R. 1939 F.C. 1 (35).

*The General Clauses Act.*—Article 367 of the Constitution expressly provides that ‘unless the context otherwise requires’, the General Clauses Act, 1897, adapted under Article 372, shall apply for the interpretation of this Constitution. Hence, for the meaning of such words of this Constitution as follows, the Court would be entitled to refer to the General Clauses Act and the case-law thereunder: ‘commencement’, ‘financial year’, ‘local authority’, ‘Magistrate’, ‘month’, ‘oath’, ‘person’, ‘rule’, ‘year’.

### (b) SPECIAL RULES FOR CONSTITUTIONAL INTERPRETATION.

We have already stated that though in general the rules for interpreting Constitution are the same as those for interpreting general statutes, there are some special rules applicable only to the interpretation of Constitutions, and that is owing to the special character of constitutional enactment. The very ordinary rules of interpretation applying to general statutes compel us to take into account the nature and scope of a constitutional enactment, viz., “that it is a mechanism under which laws are to be made and not a mere Act which declares what the law is to be.”<sup>1</sup>

In the words of the Privy Council,<sup>2</sup>

“There are statutes and statutes and the strict construction deemed proper in the case for example of a penal or taxing statute or one passed to regulate the affairs of an English parish, would often be subversive to Parliament’s real intention if applied to an Act passed to ensure the peace, order and good Government of a British Colony”.<sup>3</sup>

The more important of these special rules may now be summarised :

I. *The Doctrine of Liberal Interpretation.*—It follows from the very nature of constitutional enactment as explained above, that it is not to be interpreted in any narrow and pedantic sense.<sup>4</sup>

Thus, in giving a liberal interpretation to the federal powers in the American Constitution, Chief Justice Marshall observed,

“In considering the question, then, we must never forget, that it is a Constitution we are expounding”.<sup>5</sup>

In interpreting the *Canadian Constitution*, similarly, the Privy Council observed:

“In interpreting a constituent or organic statute, that construction most beneficial to the widest amplitude of its powers must be adopted”.<sup>6</sup>

In another case, their Lordships observed<sup>7</sup> :

“ . . . . . If the text says *nothing*, then it is not to be presumed that the Constitution withholds that power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter, unless it is extraneous to the statute itself, or otherwise clearly repugnant to its sense. For whatever belongs to self-Government in Canada belongs either to the Dominion or to the Provinces within the limits of the British North America Act”.<sup>8</sup>

Similarly, in interpreting the *Government of India Act, 1935*, the Federal Court said that the strict rules of interpretation applicable to the interpretation of the charter of incorporation of a company or public body are not applicable to the interpretation of a Constitution Act.<sup>9</sup>

“A broad and liberal spirit should inspire those whose duty is to interpret it; but this does not imply that they are free to stretch or pervert the language of the enactment in the interests of any

(1) 1. In re C. P. Motor Taxation Act, (1938) 2 F.L.J. 6 (15).

A.-G. for N.S.W. v. Brewery Union, (1908) 6 C.L.R. 469 (611).

(2) Edwards v. A.-G. for Canada, (1930) A.C. 124 (137).

See also Baxter v. Commissioner, (1909) 4 C.L.R. 1087 (1107).

(3) James v. Commonwealth of Australia, (1936)

A.C. 578.

(4) McCulloch v. Maryland, (1819) 4 Wh. 316.

(5) British Coal Corporation v. The King, A.I.R. 1935 P.C. 158.

(6) A.-G. for Ontario v. A.-G. for Canada, (1912) A.C. 571 (583).

(7) J. K. Gas v. King-Emperor, (1947) 52 C.W.N. (F.R.) 25; Bhola Prasad v. King-Emperor. (1942) 46 C.W.N. (F.R.) 32 (36).

legal or constitutional theory or even for the purpose of supplying omission or correcting supposed errors."<sup>1</sup>

It is clear, therefore, that the doctrine of liberal interpretation does not mean that the Constitution can be interpreted in the light of any so-called 'spirit' or theory of the Constitution or according to any principles of 'natural right, justice or liberty'. The question is not what may be supposed to have been intended, but what has been *said*.<sup>2</sup>

In the *United States*, it has, indeed, been asserted in some cases<sup>3</sup>, that there were some limitations which are essential to every free government, and that statutes which transgressed these limitations would be declared to be void by the Courts, even though the legislation did not violate any of the limitations imposed by the Constitution either expressly or by necessary implication. But it has now been *settled* that the validity of any statute cannot be tested by the general spirit which is supposed to pervade the Constitution but is not expressed in words.<sup>4</sup>

In the words of the dissenting opinion of Clifford, J., in *Loan Association v. Topeka*<sup>5</sup>—

... "to concede it (*viz.*, the power to nullify a statute as being opposed to the spirit of the Constitution) would be to make the Courts sovereign over both the Constitution and the people and convert the government into a *judicial despotism*".

The doctrine of 'liberal interpretation' shall have a special application in interpreting the ambit of the various entries in the Legislative Lists included in Schedule VII of *our Constitution*. "In interpreting a Constitution Act, a wide meaning should be given to the words which confer on the Legislature the power to legislate on certain topics, and within the ambit of the words the *most* sovereign powers must be understood to be given to the Legislature"<sup>6</sup>.

The Legislative Lists of the Constitution being modelled upon those of the *Government of India Act, 1935*, the observations made by the Federal Court in relation to the legislative entries of the Act of 1935, shall be equally applicable to the Constitution, except of course, where there has been a patent departure from that Act. As in the Act of 1935, the allocation of the subjects in the Lists is not by way of scientific definition, but by way of a mere '*simplex enumeratio*' of broad categories<sup>7</sup>.

Thus, like the Act of 1935, the Constitution

"seems to have been content to take a number of *comprehensive* categories and to describe them by a word of broad and general import. In the case of some of these categories, *e.g.*, 'local Government', 'Education', 'Water', 'Agriculture'<sup>8</sup>, the general word is amplified and explained by a number of examples and illustrations—some of which would probably in any construction have been held to fall under the more general word, while the inclusion of others might not be so obvious."<sup>9</sup>

According to the doctrine of liberal interpretation, the ambit of a particular power of a Legislature has to be determined with reference to the '*purpose*' for which that power is conferred on that Legislature and the entry should receive such interpretation as would best effectuate that purpose rather than restrict or defeat it. The scope of a power may thus change with circumstances. Though a change in the *circumstances* may not create a power which the Legislature never possessed it may provide the *occasion* for the exercise of such power.

The most striking application of the above principles is to be found in the interpretation of the '*defence power*' of the national Legislature of all countries.

(1) In re *C. P. Motor Taxation Act*, (1938) 1 F.L.J. 6 (15).

(2) *Humble v. A.-G. of Canada*, A.I.R. 1930 P.C. 120 (126).

(3) *Loan Association v. Topeka*, (1875) 20 Wall. 655; *Calder v. Bull, Chase, J.*, (1798) 3 Dall. 386; *Downes v. Bidwell*, (1901) 182 U.S. 244.

(4) Cooley, *Constitutional Law*, p. 196; *Constitutional Limitations*, pp. 350-9.

Willoughby, *Constitutional Law*, Vol. I, p. 71.

(5) (1875) 20 Wall. 655.

(6) Re *C. P. and Berar Sales Taxation Act*, A.I.R. 1939 F.C. 1.

(7) Entry 5, List II of the Constitution.

(8) Entry 11, List II, *ibid.*

(9) Entry 17, List II, *ibid.*

(10) Entry 14, List II, *ibid.*



Thus, the *Australian High Court* has said<sup>11</sup> :

"In dealing with that constitutional power (defence), it must be remembered that, though its meaning does not change, yet unlike some other powers its application depends upon *facts*, and as those facts change so may its actual operation ■ a power enabling the Legislature to make ■ particular law. . . . The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of operation of the power. Whether it will suffice to authorise a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto".

So, in another case, it said<sup>12</sup> :

"Because war promotes abnormal conditions, abnormal means are required to cope with them, and this justifies Parliament of the Commonwealth under the defence power enacting many laws in times of *war* which would be beyond its scope in times of *peace* . . . . A state of war, therefore, justifies legislation in the exercise of the defence power, which makes many inroads on personal freedom, and which places many restrictions on the use of property of an abnormal and temporary nature which would not be legitimate in times of peace. A law that called up the whole of the civil population between the ages of 18 and 60 for continuous military service . . . . in times of *peace* would be so fantastic that it could not be said to be a *real* exercise of the defence power. The substance and *purpose* of such a law would be to organize the Commonwealth as a military state and not to take the necessary steps to prepare for war ; but it would be a valid exercise of the power to call up all or any citizens between these ages for continuous military service for the *indefinite* period of the war."<sup>13</sup>

These observations are to be borne in mind while interpreting Entry ■ of List I of our Constitution.

II. *The Doctrine of Progressive Interpretation.*—A rule of interpretation of ordinary statutes is that their terms must be construed in the light of the meaning which they bore *at the time of the passing* of the Statute.<sup>14</sup>

But since a Constitution, unlike other statutes, is intended to be *permanent* and is 'to endure for ages', the chief consideration in its construction should be *present* conditions, relations and requirements and when the language of the Constitution will bear it, these should determine the interpretation<sup>15</sup>; provided, of course, there is no express command or prohibition to the contrary<sup>16</sup>. In fact, if the ordinary rule of contemporary meaning were given to ■ Constitution, it would be "to command the race to halt in its progress"<sup>16</sup> and "to project oneself mentally backward through a period of transition"<sup>17</sup>.

Though the terms of the "Constitution" do not undergo any change with time, and the nature of the grant of power must always remain the same, its *extent* and *ambit* may grow with the progress of civilisation so as to include such new specific developments of particular matters as may arise from time to time.<sup>18</sup> According to *Wynes*<sup>18</sup>, the doctrine should better be styled as the doctrine of '*generic interpretation*' meaning that new developments of the same subject and new means of executing an unchanging power do arise from time to time and are capable of control and exercise by the appropriate organ to which the power was been committed<sup>18</sup>.

In some *American cases*<sup>19</sup>, the ordinary rule had indeed been applied. But the doctrine of progressive interpretation has later come to be firmly inbedded in the interpretation of the American Constitution. It has been explained that the doctrine does not mean that new conditions shall justify the exercise of ■ power not granted or to create limitations not imposed by the Constitution<sup>20</sup>. It only means that the powers and limitations created by the Constitution shall, if possible, be made *applicable* to the new conditions<sup>20</sup>. Such application cannot be prevented by the

(11) *Andrews v. Howell*, (1941) 65 C.L.R. 255 (278).

(12) *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116 (H.C.).

(13) *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116 (161).

(14) *Trustees of Clyde Navigation v. Laird*, ■ App. Cas. 673.

(15) *Toronto Corporation v. Bell Telephone Co.*,

(1905) A.C. 52.

(16) *Borgins v. Falk*, (1911) 147 Wis. 327.

(17) *Att.-Gen. v. Holland*, 15 C.L.R. 46.

(18) *Wynes, Legislative and Executive Powers*, pp. 30-31.

(19) *South Carolina v. United States*, (1905) 199 U.S. 437.

(20) *Willoughby, Constitutional Law*, Vol. I, p. 71.



consideration that the new conditions could not have been foreseen or such application could not have been contemplated by the framers of the Constitution<sup>21</sup>. The test in such cases is whether the application to the new conditions may be included in the *scope* of the powers granted by the Constitution in general terms and whether such application would be barred by some other provisions of the Constitution. It is by the application of this doctrine that the remarkable expansion of federal powers has been made possible by judicial interpretation in the United States, thus obviating the difficult processes of amending the Constitution.

Thus, in interpreting the 'commerce clause' [article 1, section 8 (3)] of the *American Constitution*, the Supreme Court observed<sup>22</sup> :

"The powers granted . . . . are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they *keep pace* with the progress of the country, and *adapt themselves* to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steam boat to the railroad, and from the railroad to the telegraph, as the new agencies are successively brought into use to meet the demands of increasing population and wealth."<sup>23</sup>

The Privy Council applied this doctrine in interpreting the terms 'trade and commerce' in sections 51 (1) and 92 of the *Australian Constitution Act*, in these words<sup>24</sup> :

"The words used are necessarily general and their full import and true meaning can often be appreciated when considered as the years go on in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of words changes, but the changing circumstances illustrate and illuminate the full import of that meaning . . . . It may be that in 1900 the framers of the Constitution were thinking of border tariffs and restrictions in the ordinary sense and desired to exclude difficulties of that nature, and to abolish the barrier of the State boundaries so as to make Australia a single country. Thus they presumably did not *anticipate* those commercial and industrial difficulties which have in recent years led to marketing schemes and price control, or traffic regulations such ■ those for the co-ordination of rail and road services, to say nothing of new inventions, such as aviation or wireless. The problems, however, of the Constitution can only be solved as they emerge by *giving effect to the language used*."

Similarly, applying the doctrine to the *Canadian Constitution*, the Privy Council has held<sup>25</sup> that the power to regulate 'trade and commerce' under section 91 (2) of the *British North America Act*, extended to the creation of a 'national mark', which ■ now ■ usual feature of international commerce :

"There seems no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in *novel fields*, if they can be brought *fairly* within the classes of subjects confided to Parliament by the Constitution"<sup>26</sup>.

In ■ later case, the Privy Council observed<sup>1</sup> :

"In 1867, 'postal services' [section 91 (5) of *British North America Act*] in Canada were rendered by the help of land vehicles, but nobody could contend that the modern use of *aeroplanes* for carrying mail is, on that account, not within the phrase".

III. *Utres magis valeat quam pereat*.—Practically a corollary from the foregoing two doctrines is the application of the maxim *ut res magis valeat quam pereat* to a Constitution, meaning that it should be so interpreted that it should have validity rather than it should perish.

In the interpretation of ordinary statutes, the maxim is generally used to get over the draftsman's unskilfulness, in cases of *absolute* necessity, where the object of the statute is otherwise clear.<sup>2</sup> In such cases, applying the doctrine, the Court may (i) rectify obvious misprints ; (ii) reject superfluous words and phrases ; (iii) substitute one word for another ; (iv) read negative words as affirmative and

(21) *Dartmouth College v. Woodward*, (1819) 4 Wh. 518.

(22) *Pensacola Tel. Co. v. W. U. Tel. Co.*, (1877) 96 U.S. 1.

(23) See also *Re Debs*, (1895) 158 U.S. 564.

(24) *James v. Commonwealth*, (1936) A.C. 587 (614).

(25) *A.-G. of Ontario v. A.-G. of Canada*, A.I.R. 1937 P.C. 99 (100).

(1) *A.-G. of Alberta v. A.-G. of Canada*, (1939) A.C. 117.

(2) *Salmon v. Duncombe*, (1886) 11 A.C. 627 (634).

*vice versa* ; (v) put a possible but not the usual meaning upon words ; (vi) expand their literal meaning.<sup>3</sup>

But while the scope for application of the maxim in the case of ordinary enactments is very narrow, the caution being that the Court should not pose as the legislator<sup>4</sup>, a more liberal use of the maxim is warranted in the case of a Constitution, having regard to the nature of the instrument. As our Federal Court said :

" A Constitution of Government is a *living* and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat* ".<sup>5</sup>

To such an organic statute the flexible interpretation must be given that changing circumstances require.<sup>6</sup>

Again, as the Privy Council has observed, with reference to the *Canadian* and *Australian* Constitution, the Court is to remember—

" that if there are at points obscurity in *language*, this may be taken to be due, not to uncertainty about general principles, but to the difficulty in obtaining ready agreement about *phrases* which attends the drafting of legislative measures by large *assemblages*."<sup>7</sup>

The maxim has a special application in interpreting the constitutional distribution of powers to the Union and State Legislatures and in determining whether a particular legislation has been *ultra vires* of the powers of the Legislature enacting it. The Court will start with the presumption that the Legislature has acted *intra vires*, and try to give it that effect which is within the powers of the Legislature in question.

" It is always to be presumed that the Legislature designed the statute to take effect and not to be ■ nullity."<sup>8</sup>

In the words of the Supreme Court of the U. S. A. :

" As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."<sup>9</sup>

Thus, where the Legislature concerned has no power to legislate with extra-territorial effect, the Court will hold that the statute has application only within the territory over which that Legislature has jurisdiction.<sup>10</sup> So, if the extra-territorial provisions are *severable*, invalidity of the statute will attach only to those provisions and the rest of the statute will be saved.<sup>10</sup>

It is to be noted in this connection that our Constitution confers extra-territorial powers upon the Union Parliament [Article 245 (2)]. But no such power has been conferred upon the State Legislature. So, by reading clauses (1) and (2) of Article 245 together, we must arrive at the conclusion, that the State Legislatures shall have no extra-territorial powers and that their legislation will be confined in its operation to their respective territories. The position of the State Legislatures of India will thus be similar to that of the Provincial Legislatures of Canada<sup>11</sup> and Australia<sup>10</sup> and of the United States.<sup>12</sup> So, what has been said about extra-territorial operation will apply to legislation by the States under the Indian Constitution.

There is, however, ■ rule of caution to be applied in construing whether a legislation has, in fact, extra-territorial operation. Though a Legislature may not be competent to legislate as to matters outside its territory, it does not follow that a legislation which is *in substance* in respect of matters within the competence of that Legislature is invalid simply because it may have *possible* effects outside that territory.

(3) Halsbury, Laws of England, Vol. 27, p. 147.

(4) *Crawford v. Spooner*, (1846) 6 Moo. P.C. 9.

(5) *In re C. P. Motor Spirit Taxation Act*, (1938)

■ F.L.J. 6 (15).

(6) *A.-G. of Ontario v. A.-G. of Canada*, (1938)

25 C.W.N. 886 (896) (P.C.).

(7) *John Deere Plow v. Wharton*, (1915) A.C.

330 (338).

(8) Cooley, Constitutional Limitations, p. 217.

(9) *United States v. Delaware*, 213 U.S. 366.

(10) *McLeod v. A.-G. for New South Wales*, (1891) A.C. 455.

(11) *British Coal Corporation v. King*, (1935) A.C. 500.

(12) *United States v. Bennett*, 232 U.S. 299.

Hence, when a statute is impugned as having extra-territorial operation, the validity of that legislation "depends upon the sufficiency of the purpose for which is used the territorial connection".<sup>13</sup>

"There is no rule of law that the territorial limits of a subordinate Legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by it depends upon the proper construction of the statute *conferring those powers*. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the Legislature. Concern by a subordinate Legislature with affairs or persons outside its own territory may therefore suggest a query whether the Legislature is *in truth* minding its own business . . . . . It does not *compel* the conclusion that it is not. The enabling statute has to be *fairly construed*".<sup>13</sup>

Thus, when a State under the Indian Constitution legislates with reference to public order, the enactment would not become *ultra vires* merely because it may have repercussions or consequences outside the State.<sup>14</sup>

IV. *Mandatory and Directory Provisions*.—The distinction between mandatory and directory provisions applies in the case of Constitutions ■ in the case of ordinary statutes. But the *general* rule about constitutional provisions is that they should be regarded as mandatory where such construction is possible.<sup>15</sup>

Nevertheless, there are certain provisions over which the Courts have no cognisance and these provisions must necessarily be regarded by the *Courts* as directory. As regards such provisions, the United States Supreme Court observes<sup>16</sup> :

"The Constitution has many commands that are not enforceable by Courts because they clearly fall outside the conditions and purposes that circumscribe judicial action . . . . . The Constitution has left the performance of many duties in our Governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."

Though *our* Constitution does not strictly apply the Theory of Separation of Powers<sup>17</sup> by vesting the 'judicial power' in the Supreme Court or the Judiciary, it cannot be supposed that our Courts would, in the absence of any provisions in the Constitution assume to exercise any function other than the 'judicial function' which properly belongs to the Courts, *viz.*, the determination of justiciable controversies properly brought before them<sup>18</sup>. So, our Courts would not meddle into *legislative* or *political* questions. Hence, although every provision in the Constitution ■ mandatory in the sense that the Organ of Government to which it is addressed must, in pain of violation of the Constitution, necessarily comply with it, to the Courts a provision would be regarded ■ recommendatory if there is no judicial means to enforce it and the act falls outside the province of the Judiciary. It is from the context, along with the other circumstances that the nature of the provision ■ to be ascertained<sup>19</sup>, and the mere use in the Constitution of words such ■ 'shall' is not conclusive in this respect<sup>16</sup>.

For example, Article 35 (ii) (a) says that 'Parliament *shall*, as soon ■ may after the commencement of this Constitution, make laws for prescribing punishment . . . . .'. This is obviously ■ mandatory power of Parliament since it would be meaningless to declare certain acts ■ offences by the Constitution (*e.g.*, Article 17), unless there is any punishment prescribed for them. But the Courts would be powerless to compel Parliament to make such laws, if Parliament fails, for any length of time. The remedy in such cases would lie in the hands of the electorate.

(13) *Wallace Bros. v. Income-tax Commissioner*, (1948) ■ D.L.R. (P.C.) 248.

(14) *Siddique v. Province of Bihar*, (1948) 4 D.L.R. (Pat.) 29.

(15) Cooley, *Constitutional Limitations*, pp. 108-9; Wynes, *Legislative and Executive Powers*, p. 33.

(16) *Colegrove v. Greene*, (1949) 328 U.S. 549.

(17) See my Article on "The Indian Constitu-

tion through American Eyes" in (1949) F.L.J. p. 170 (Jour.); see also under Part V, Ch. I, *post*.

(18) Cf. Cooley, *Constitutional Law*, p. 48; *Ogden v. Blackledge*, 2 Cr. 276; *Sinking Fund Cases*, 99 U.S. 700; *Shell Co. v. Fed. Commissioners*, (1931) A. C. 275, approving *Huddart Parker v. Moorehead*, (1908) 8 C.L.R. 330 (357).

(19) *Osborne v. Commonwealth*, (1911) 12 C.L.R. 321.



Similar examples are to be found in—Article 81 (3) : Readjustment of territorial constituencies<sup>20</sup>; Article 93 : Election of Speaker and Deputy Speaker; Article 85 : Summoning and Session of Parliament.

Similarly, in relation to the Executive, there are many provisions for which there is no judicial sanction. For example, Article 59 (2) enjoins—‘ The President shall not hold any other office of profit ’. But the only sanction against violation of this provision is impeachment (Article 61) and the Courts would be powerless either to remove the President or to issue a prohibitory injunction upon him not to hold any alleged office of profit. Nor can the Courts issue a mandatory injunction upon the President to compel him to address the Houses of Parliament at the commencement of a session, notwithstanding the word ‘ shall ’ in Article 87 (1).

#### RULES RELATING TO DISTRIBUTION OF POWERS.

The above is a summary of the more important of the general rules which will be applicable to the interpretation of the Constitution of India. Besides these, there are some *particular* rules which would be applicable for interpreting the distribution of powers between the Union and the States. These will be dealt with, separately, under Part XI, *post*.

#### PREAMBLE.

Preamble. WE, THE PEOPLE OF INDIA having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens :

JUSTICE, social, economic and political ;  
LIBERTY of thought, expression, belief, faith and worship ;  
EQUALITY of status and of opportunity ;  
and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation ;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

#### OTHER CONSTITUTIONS

##### *Declaration of American Independence, 1776.*

“ We hold these truths to be self-evident ; that all men are created *equal* ; that they are endowed by their creator with certain inalienable rights ; that among these *life, liberty, and the pursuit of happiness* ; that to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed . . . . . ”

##### *Preamble to the Constitution of the United States, 1787 .*

“ We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

##### *Preamble to the Constitution of Eire, 1937 .*

“ In the name of the most Holy Trinity from whom is all authority and to whom as our final end all actions both of men and states must be referred, we, the people of the Eire, humbly acknowledging all our obligations to our Divine Lord Jesus Christ, who sustained our fathers through centuries of trial gratefully remembering their heroic and unremitting struggle to regain the rightful independence of nation and seeking to promote the common good with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be secured, true social



order attained, the unity of our country restored, and concord established with other nations, do hereby accept, enact and give to ourselves this constitution."

*Preamble to the Constitution of Burma, 1948.*

"WE, THE PEOPLE OF BURMA including the Frontier Areas and the Karenni States, determined to establish in strength and unity ■ SOVEREIGN INDEPENDENT STATE, to maintain social order on the basis of the eternal principles of JUSTICE, LIBERTY AND EQUALITY and to guarantee and secure to all citizens JUSTICE social economic and political; LIBERTY of thought, expression, belief, faith, worship, vocation, association and action; EQUALITY of status, of opportunity and before the law, IN OUR CONSTITUENT ASSEMBLY DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

## INDIA

### OBJECT AND SCOPE OF THE PREAMBLE.

The proper function of a Preamble is to explain certain facts which are necessary to be explained before the enactments contained in the Act can be understood.<sup>21</sup> In short, it contains ■ recital of the facts or state of the land for which it is proposed to legislate by the statute, the *object* and *policy* of the legislation and the evils or inconveniences it seeks to remedy. But though it is a recital of *some* inconveniences, it does not exclude others, for which remedy is given by the enacting part of the statute.<sup>22</sup>

Hence, where the language of the enacting sections is *clear* and *unambiguous*, the terms of the Preamble cannot qualify or cut down that enactment.<sup>23</sup> There may be cases where the enacting part of a statute is not co-extensive with the object enunciated in the Preamble. In such cases, if the language of the section be clear, it is the section which will prevail, for the general terms of the Preamble may not indicate or cover all the mischief which in the enacting portions of the Act itself are found to be provided for.<sup>24</sup>

Thus, of the Preamble to the *Constitution of the United States*, the Supreme Court has observed :

"Although the Preamble indicates the *general purposes* for which the people ordained and established the Constitution, it has never been regarded ■ the source of any *substantive power* conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution, and such ■ may be implied from those powers"<sup>25</sup>.

But where the enacting part of the statute is *ambiguous*, the Preamble can be referred to, to explain and elucidate it. In such ■ case, the Preamble may afford ■ useful light ■ to what ■ statute intends to reach.<sup>24</sup>

"If any doubt arises from the terms employed by the Legislature, it has always been held ■ safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the Preamble . . . which is ■ 'key to open the mind of the makers of the Act, and the mischiefs which they intended to redress'."<sup>21</sup>

In short, ■ Court may look into the object and policy of the Act as recited in the Preamble when a doubt arises in its mind as to whether the narrower or the more liberal interpretation ought to be placed on the language which is capable of bearing both meanings. But an ambiguity cannot be *created* or imagined in order to bring in the aid of the Preamble ■ that would be frustrating the enactment.<sup>23</sup>

Like the Preamble to the American Constitution, the Preamble to our constitution serves two purposes,—(a) It indicates the *source* from which the Constitution derives its authority. (b) It also states the *objects* which the Constitution seeks to establish and promote.

'*We the people of India*'.—Though there is, in our Constitution, no independent article in the enacting portion declaring that all powers ■ derived from the people<sup>2</sup> or vesting the sovereignty or the reserved powers in the people<sup>3</sup>—the words "■

(21) Thring, Practical Legislation, p. 92.

(22) 7 Bac. Abr. Statute (i).

(23) *Powell v. Kempton Park Co.*, (1899) A.C. 143 (157).

(24) *Secretary of State v. Maharaja of Bobbili*, (1920) 43 Mad. 529 (P.C.).

(25) *Jacobson v. Massachusetts*, (1905) 197 U. S. 11.

(1) *Sussex Peerage Case*, (1844) 11 Cl. & F. 85 (143).

*Bhola Prasad v. King-Emperor*, (1942) 46 C.W.N. (F.R.) 32 (37).

(2) Cf. Constitution of Eire, Art. II (1).

(3) Cf. Tenth Amendment to the Constitution of the U. S. A.

the people of India" echo the opening words in the Preamble to the Constitutions of the United States and of Eire and emphasise the ultimate sovereignty of the people and that the Constitution itself is founded on the authority of the people.

Though our Constitution has been made by men who cannot be said to be fully representative of the nation, nor has it been ratified by a direct vote of the people, our Constitution, like that of the United States<sup>4</sup> professes that it is founded on the consent and acquiescence of the people. It is not imposed by any external authority as was the Government of India Act, 1935.

Again, as interpreted in the United States<sup>5</sup> the word 'people' indicates that the Constitution is not created by the States or by the people of the several States<sup>6</sup>, but by the people of India in their aggregate capacity. Hence, it would not be open to any State, or group of States either to put an end to the Constitution or to secede from the Union created by it.

*Sovereign*.—The word 'sovereign' is presumably taken from Article 5 of the Constitution of Eire.

"Sovereign or supreme power is that which is absolute and uncontrolled within its own sphere."<sup>7,8</sup>

In the words of *Cooley*,<sup>9</sup>

"A State is sovereign when there resides within itself a supreme and absolute power, acknowledging no superior."

Sovereignty, in short, is the final power of decision. But it has an external as well as an internal aspect :

(a) *External* sovereignty or sovereignty in international law means the independence of a State of the will of other States.

"Sovereignty in its relation between States signifies *independence*. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State . . . . ."<sup>10</sup>

Now, India ceased to be a 'Dependency' of the British Empire by the passing of the Indian Independence Act, 1947. Whatever subjection or limitation was still implied has been abjured by India declaring herself a Republic in the Constitution. So, India is now as sovereign a State as the United States of America.

Of course, at the Prime Ministers' Conference at London (April 27, 1949), India has made a declaration to the effect that notwithstanding her becoming a sovereign, independent Republic, she will continue—

"her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of the independent nations and as such the Head of the Commonwealth".

But it is to be noted that this declaration is *extra-legal* and there is no mention of it in the Constitution of India. It is a voluntary declaration and indicates a free association and no obligation. Again, it accepts the King of England only as a *symbolic* head of the Commonwealth (having no functions as belonged to him prior to the Constitution), and there is no question of allegiance of the citizens of India to the King of England. Hence, this voluntary association of India with the Commonwealth<sup>11</sup> does not affect her sovereignty to any extent and it would be open to India to cut off that association as easily as it has been declared.

(b) *Internal* sovereignty, on the other hand, refers to the relation between the State and the individuals and bodies within its territory. It means 'the power to compel obedience and to punish for disobedience'.

(4) Cf. Munro, Government of the United States, p. 62.

(5) *Martin v. Hunter's Lessee*, (1816) 1 Wh. 304 (324); *McCulloch v. Maryland*, (1819) 4 Wh. 316 (429).

(6) It did not even require ratification by the States, as in the United States [cf. *Burdick*, Law of the American Constitution, p. 14].

(7) Salmond's Jurisprudence, 1948, p. 143.

(8) Burgess, Political Science and Constitu-

tional Law, Vol. I, p. 53.

(9) *Cooley*, Constitutional Law, p. 18.

(10) *Schwarzenberger*, International Law, 1945, Vol. I, p. 44.

(11) See privileges of membership of Commonwealth as regards civic rights summarised in 54 C.W.N. xlv (45 n.); and the India (Consequential Provision) Act, 1949, passed by the British Parliament.

In the *United States*, the judicial view<sup>12</sup> is that the sovereignty is divided between the Union and the States, each being sovereign as regards the subjects committed to it by the Constitution.

In the *Indian Constitution*, though there is a division of powers between the Union and the States, there is no scope for any such theory of divided sovereignty ; for, though the division of powers is to be respected in all normal times, the Constitution itself vests the Union to override the division in the national interests, in emergencies and other specified cases. As the Preamble indicates, the sovereignty, under the Constitution, vests in the Republic of India, and not in any of its component parts, and, hence, no question of any right of secession may possibly arise.

'Democratic'.—'Democracy' is one of the most comprehensive terms used in Political Science. It may mean a political, social as well as economic condition. Since the word 'democratic' in our Constitution is used as an attribute of 'Republic' it may seem that it refers only to political democracy or a form of Government. But the following words of the Preamble explain that it does not refer to merely a form of Government, but to a democratic State in which social, economic and legal equality and justice prevails.

As a form of Government, 'Democracy' means a Government in which the whole of adult population has a direct or indirect share.

(a) In a direct democracy, the entire body of the people directly exercises the political power. Here the legal as well as political sovereignty rest in the people as a whole and they can even change the Constitution itself by their direct vote. (b) In an indirect or representative democracy, on the other hand, the great mass of the people, viz., the electorate, choose their representatives who carry on the Government. The legal sovereignty in such a State rests, not in the electorate but in their representatives. The electorate must exercise its will through the representatives chosen by it.

The *Indian Constitution* aims at a representative democracy, but it is far more radical than the English or the American democracy inasmuch as it abolishes any restrictions on adult suffrage,—on the basis of property, income, taxation, education or the like. The entire adult population of the vast territory of India, numbering about 170 millions, will form the electorate and will thus share in the political power. At the same time, it will not be open to the electorate to exercise any political function by their direct vote. They can act only through their representatives. There is no provision for direct devices such as the Initiative, Referendum or Recall, either for ordinary or constitutional purposes. The powers of amendment of the Constitution, thus, are placed not in the hands of the electorate, but in the Legislature. (Article 368).

'Republic'.—In political literature, the word 'Republic' is used in various senses.

(a) In a narrow sense, it is used simply in opposition to 'Monarchy'. Thus, according to *Jellinek*, a Republic is a Government, not by a single person, but by a collegial organization more or less numerous.<sup>13</sup>

(b) In a wider sense, the word 'Republic' denotes a Government where no one holds the public power as a proprietary right, but all power is exercised for the common good,—where the inhabitants are subjects and free citizens at the same time.<sup>14</sup>

It may be said that the Preamble to our Constitution uses the term in both these senses. For, not only shall we have an elected President instead of a King at the head of our State, but the State will also be characterized by the absence

(12) *Chisholm v. Georgia*, (1792) 2 Dallas, 435.

(13) *Garner*, Political Science, p. 177.

(14) *Bluntschli*, Theory of the State.



of any ruling or privileged class, and all office,—from the humblest to the highest (including that of the President) will be open to all citizens without any distinction of caste, creed, religion or sex. Thus, Indian citizens will be 'subjects and free citizens at the same time'.

The essence of the republican form as understood in the *United States* and as gathered from the prefederal State Governments is that the Government under this form derives its power directly or indirectly from the bulk of the people,—

“that the *supreme power resides in the body of the people*”.<sup>15</sup>

We have already shown that in the Indian Republic, too, the supreme power will reside in the body of the people, enfranchised by universal adult suffrage.

“*Fraternity*”.—Article 1 of the Declaration of Human Rights as passed by the United Nations says :

“All human beings are born free and equal in *dignity* and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

It is this spirit of brotherhood that the Preamble of our Constitution refers to. It will be achieved not only by abolishing untouchability amongst the different sects of the same community, but by abolishing all communal or sectional or even local or Provincial anti-social feelings which stand in the way of the unity of India. Composed of people of so many races, religions, languages and culture, India can attain unity only if there is a spirit of brotherhood amongst all sections of the people,—a feeling that they are all children of the same soil, the same Motherland.

‘*Justice*’.—Justice, briefly speaking, is the harmonious reconciliation of individual conduct with the general welfare of society. Every man acts according to his self-interest, but his act or conduct is said to be ‘just’ only if it promotes the general well-being of the community.<sup>16</sup>

The essence of justice, thus, is the attainment of the common good as distinguished from the good of individuals or even of the majority of them. The Indian Constitution professes to secure to *all* its citizens social, economic and political justice, even though the form of Government prescribed by the Constitution is a majority government which lies at the foundation of the representative system.

(i) *Social* justice requires the abolition of all sorts of inequities which result from inequalities of wealth and opportunity. Thus, the provision of humane conditions of work, maternity relief, offering leisure and cultural opportunities to every individual, prevention of exploitation of child in labour and industry, provision for free primary education for all, the promotion of the educational and economic interests of the backward classes (Part IV) ; banning of forced labour [Article 23],—are all programmes of social justice,—held out by the Constitution of India.

(ii) The ideal of *economic* justice means that there will be no distinction between man and man from the standpoint of economic value. In short, it means equality of reward for equal work [Article 39 (d)]. Every man should get his just dues for his labour, irrespective of caste, creed, sex or social position. It also means the abolition of those economic conditions which ultimately result in the inequality of economic value between man and man, *viz.*, the concentration of wealth and means of production in the hands of a few [Article 39 (c)]. Though the Indian Constitution is not tied to any particular school of social philosophy like Socialism, Communism or the like and though it does not advocate the State ownership of the means of production, it holds out the above ideals of economic justice in its Chapter on the Directive Principles of State Policy.

(iii) *Political* justice means the absence of any arbitrary distinction between man and man in the political sphere. This will be secured under the Constitution

(15) *Chisholm v. Georgia*, (1792) 2 Dall. 419 (457).

(16) *Salmond's Jurisprudence*, 1948, p. 62.



by universal adult suffrage and the abolition of communal reservation, and throwing open employment under the State to all citizens without distinctions of race, caste, sex, descent, place of birth or religion (Article 16).

'*Liberty*'.—'Liberty' was originally understood only as a negative concept, viz., the absence of undue or arbitrary interference with individual action on the part of Government. But to modern thinkers it has become a positive concept, as comprising 'liberties' or rights which are essential to the development of the individual and the perfection of the national life, e.g., liberty of thought and expression.<sup>17</sup>

The Indian Constitution regards the liberty of thought, belief, faith and expression to be essential to the development of the individual and the nation, and these it promises to secure, in the Preamble. The exact contents of these rights or liberties are *however* defined by the Chapter on Fundamental Rights, but in cases of doubt, it would be wholesome to refer to the ideal of liberty embodied in the Preamble.

'*Equality*'.—The Declarations of the Rights of Man and Citizen<sup>18</sup> adopted by the authors of the French Revolution included—

"Men are born and remain free and equal in rights. Social distinctions can be based only upon public utility . . . . ."

*Law is the expression of the general will . . . . It must be the same for all, whether it protects or punishes. All citizens being equal in its eyes, are equally eligible to all public dignities, places and employments, according to their capacities, and without distinction than of their virtues and talents."*

It is exactly this equality of 'status and opportunity' that the Indian Constitution professes to offer to the citizens, by the Preamble. And the object is secured in the body of the Constitution, by making all discriminations by the State between citizen and citizen, simply on the ground of religion, race, caste, sex or place of birth, illegal [Article 15]; by throwing open 'public places' to all citizens [Article 15 (2)]; by abolishing untouchability [Article 17]; by abolishing titles of honour [Article 18], and offering equality of opportunity in matters relating to employment under the State [Article 16]; it also guarantees equality before the law and equal protection of the laws, as justiciable rights [Article 14]. The cumulative effect of all these guarantees is certainly wider than what Jefferson could comprehend when he explained equality as—

"the denial of every pre-eminence but that annexed to legal office and particularly the denial of a pre-eminence by birth",—

for, notwithstanding the solemn guarantee in the American Constitution of the equal protection of the laws, America has failed to abolish discriminations on grounds of birth and colour. Our guarantee of 'equal access to public places' and the punishment of untouchability are thus in advance of the American Constitution.

## PART I

### THE UNION AND ITS TERRITORY

Name and territory of the Union.

1. (1) India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof, shall be the States, and their territories specified in Parts A, II and C of the First Schedule.

(3) The territory of India shall comprise—

(a) the territories of the States ;

(17) Cf. Laski, Grammar of Politics.

(18) These are adopted and affirmed in the

Constitution of the Fourth French Republic, 1946.

- (b) the territories specified in Part D of the First Schedule ;  
and  
(c) such other territories as may be acquired.

#### OTHER CONSTITUTIONS

##### *Preamble to the British North America Act, 1867.*

“Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom :

And whereas such a union would conduce to the welfare of the Provinces and promote the interest of the British Empire. . . . .”

##### *Preamble to the South Africa Act, 1909.*

“Whereas it is desirable for the welfare and future progress of South Africa that the several British Colonies therein should be united under one Government in a legislative union under the Crown of Great Britain and Ireland . . . . .”

### INDIA

#### CL. (1) : INDIA, A UNION OF STATES.

Though an academic discussion as to the nature of the Indian federation is not very much within the scope of a juridical study, a brief review of the salient principles underlying the scheme of Government prescribed by the Constitution would nevertheless be useful even for a juridical interpretation of the clauses of the Constitution, relating to the same.<sup>19</sup>

The word ‘Union’ was deliberately selected by the Drafting Committee from the Preamble to the British North America Act, in order to explain that the type of federation that the Constitution was going to adopt, was of the Canadian type. According Dr. Ambedkar, the Chairman of the Drafting Committee, the word has been used to indicate two things, viz., (a) that the Indian federation is not the result of an agreement by the units and (b) that the component units have no freedom to secede from it.<sup>20</sup>

The word ‘Union’, of course, does not indicate any particular type of federation, inasmuch as it is used also in the Preamble of the Constitution of the United States,—the model of federations ; in the Preamble of the British North America Act (which, according to Lord Haldane, did not create a true federation at all)<sup>21</sup>; as well as in the Preamble to the Union of South Africa Act, 1909, which patently set up a unitary Constitution. Nevertheless, since the framers of the Indian Constitution have used the word ‘Union’ to indicate the likeness of the Indian federation to the Canadian type, we should note the points of similarity between the union of India and the Canadian federation and the points of dissimilarity between the Indian and American types.

*Firstly, as to the mode of formation* :—A federal union may be formed in either of two principal ways, having regard to the pre-existing condition of the component units,—(i) it may be formed by a voluntary agreement between a number of sovereign and independent States, for the administration of certain affairs of general concern, as in the case of the United States of America ; or (ii) the provinces of a unitary State may be transformed into a federal union, as happened in the case of Canada. The provinces of Canada had no separate or independent existence apart from the colonial Government of Canada, and the Union was not formed by any agreement between them, but was imposed by a British statute, which withdrew from the Provinces all their former rights and then re-divided them between the Dominion and the Provinces.<sup>22</sup>

India had a thoroughly unitary constitution until the Government of India Act, 1935. The Provincial Governments were virtually the agents of the Central

(19) As to the nature of the Indian Federation, generally, see my article ‘The Indian Constitution through American eyes’, in (1949) F.L.J. pp. 170—182 (Jour.).

(20) Constituent Assembly Debates, Vol. VII,

No. 1, p. 43.

(21) *A.-G. for Commonwealth v. Colonial Sugar Refining Co., Ltd.*, (1914) A. C. 237 (252-4).

(22) Clokie, *Canadian Government and Politics*, 1944, p. 206.

Government, deriving powers by delegation from the latter.<sup>23</sup> By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of Canada, *viz.*, "by creating autonomous units and combining them into a federation by one and the same Act" (Joint Parliamentary Committee). All powers hitherto exercised in India were resumed by the Crown and redistributed between the Federation and the Provinces by a direct grant.

As is well-known, the federation prescribed by the Act of 1935 never came into being though the Part relating to Provincial autonomy was given effect to. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through 'the Governor's special responsibilities' and his obligation to exercise his individual judgment and discretion in certain matters, and there was the power of the Centre to give directions to the Provinces.

Be that as it may, it cannot be said that under the Act of 1935, the Provinces were in any sense 'sovereign' States like the States of the American Union. And these Provinces have no part in the making of the new Constitution. The Constitution has been framed by the people of India, assembled in the Constituent Assembly, and powers are distributed between the Union and the units (composed of the old Provinces, with changes, and some of the Indian States and other territories),—under a plan, similar in many respects to that under the Act of 1935. In short, the Union of India is not the result of any *compact* between the component units. A definite improvement made by the framers of the Constitution over the 1935 plan is, however, the bringing of the Indian States under the same federal system. Under the scheme of 1935, the Provinces and the Indian States were treated differently and the accession of the Indian States to the system was voluntary while it was compulsory for the Provinces, and the powers exercisable by the Federation over the Indian States were also to be defined by the Instruments of Accession. But under the scheme introduced by the present Constitution, the survivors of the old Indian States (States in Part B of the First Schedule) are, with minor exceptions (to be explained later) placed under the same political system as the old Provinces (States in Part A). The Constitution also improves upon the Draft by laying down that the 'Union' shall have residuary powers of legislation (Article 248) not only in relation to the States in Part A, but also in relation to the States in Part B. The federal plan of the Constitution is thus uniform and not heterogeneous, ■ it was under the Act of 1935.

Secondly, as to the *ambit of the Constitution*:—While the Constitution of the *United States* (1787) simply drew up the constitution of the national government, leaving it "in the main (to the States) to continue to preserve their original Constitutions"<sup>24</sup> (or in the case of new admissions—to draw up their own constitutions by a Convention), the Constitution of *India*, like that of Canada, prescribes the constitutions of the Union as well as those of the States.<sup>25</sup> The States of the Indian Union shall have ■ rights or powers anterior to or apart from this Constitution.<sup>1</sup>

Thirdly, as to *representation of the States*:—One of the essential principles of *American* federalism is the equality of the component States under the Constitution, irrespective of their size or population. This principle is reflected ■ the equality of representation of the States in the upper House of the federal Legislature (*i.e.*, in the Senate) and no State may, without its consent, be deprived of its equal representation in the Senate (Art. V). The principle of equal representation of the States in the upper House of the federal Legislature is followed in the *Australian* Constitution ■ well. But in *Canada*, while each of the

(23) *A.-G. for Commonwealth v. Colonial Sugar Refining Co.*, (1914) A.C. 237.

Cf. Simon Report, Vol. I, p. 112, para. 128.

(24) *A.-G. for Commonwealth v. Colonial Sugar*

*Refining Co.*, (1914) A. C. 237.

(25) With one exception, in the case of Jammu & Kashmir [Art. 370 (2)].

(1) Cf. *Bank of Toronto v. Lambe*, (1887) ■ A.C. 575.



three original Provinces has 24 members each, the number of members from other Provinces, subsequently added, varies down to a minimum of 4. Under our Constitution, there is no equality of representation of the States in the Council of States. As given in the Fourth Schedule, the number of members for the several States varies from 1 to 31. Further, like the Canadian Senate,<sup>2</sup> our Council of States does not exclusively represent the federal principle in as much as it will consist of 12 nominated members (Art. 80) apart from the representatives of the States.

In short, there is no scope under our constitution, for the theory of 'equality of States',—the Union not being the result of any agreement between the States.

Fourthly, as to the *nature of the polity*.—As a radical solution of the problem of reconciling national unity with 'State rights', the framers of the American Constitution made a logical division of everything essential to sovereignty and created a dual polity, with a dual citizenship, a double set of officials and a double system of Courts. But the Indian Constitution, like the Canadian, does not introduce any double citizenship, but one citizenship, *viz.*,—the citizenship of India (Art. 5). Secondly, though the Union and the States shall have their own public services, there will be no clear-cut bifurcation in the administration of the Union and the State laws as in the U. S. A. The State officials will administer the State laws as well as the Union laws applicable within that State, whereas the members of the Union Services while working within a State, will also carry out State laws. There is also provision for delegation of Union executive functions to the States (art. 258). Above all, the Constitution specifically makes it a duty of the States to execute the Union laws and the executive power of the States must also be so exercised as not to interfere with the executive power of the Union (Arts. 256-7), and in these matters, the States shall be under the *directions* of the Union. Herein, the framers of the Constitution appear to have been influenced by the pre-existing system,—*i.e.*, under the Government of India Act, 1935.<sup>3</sup> Such a plan of giving directions by the Union to the States is totally foreign to the American Constitution. Thirdly, there is no dual system for administration of justice under the Constitution of India. There will be no separate system of federal Courts for the administration of federal laws. As in Canada, the same system of Courts in the States will administer both the Union and State laws.

Not only is the Union entitled to give directions to the States, failure on the part of a State to carry out the directions of the Union (Art. 365) would entitle the Union to supersede the State Government, for the time being, by assuming to itself the powers of the State Government concerned (Art. 356). Again, though there is a division of powers between the Union and the States, there is provision for control by the Union both over the administration and legislation of the States. Firstly, legislation by a State shall be subject to disallowance by the President, when reserved by the Governor (Art. 201). Secondly, the Governor of a State shall be appointed by the President of the Union and shall hold office 'during the pleasure' of the President (Arts. 155-6). Both these ideas are repugnant to the Constitution of the United States, but exist under the Canadian Constitution.<sup>4</sup>

But if, as Canadian constitutionalists<sup>5</sup> maintain, the essence of federalism does not lie in the historical process of formation of the union, but in the fact that once formed, the national and State governments have *co-ordinate* authority,—each deriving its authority from the same constitution, neither being a delegate or agent of the other,—the Indian Union is a federation just as the Canadian union is. The States of the Indian Union are in no sense like the units of local administration under a unitary Constitution. The object of our Constitution, like that of the Br. North America Act is—

(2) Kennedy, Some Aspects of Constitutional Law, p. 69.

(3) *Vide* J. P. C. Report, Vol. I, para. 219, page 120; S. 126, Government of India Act, 1935.

(4) Cf. Kennedy, Essays in Constitutional Law, pp. 42-43.

(5) Kennedy, Essays in Constitutional Law, pp. 30-39; Clement, Law of the Canadian Constitution, 3rd Ed., p. 337.



"neither to weld the provinces into one nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented."<sup>6</sup>

And it will be the duty of the Courts to guard the distribution of powers<sup>7</sup> between the Union and the States as laid down in the Constitution.

But though the Indian Constitution presents a federal system for *normal times*, it makes a unique achievement of imparting to that federal system the strength of a unitary system, by enabling the federal government to convert itself into a unitary one, in *emergencies*. One of the basic principles of federalism as it is understood in the United States is that the division of powers made by the original compact embodied in the Constitution should not be allowed to be superseded at the mere will of *one* of the contracting parties. Thus, in the *United States*, it is not possible for the national government to transfer to itself any of the powers belonging to the States, by unilateral action nor to suspend the working of the State Governments.

But this will be possible under the Constitution of *India*, and in this respect, the Constitution even goes beyond the Canadian. We have already seen that it will be open to the Union Government to supersede a State Government which refuses to carry out its directions as are authorised by the Constitution. While in normal times the power to give directions is confined to some specified matters (Arts. 256-7), when a Proclamation of Emergency is made by the President (Art. 352) the power of the Union executive to give directions to the State executive, will extend to any matter (notwithstanding anything in this Constitution) [Art. 353 (a)]. The legislative power of the Union Parliament will also automatically extend to matters in the State List [Art. 250 (1)].<sup>8</sup>

Even apart from emergencies, the Indian Constitution (Art. 249) empowers the Union Parliament to assume legislative powers (though temporarily) over any subject included in the exclusive State List by a simple resolution of 2/3 of the members present and voting in the Council of States (*i.e.*, the upper Chamber of Parliament itself) that such legislation is necessary in the 'national interest'. Of course, the Council of States would contain representatives of the States, but owing to inequality of State representation, it is practically the majority in one of the Houses of the national Legislature who would be competent to override the normal distribution of powers laid down by the Constitution.

As has been already explained, the object of the framers of the Constitution of India has been to build a strong central authority which may resist external aggression and also to check internal disruptive forces that may tend to undermine the nascent State. This object has been sought to be attained, not only by endowing larger enumerated powers upon the Union than elsewhere and by giving it the residue (Art. 248), but by enabling the Centre itself to assume control of the units whenever there is any threat of disruption either from outside or from within. So, this object must be borne in mind, while interpreting the above exceptional provisions of the Constitution.

In fine, it may be said, that the Constitution of India is neither purely federal nor unitary but is a combination of both. It is a union or composite State of a novel type.

#### CL. (2) : TERRITORIES OF THE STATES.

The territories of the States comprising the Union are described in Parts A, A and C, in the First Schedule, *post*. As to the limits of the territory of these States

(6) Cf. *Maritime Bank of Canada v. Receiver-General*, (1892) A. C. 437 (441-2).

(7) The principles underlying the distribution of legislative powers under this Constitution will be separately dealt with under Part XI, *post*.

(8) The Indian Union in short, is not like the United States 'an indestructible union composed of indestructible States' [*Texas v. White*, (1869)

7 Wall. 700]. In another cases the United States Supreme Court said "The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence . . . . . without the States in Union, there could be no such political body as the United States" (*County of Lane v. Oregon*, (1868) 7 Wall. 71 (76).

'at the commencement of the Constitution', see the Government of India Act, 1935, as amended by the Indian Independence Act, 1947 and the White Paper on Indian States.<sup>9</sup> The effects of these will be discussed under the First Schedule.

Broadly speaking, the States in Part A correspond to the Governor's provinces under the Government of India Act, 1935,—the Provinces of the Punjab and Bengal having been truncated by the Partition. The States in Part B represent the bigger Indian States as integrated into groups under the 'Patel Scheme'. Part C, on the other hand, represent the Chief Commissioner's Provinces under the Act of 1935, plus 61 viable Indian States which were placed under Chief Commissioners prior to the commencement of the Constitution under the same Patel Scheme relating to Indian States.<sup>1</sup> (Thus, 216 Indian States<sup>1</sup> had merged into the different adjoining Provinces as are now represented by the States in Part A).<sup>10</sup>

#### ADMINISTRATION OF THE STATES OF THE THREE CATEGORIES.

Part VI of the Constitution provides the Constitution of the States in Part A. The States in Part B, too, are governed by these provisions, except as regards certain matters, which are included in Part VII, read with Article 366 (21). The Constitution of the States in Part C is provided by Part VIII.

It is to be noted that the administration of Scheduled Areas, Scheduled Tribes and Tribal Areas as are included within the States in Parts A and B are taken out from the operation of the general provisions of Parts VI and VII, and are placed under the Fifth and Sixth Schedules which contain certain self-contained provisions regarding them (Article 244).

#### CL. (3) : MEMBERSHIP OF THE UNION AND TERRITORY OF INDIA.

The Constitution will extend to any territory which comes within the scope of the expression 'territory of India' as defined in cl. (3) of the present article.

The 'territory of India' comprises three categories of territories :

(a) The territories included in Parts A, B, and C of the First Schedule are called 'States', and these are members of the 'Union of States' referred to in Cl. (1), *ante*.

(b) The territories specified in Part D of the First Schedule (at the commencement of the Constitution, this Part includes only one territory, *viz.*, the Andaman and Nicobar Islands).

(c) Any territory ■ may be acquired by India, at any time.

It is to be noted that though the number of States of the Union was 28 in the Constitution as passed, it has been reduced to 27, owing to the merger of Cooch Behar (State No. 4 of Part C) to West Bengal, before the commencement of the Constitution (from January 1, 1950). [States' Merger (West Bengal) Order, 1950].

The difference between the status of these 27 States (members of the Union) and that of ■ Territory coming within sub-cl. (b) and (c) of Cl. (3) ■ principally as regards representation in the Union Parliament. Representation in the Council of States is limited only to the States (Fourth Schedule). As regards the House of the People, people of the States shall have representation by virtue of the Constitution [(Art. 81 (1) (a)] ; but the representation of the people of the territories outside the States shall depend on legislation by Parliament [Art. 81 (2)].

#### EXTENT OF 'TERRITORY' UNDER INTERNATIONAL LAW.

The word 'territory', in International Law, is not co-terminous with the geographical boundary of the land of ■ State, but comprises—

(9) White Paper on Indian States, Govt. of India Publication, MS. 1, (also reproduced in the Indian Law Review, App. to Vol. II.

Nos. 3-4); also Ms 9, (10) See App. XIX, Ms 1; App. XLIII, Ms 6.

"the whole area, whether of land or water, included within definite boundaries, as ascertained by occupation, prescription, or treaty; together with such inhabited or uninhabited lands ■■■ considered to have become attendant on the ascertained territory through occupation or accretion".<sup>11</sup> "Territory" is the "space within which that State and no other State exercises its supreme authority."

The areas *attendant* on the territory of a State are—

- (a) such parts of the sea as are known as 'territorial waters';
- (b) such adjacent islands as are either situated within ■ distance of 3 miles from the coast, or are otherwise regarded as natural appendages of the territory.

The expression 'territory' of India, in our Constitution therefore, includes such attendant areas as well, and since other provisions of the Constitution use expressions such as 'territorial waters' (e.g., Art. 297), it would be useful to note the contents of these attendant areas under International law:

*Territorial waters.*—The 'territorial waters' of a State comprise—(i) the littoral or marginal sea; (ii) inlets, exhibiting a well-marked configuration, such as gulfs and bays and inland seas; (iii) straits, not exceeding 6 miles in breadth; and (iv) rivers.

(i) *The littoral or marginal sea.*—Every State has sovereignty over its adjacent territorial waters comprising the 'maritime belt' or a three-mile zone (one marine league) of the open sea, measured from the low-water mark on its coast.<sup>12</sup> While the open sea cannot be the subject of dominion of any State, the above littoral zone adjoining the coast of each State has been treated ■ part of the territory of that littoral State, by general assent, since sovereignty over the littoral zone is necessary for the defence and security of that State.

(ii) *Inlets.*—Harbours, estuaries and land-locked bays belong to the territory of the State possessing the shores around them.<sup>13</sup> There is no agreement as to what maximum width at its point of actual junction with the open sea, would constitute to be a 'territorial bay,' but the British view puts it at 6 miles.<sup>14</sup>

(iii) *Straits.*—Straits are broadly governed by the same principles as applicable to the 'littoral sea,'<sup>15</sup> so that the breadth of a "strait" should not exceed 6 miles in order to be 'territorial.'

(iv) *Rivers.*—Rivers wholly inclosed within the limits of a State form part of its territory. The rivers which flow *through* the territory also form a part of the domain from their sources to their mouths, or as far as they flow within the territory, including the bays or estuaries formed by their junction with the sea.<sup>16</sup>

#### CL. (3) (c) : MODES OF ACQUISITION OF TERRITORY.

Sub-cl. (e) provides that besides the territories included in the several parts of the First Schedule, such other territories as may be 'acquired' by India at any time, shall form part of the territory of India, within the meaning of clause (3) of Article 1.

International law prescribes different modes in which territory may be validly acquired by ■ State. These are (i) Cession, (ii) Occupation, (iii) Prescription, (iv) Accretion, (v) Conquest, (vi) Subjugation. So, India will be competent to add to its territory in any of the above modes of acquisition, which may now be explained in some detail.

(i) *Cession.*—A territory may be ceded by one State to another by voluntary arrangement, such as sale, gift or exchange. Sometimes cession may be made

(11) Hall, *International Law*, 1924, p. 125. Acquisition of territory is specifically referred to in cl. (3) (c) of Art. 1 of the Constitution.

(12) *R. v. Keyn*, (1876) ■ Ex. 63.  
Pitt Cobbett, 1947, Vol. I, p. 154.

(13) *Direct United States Cable Co. v. Anglo-American Telegraph Co.*, (1877) ■ App. Cas. 394.

(14) Pitt Cobbett, 1947, Vol. I, p. 158.

(15) *ibid.*, p. 165.

(16) *ibid.*, p. 129.



by an act of a non-sovereign power such as a native ruler<sup>17</sup> or by the general consent or desire of the inhabitants of the ceded territory.<sup>18</sup> These latter cases may properly be called 'annexation.'<sup>17</sup>

(ii) *Occupation*.—Occupation is the appropriation by one State of territory not belonging to any civilized State. In order to acquire valid title by occupation—  
(a) There must be some *formal* act of appropriation on behalf of the occupying State, done under circumstances reasonably sufficient to bring it under the notice of other States; (b) Such act of appropriation must be followed by actual settlement and establishment of an effective exclusive *control* by the occupant over the area in question.<sup>19</sup> The mere discovery, without actual appropriation and settlement will confer no title to such territory. If an occupied territory is abandoned by the occupant, it becomes again open to occupation by other States.<sup>19</sup>

(iii) *Prescription*.—Title to a territory may be acquired by long possession and user, on a principle akin to that of prescriptive acquisition under municipal law. When the exclusive user by one State is acquiesced in by other States, for a long period (say, for 50 years<sup>20</sup>) the occupied territory becomes part of that State which has exercised dominion over the prescriptive period.<sup>21</sup> Acquisition by prescription is, of course, possible only when the territory was in fact lying derelict.

(iv) *Accretion*.—Accretion means the addition of new land to the existing territory of a State by the action of water.

(v) *Conquest*.—Conquest is effective occupation of enemy territory during war, followed by retention of the same after termination of the war, without any treaty. Conquest confers legal title "while the victor maintains the exclusive possession of the conquered territory."<sup>22</sup>

(vi) *Subjugation*.—Subjugation means military conquest followed by annexation.

#### GOVERNMENT OF ACQUIRED TERRITORY.

In the *United States*, territory acquired by purchase or conquest is not, *ipso facto*, placed on the same footing as the States. It has been held that the Constitution is applicable to such territory, only insofar as Congress shall direct<sup>23</sup> under its power over 'territory' [Article IV, S. 3 (2)]. So, a territory, though belonging to the United States, does not become a 'part' of the United States, until it is incorporated by a formal Congressional declaration.<sup>24</sup> As a result, while the 'natural rights' granted in the *Constitution*, such as freedom of religion, of speech, person, property and 'such other immunities as are indispensable to a free government' apply automatically to all territories acquired by the U. S. A.,—the artificial or remedial rights which are peculiar to Anglo-Saxon jurisprudence, such as citizenship, suffrage<sup>23</sup> the right to a preliminary indictment in trial of manslaughter, or the right to jury trial<sup>24</sup> extend to such territories only on specific legislation by Congress.

There is a specific provision in the *Australian Constitution* (section 122) which empowers the Commonwealth Parliament to make laws for the Government of acquired territory, and it has been held that this is a plenary power and that while legislating under this section the Commonwealth Parliament is not subject to the limitations on its powers which are imposed by other provisions of the

(17) *Amodu v. Secretary, Southern Nigeria*, (1921) 2 A. C. 399.

(18) *Sammut v. Strickland*, A.I.R. 1939 P. C. 39.

(19) Pitt Cobbett, 1947 Vol. I, pp. 113-114. American Journal of International Law, (1932), Vol. 26, p. 390.

(20) Treaty of Washington, 1897.

(21) *Direct United States Cable Co. v. Anglo-American Telegraph Co.*, (1877) 1 A.C. 394.

(22) *Fleming & Marshall v. Page*, (1850) 9 Howard 603.

(23) *Downes v. Bidwell*, (1901) 182 U. S. 194.

(24) *Balzac v. People of Porto Rico*, (1922) 258 U. S. 298.



Constitution, *e.g.*, relating to the distribution of legislative powers between the Commonwealth and States, creation of Courts, and the like.<sup>1</sup>

In *our Constitution*, the Union shall be composed only of the States in Parts A, B and C of the First Schedule. Any other territory, including acquired territory, will be treated in the same manner as the territory mentioned in Part D of the First Schedule (Art. 243) and shall be administered by the President, through a Chief Commissioner or other authority appointed by him, and by regulations which shall have the force of an Act of Parliament. Again, the legislative powers of Parliament as regards such territories, shall also include matters enumerated in the State List Art. 246 (4). Such acquired territories, or other territories for the time being included in Part D, shall become a member of the Union only when admitted by Parliament by a law under Articles 2 and 4. It is to be noted, however, citizenship (Art. 5) and fundamental rights, under our Constitution, go with birth or residence within any 'territory' of India, and are not confined to the States in Parts A-C alone. But not being members of the Union, territories other than those in Parts A-C have no seat in the Council of States (Fourth Schedule), and their representation in the House of the People will depend upon legislation by Parliament [Art. 81 (2)].

**2.** Parliament may by law admit into the Union, or establish new States on such terms and conditions as it thinks fit.

Admission or establishment of new States.

#### OTHER CONSTITUTIONS

*U. S. A.*—Article IV, section 3 (1) of the Constitution of the United States says :

"New States may be admitted by the Congress into this Union.".....

The Constitution provides no definite procedure<sup>2</sup> to be followed by Congress for admission of any new State to the Union, nor any conditions for their eligibility. So, Congress has full discretion to admit or refuse a new State and it can impose any *condition* for such membership, *e.g.*, abolition of polygamous marriage.<sup>3</sup> It has been held, however, that once a State is admitted into the Union, the State is free to override the condition,<sup>4</sup> unless the condition has created a *property right* in favour of the citizens,<sup>5</sup> or the term relates to *federal property* which the State has contracted to manage under the direction of Congress.<sup>6</sup> The reason is that any State, newly admitted or otherwise, is not bound by any limitation outside the federal Constitution, which places it upon a footing of inequality with the other States.<sup>7</sup> The American Union is ■ 'Union of equal States.'<sup>4</sup> Whatever be the size of the new State, it shall have equality of representation in the Senate (two members), by virtue of Article 1, section 3 (1).

*Australia.*—Section 121 of the Australian Constitution Act provides—

"The parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, ■ it thinks fit."

So, the Commonwealth Parliament has plenary powers in this respect and there is no condition ■ regards equality of the new State as in the American Constitution. The admitted State would be bound by whatever condition may be imposed by Parliament, including the extent of its representation in Parliament.

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*Source of Article 2.*—This article follows section 121 of the Commonwealth of Australia Constitution Act ; and Article 4, section 3 (1) of the Constitution of the U. S. A. (see above), with differences to be noted below..

(1) *Buchanan v. Commonwealth*, (1913) 16 C.L.R. 315; Wynes, Legislative & Executive Powers, p. 116.

(2) As to the procedure usually followed, Cf. *West*, American Government, 1946, p. 290.

(3) *Munro*, Government of the United States,

1944, p. 547.

(4) *Coyle v. Smith*, (1911) 221 U. S. 559.

(5) *Stearns v. Minnesota*, (1900) 179 U.S. 223.

(6) *Ervin v. U.S.*, (1919) 251 U. S. 41.

(7) *Bollin v. Nebraska*, (1900) 176 U. S. 83.

## ADMISSION OR ESTABLISHMENT OF A NEW STATE.

The word 'admit' refers to the admission of a duly organised political community which might be called ■ 'State' from before<sup>8</sup> such admission; while 'establish' refers to the *creation* of a State, where none existed before. Some of the modes in which a new State may be created are mentioned in Article 3 (a), *post*.<sup>\*</sup>

'Upon such terms and conditions as it thinks fit.'—These words mean that full discretion as to whether ■ State should be admitted into the Union, and if so, the time and manner of such admission,<sup>9</sup> rests fully with Parliament and that it can impose any conditions, as requisite for admission.

It is to be noted that there being under the Indian Constitution no theory of equality of States, the terms imposed by Parliament under the present article would be binding upon the new State even after the admission, even though they may be 'discriminatory' or unequal.

## STATUS OF THE ADMITTED STATE

But, subject to the terms and conditions imposed under the present article, the status of the admitted State will not, in any way, be inferior to the other States under the Constitution. In *Australia*, it has been maintained that on admission, the new State shall have all the 'State rights' ■ are implied by section 6 of that Constitution Act<sup>10</sup> and that the admitted State shall not be liable to any particular construction of the Constitution.<sup>11</sup>

Under *our* Constitution, similarly, since the admission will be effected by an amendment of the First Schedule to the Constitution [Article 4 (1)], it follows that the provisions of the Constitution applicable to States of that Part of the First Schedule in which the new State is included, will be applicable equally to the new State and it will be governed in the same way. Its representation in the Council of States, however, shall be as provided in the law of Parliament, referred to in Article 4, *post*, by proper amendment of the Fourth Schedule, and such representation would obviously be unequal.

Formation of new States  
and alteration of areas,  
boundaries or names of  
existing States.

**3. Parliament may by law—**

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State ;

(b) increase the area of any State ;

(c) diminish the area of any State ;

(d) alter the boundaries of any State ;

(e) alter the name of any State :

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the boundaries of any State or States specified in Part A or Part B of the First Schedule or the name or names of any such State or States, the views of the Legislature of the State or, as the case may be, of

(8) Wynes, Legislative & Executive Powers,

P. 114.

P. 113.

(9) Von Holst, Constitutional Law, p. 187.

(11) Kerr, Law of the Australian Constitution,

P. 57.

(10) Wynes, Legislative & Executive Powers,

each of the States both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President.

#### OTHER CONSTITUTIONS

*U. S. A.*—Article IV, section 3 (1) of the American Constitution says :—

“But no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”

This is one of the provisions by which the integrity of the States in the federal system is maintained. It means that it will not be open to one of the parties (*viz.*, the national Government) to the Union, to redraw the map of the United States. It prevents the merger or partition of States without their consent.<sup>12</sup> The plenary powers of Congress to admit new States into the Union is subject to this limitation.

*Australia.*—Sections 123-4 of the Australian Constitution Act are as follows :

“The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.” (Section 123).

“A new State may be formed by separation of territory from a State but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.” (Section 124).

The Commonwealth Parliament has, thus, the power—(a) to create new States from an old State or from parts of old States, with the consent of the Legislatures of the States affected ; and (b) to alter the boundaries of a State, with the consent of the Legislature of that State and the approval of the *electors* of such State.

*Government of India Act, 1935.*—Section 290 (1) of the Act provided:

“Subject to the provisions of this section, the Governor-General may by Order—

- (a) create a new Province ;
- (b) increase the area of any Province ;
- (c) diminish the area of any Province ;
- (d) alter the boundaries of any Province ;

Provided that before making any such Order the Governor-General shall ascertain the views of the Government of any Province which will be affected by the Order, both with respect to the proposal to make the Order and with respect to the provisions to be inserted therein.”

#### INDIA

*Source of Art. 3.*—This Article takes some of the provisions of the American and Australian Constitutions together with the proviso to section 290 (1) of the Government of India Act, 1935, with differences as are noted below.

*Scope of the Article.*—The States existing at the commencement of the Constitution ■ from the Union [Art. 1 (1)] are specified in the First Schedule. The present article provides the procedure for the formation of new States as well as alteration of the boundaries, names, etc., of the States forming part of the Union at any point of time.

This can be done only by legislation by the Union Parliament (as in the United States and Australia) but legislation in this respect is *subject* to the condition that no Bill for this purpose shall be introduced except ■ the recommendation of the President.

(12) Of course, in the case of formation of West Virginia, the constitutional provision was followed only in letter (*vide* West, Am ■ Government, 1946, p. 291).



There is a further condition in the case of Bills coming within clauses (d) and (e) i.e., altering the boundaries and names, of any State or States in Parts A and II of Schedule I,—viz. that in these cases, the President shall ascertain the views of the Legislature of *each* of the States concerned, before he makes his recommendation. 'Each' of the States makes it clear that the views of the affected State as well as of the gainer State must be ascertained in case of alteration of boundaries.<sup>13</sup> The views of the State Legislatures are to be ascertained on two points —(a) as regards the proposal to introduce the Bill ; (b) as regards the provisions of the Bill.

*Recommendation of the President.*—Art. 255 debars the Court from enquiring into the validity of a law on the ground that the Bill was introduced without such recommendation.

#### CL. (a) : FORMATION OF NEW STATES.

The enumeration of some specific methods of 'formation' of a new State in this clause does not exhaust the possible methods<sup>14</sup> in which Parliament is empowered to 'establish' a new State, by Art. 2. Thus Parliament may establish a new State over an area which did not appertain to any State before such act of Parliament.

The specific modes enumerated by the present clause are : (i) separation of territory from an existing State ; (ii) union of two or more States or parts of States ; (iii) uniting a 'territory' to a part of any state.

#### *Proviso : 'Ascertaining' the views of the Legislature.*

It is to be noted that the President is not required to obtain the 'consent' of the State's Legislature,<sup>15</sup> but has simply to 'ascertain' its views (these words are taken from the Proviso to section 290 (1) of the Government of India Act, 1935). This means that the President is not necessarily bound to act according to the wishes of the majority in any of the Legislatures concerned. As the President shall act according to the advice of his Ministers, it will ultimately rest on the Council of Ministers for the Union, whether the Bill should be introduced in opposition to the views of the majority in the affected State or not. It is also to be noted that there is no provision for a referendum as in the Australian Constitution. On the other hand, the provisions of our Constitution are less stringent than those of the American Constitution where no alteration of boundaries of existing States can be made against their consent. But under our Constitution, though the President is under an obligation to ascertain their views, he has the discretion to override such views, or, at least, is not bound to act in conformity with the views of the State Legislatures. There is thus a greater balance of power in the hands of the Union (in this matter) under our Constitution than under the American.

It is also to be noted that the 'procedure' is the same for all the States included in the First Schedule and no distinction is made as between the States in Parts A and B as regards the present matter.

4. (1) Any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions

Laws made under Articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.

(13) Views of the 'affected' State only had to be ascertained, under the Proviso to section 290 (1) of the Act of 1935.

(14) Wynes, Legislative & Executive Powers, p. 113.

(15) This was recommended by the Union Constitution Committee (vide Constituent Assembly Debates, Vol. IV, No. 6, App. A, Part I, cl. 7).



(including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) ■ Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this constitution for the purposes of Article 368.

*Scope of Art. 4.*—This article gives the Union Parliament the power to admit new States or alter boundaries, etc., and to make all consequential changes in the Constitution, including provisions as to representation of such States in Parliament, and in the State Legislatures, without going through the special provisions for amendment provided in Article 368. In other words, an ordinary majority of Parliament, in the usual course of legislation (subject to the Proviso of Article 3) will suffice for the passing of ■ Bill brought under Articles 2-3. Thus, by an amendment of the First Schedule the new State may be included in any of the Parts thereof, incorporating the State into the Union. On the other hand, the representation of the State will be fixed by amendment of the Fourth Schedule.

Cl. (2) expressly lays down that an Act of Parliament coming within the scope of the present article will not be deemed to be 'an amendment of the Constitution'. Here is, therefore, one of the instances of the flexibility of our Constitution.

## PART II

### CITIZENSHIP

Citizenship at the commencement of the Constitution.

5. At the commencement of this Constitution, every person who has his domicile in the territory of India and—

- (a) who was born in the territory of India ; or
- (b) either of whose parents was born in the territory of India; or
- (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

6. Notwithstanding anything in Article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if—

Rights of citizenship of certain persons who have migrated to India from Pakistan.

- (a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted) ; and

- (b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

- (ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as ■ citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on ■ application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government :

Provided that no person shall be so registered unless he has

been resident in the territory of India for at least six months immediately preceding the date of his application.

**7.** Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India :

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

**8.** Notwithstanding anything in Article 5, any person who or either of whose parents or any of whose grandparents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

*Scope of Articles 5-8.*—These articles do not prescribe, permanently, the Indian law of citizenship. They only give tentative provisions for acquisition of Indian citizenship at the commencement of the Constitution, for convenience at the initial elections and for the exercise of civic rights till Parliament can legislate on the subject (Article 11). The power of Parliament to legislate as regards citizenship will be plenary notwithstanding the present constitutional provisions in Articles 5 to 8. Hence, any person who is a citizen of India at the commencement of the Constitution according to any of the provisions of Articles 5-8, may lose his citizenship by reason of subsequent Parliamentary legislation. But so long as Parliament does not enter into the field or does not modify the provisions of the present articles, one who is a citizen at the commencement of the Constitution shall continue to be a citizen of India.

*Analogous Provisions.*—As to the meaning of 'citizenship,' 'domicile,' 'aliens,' etc., see under Entry 17, List I, of 7th Schedule, *post*.

'Citizen of India'—It has been pointed out at the outset (p. 30 *ante*), that while in the *United States*, there is a dual citizenship (*viz.*, federal and State) with separate 'privileges and immunities,'<sup>16</sup> and the citizen is sometimes under a conflict of allegiance,—in *India* there shall be a single citizenship, notwithstanding the adoption of a federal polity.<sup>17</sup> This is one of the elements that go to give the Indian Union the strength of a unitary State. Together with this we should notice the freedoms

(16) Burdick, *Law of the American Constitution*, p. 329; Cooley, *Constitutional Law*, p. 322.

(17) The *Burmese Constitution*, 1918 (c. 10) also provides a single citizenship, though the form of polity is a federal 'Union' (s. 1).

guaranteed by clauses (d) and (e) of Article 19 which seek to remove artificial State barriers and article 301 which guarantees freedom of trade, commerce, and intercourse ' throughout the territory of India.'

*Commonwealth Citizenship.*—A citizen of India would retain citizenship of the Commonwealth, notwithstanding India being a Republic, by virtue of the India (Consequential Provision) Act,<sup>18</sup> 1949, read with the British Nationality Act, 1948.

• PERSONS WHO WOULD BE CITIZENS OF INDIA AT THE COMMENCEMENT OF THE CONSTITUTION.

The following persons will be citizens of India at the date of commencement of the Constitution, under Articles 5-8 :

I. A person born as well as domiciled in the *territory of India* (see under article 1 (3), *ante*)—irrespective of the nationality of his parents [Article 5 (a)].

II. A person domiciled in the territory of India, either of whose parents was born in the territory of India,—irrespective of the nationality of his parents or the place of birth of such person [Article 5 (b)].

III. A person who or whose father was not born in India, but who (a) has his domicile in the territory of India, and (b) has been ordinarily residing within the territory of India for not less than 5 years immediately preceding the commencement of the Constitution. In this case also, the nationality of the person's parents is immaterial. (Thus, a subject of a Portuguese or French Settlement, residing in India for 5 years preceding the commencement of the Constitution, with the intention of permanently residing in India, would become a citizen of India at the commencement of the Constitution). [Article 5 (c)].

IV. A person who has migrated from Pakistan, provided—

(i) he or either of his parents or grandparents was born in ' India as defined in the Government of India Act, 1935 (as originally enacted) ' ; and—

(ii) (a) if he has migrated before July, 19, 1948<sup>19</sup>, he has ordinarily resided within the " territory of India " [see Article 1 (3)], *ante*, since the date of such migration (in this case *no registration* of the immigrant is necessary for citizenship) ; or

(b) if he has migrated on or after July 19, 1948, he further makes an application before the commencement of this Constitution for registering himself as ■ citizen of India to an officer appointed by the Government of India, and is registered by that officer, being satisfied that the applicant has resided in the territory of India for at least 6 months before such application.

V. A person who migrated from India to Pakistan after 1st March, 1947<sup>20</sup>, but has subsequently *returned* to India under a permit issued under the authority of the Government of India for re-settlement or permanent return, or under the authority of any law, provided he gets himself registered in the same manner as under Article 6 (b) (ii). [Article 7].

VI. A person who, or any of whose parents or grandparents was born in ' India ' as defined in the Government of India Act, 1935 (as originally enacted) but who is ordinarily residing in any country outside India provided he gets himself registered as ■ citizen of India (whether *before or after* the commencement of this Constitution), on application in the prescribed form, to the consular or diplomatic representative of India in the country of his residence (Article 8). So, under this Article, ■ person born of Indian parents but residing in Malaya or S. Africa, may acquire Indian citizenship under the Constitution by mere registration at the Indian consulate in that country.

(18) *Vide* reprint in Gazette of India, Extraordinary, dated 16-1-50 ; 54 C.W.N. xiv.

(19) July 19, 1948, is the date when the permit system for migration from India to Pakistan

and *vice versa* was introduced.

(20) 1st March, 1947, ■ the date when disturbances started and migration of Muslims from India began.



It is to be noted that in article 8 the expression used is 'country outside India' and not foreign State, which comes under Article 9. Article 8 thus refers to those countries which are not 'foreign State' according to the order of the President under Article 367 (3).

'India' as defined in the Government of India Act, as originally enacted.—This definition was contained in section 311 (1) of the Government of India Act, 1935, as follows :

"India" means British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may, from time to time, after ascertaining the views of the Federal Government and the Federal Legislature, declare to be part of India ;

Again, 'British India' was defined in the same clause as—

"British India" means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces ;

So, 'India' comprised the Governors' Provinces—Madras, Bombay, U. P., Bihar, C. P. & Berar, Assam, N. W. F. P., Orissa, Sind and the Punjab and Bengal as they stood before the Partition; the Chief Commissioners' Provinces of Br. Baluchistan, Delhi, Ajmer-Merwara, Coorg, Andaman, and Nicobar Islands and Panth Pilploda ; the Indian States and tribal areas.

9. No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State.

Persons voluntarily acquiring citizenship of foreign State not to be citizens.

*Disqualification for Citizenship : Acquisition of Citizenship of Foreign State.*

Notwithstanding his having the qualifications required by any of the Articles 5, 6, and 8, a person shall not be a citizen of India, if he has voluntarily acquired the citizenship of any foreign State.

'Voluntary' acquisition means acquisition by naturalisation or direct grant by the foreign State ; entering into the public service of the foreign State ; acquiring domicile of choice in the foreign State ; becoming an adopted child or wife of an alien ; and the like. The act, however, must be sufficient for acquiring the citizenship of the foreign state in question, according to the law of that State. Again, such acquisition must have taken place prior to the commencement of this Constitution. The present article does not deal with the loss of the Indian citizenship by acquisition of citizenship of a foreign State at any subsequent point of time. That matter will be dealt with under Parliamentary legislation under article 11.

'Foreign State'.—This is defined in article 367 (3). It means any State other than India, save those that are declared not to be 'foreign State', by order of the President.

10. Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

Continuance of the rights of citizenship.

11. Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

Parliament to regulate the right of citizenship by law.



## OTHER CONSTITUTIONS

*Eire.*—Article 9 (1) of the Constitution of Eire, 1937, provides—

1. On the coming into operation of this constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this constitution shall become and be a citizen of Ireland.<sup>(21)</sup>

2. The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law."

*Burma.*—S. 11 of the Burmese Constitution, 1948, similarly declares certain persons to be citizens at the commencement of the constitution, and then section 12 provides—

"Nothing contained in section 11 shall derogate from the power of the Parliament to make such laws as it thinks fit in respect of citizenship and alienage and any such law may provide for the admission of new classes of citizens or for the termination of the citizenship of any existing classes."

## INDIA

*Scope of Articles 10-11.*—Parliament is given plenary powers to legislate with respect to 'citizenship' [Entry 17, List I]. This includes the power to restrict or revoke the citizenship of persons who have become citizens of India at the commencement of the Constitution, under Articles 5-8. That entry gives the Parliament the power not only to legislate with respect to all matters relating to citizenship, but also with respect to 'naturalisation and aliens.'

## PART III

## FUNDAMENTAL RIGHTS.

*General*

*Scheme of Part III.*—This part of the Constitution relating to Fundamental Rights is more elaborate than the Bill of Rights contained in any other existing Constitution of importance and covers a wide range of topics. The width of the subject has been primarily due to the special problems of religion, culture and social conditions of such a huge population of heterogeneous elements!

Some of the provisions of this Part are in the nature of 'constitutional limitations,' i.e., prohibitions upon the authority of the State, e.g., prohibition of discrimination or of denial of equal protection; abolition of titles. From the standpoint of the individual, these may be termed 'negative rights', while the rest of the Part contains the 'positive rights' of the individuals, such as freedom of speech etc., protection of life and personal liberty. There is, however, no clear-cut division between the two groups of provisions and many of the rights may fall under either group. There is, however, an important distinction between the two classes of provisions. The provisions which are strictly in the nature of constitutional limitations are binding upon the State without any exception and any act of the State (legislative or executive) which contravenes any of these provisions would be altogether void, to the extent of such contravention [Article 13 (2).] On the other hand, the provisions in the nature of individual rights are subject to regulation by the State itself within certain prescribed limits, and if such restrictions made by the State are *intra vires* these exceptional provisions [e.g., Art. 19 (2)-(6)], they cannot be held to be void on account of being in contravention of the Constitutional guarantee of the rights in question. The guarantees, in short, are subject to certain slices cut away for regulation by the State.

*Extent of application of the Fundamental Rights.*—It is to be noted that while some of the provisions relating to Fundamental Rights are limited to citizens, such

(21) See in this connection, the provisions of section 40 (6) of the Constitution of Eire, 1937; Articles 114-118 of the Constitution of the German Reich, 1919.

Articles 15, 16, 19, 29, 30, the rest of the provisions of this Part are applicable to citizens and aliens alike, to all *persons* residing within the territory of India for the time being, and subject to its jurisdiction, *e.g.*, the protection of life and personal liberty<sup>22</sup> (article 21).

*No unenumerated or 'natural' rights under our Constitution.*—One important feature of our Bill of Rights is that there is no provision in it corresponding to the 9th Amendment to the Constitution of the *United States* to the effect . . . .

“The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people”.

Hence, under *our* Constitution an individual cannot claim any fundamental right against the State outside Part III, and thus the Indian Courts shall have no right to assume the role of a super-legislature under the guise of any theory of natural rights as in the *United States*.<sup>23</sup>

### NATURE OF FUNDAMENTAL RIGHTS : GENERAL.

#### *Other Constitutions*

*England.*—The Constitution of England is *unwritten*. Hence, there is in England no code of Fundamental rights as exist in the Constitution of the *United States* or in other written Constitutions of the world. This does not mean, however, that in England there is no recognition of those fundamental rights of the individual without which democracy becomes meaningless. The object, in fact, is secured here in a different way.

The foundation of individual rights in England, in short, is negative in the sense that an individual has the right and freedom to take whatever action he likes, so long as he does not violate any rule of the ordinary law of the land, which comprises both common law and statute law. Individual liberty is secured by judicial decisions determining the rights of individuals in particular cases brought before the Courts, which protect the rights by issuing appropriate ‘writs’ or ‘remedies.’

The Judiciary is the guardian of individual rights in England as elsewhere ; but there is a fundamental difference. While in England, the Courts have the fullest power to protect the individual against Executive tyranny, the Courts are powerless as against legislative aggression upon individual rights. In short, there are no fundamental rights binding upon the Legislature in England.

(a) As against the *Executive*,—the Courts are the bulwark of individual liberty to-day,<sup>24</sup> just as it was in the days of absolute monarchy, though the need of restrictions on individual liberty is pressing under modern conditions even in a democratic country. As was observed by the Privy Council,—

“No member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice”.

(b) The English *Legislature* on the other hand, being theoretically ‘omnipotent,’ there is no law which it cannot change. As has been already said, the individual has rights, but they are founded on the ordinary law of the land ; hence they can be changed by Parliament like other laws. So, there is no right which may be said to be ‘fundamental’ in the strict sense of the term. Of course, there are proclamations of certain individual rights in some constitutional charters

(22) The position in this respect is the same in the U.S.A., (*Maxwell v. Dow*, (1909) 176 U.S. 581).

(23) Cf. Opinion of Chase, J., in *Calder v. Bull*, 3 Dall. 386 ; Story on The Constitution, 5th Ed., section 1905.

(24) See Wade and Phillips, Constitutional Law, p. 55.

(25) *Eshugbayi v. Govt. of Nigeria*, (1931) 35 C.W.N. 755 (P. C.)

(1) See Wade and Phillips, Constitutional Law, p. 35 ; Chalmers and Hood Phillips, Constitutional Law, p. 413 ; Keith, Constitutional Law, pp. 16-18 ; Dicey, Law of the Constitution, 9th Ed., Ch. V.

and documents like the Magna Carta and Bill of Rights, but these Charters were merely declaratory of the existing Common law, and were made to be binding upon the Executive and not upon Parliament.

Owing to the absence of any fetter upon the Legislature, individual rights may, in England, smoothly give way to the interests of the nation whenever the representatives of the people so desire, according to the exigencies of the situation. At any given time, thus, the rights of the citizen in England are merely the *residue* of freedom left after restrictions placed on the activity of the citizens by the Legislature are defined.<sup>2</sup>

Another vital consequence of the supremacy of Parliament is that the English Court has no power of judicial review of legislation<sup>3</sup> at all. It cannot declare any law as unconstitutional on the ground of contravention of any supposed fundamental or natural right. As early as 1870,<sup>4</sup> the English Courts made this self-imposed restriction upon its powers as against the Legislature—"Acts of Parliament are laws of the land, and we do not sit as a Court of Appeal from Parliament . . . . If ■ Act of Parliament has been obtained improperly, it is for the Legislature to correct it by repealing it ; but so long as it exists as law, the Courts are bound to enforce it."<sup>4</sup>

*U. S. A.*—The fundamental difference in approach to the question of individual rights, between England and the United States is that while the English were anxious to protect individual rights from the excesses of the Executive and discovered in Parliamentary sovereignty the panacea for executive tyranny, the framers of the American Constitution were apprehensive of tyranny not only from the Executive but also from the Legislature,—i.e., a body of men who for the time being form the majority in the Legislature. Thus,

"It is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent Acts which might grow out of the feelings of the moment, and that the people of the United States in adopting that instrument, have manifested ■ determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."<sup>5</sup>

So, the American Bill of Rights (contained in the first Ten Amendments of the Constitution of the U. S. A.) are equally binding upon the Legislature as upon the Executive. The result has been the establishment in the United States of ■ 'judicial' supremacy, as opposed to the 'Parliamentary' supremacy in England.<sup>6</sup> The Courts in the United States are competent to declare an Act of Congress as unconstitutional on the ground of contravention of any provision of the Bill of Rights and the Legislature is incompetent to modify or adjust any of the rights in view of any emergency or danger to the State. That power has been assumed by the Judiciary in the United States.

In most cases, the Court has responded to the situation wonderfully. Thus, (a) The same Court which in 1937, had declared the interception of telephonic messages by Government agents to collect information as unconstitutional<sup>7</sup> by reason of contravention of the Fourth Amendment, upheld it as valid<sup>8</sup> in 1942, under the pressure of a totalitarian war,—reversing its earlier decision. (b) The same Court which had during war (1917), upheld the drastic Espionage Act<sup>9</sup>,—refused in time of peace (1930), to prohibit by injunction ■ regular vilification of public officers by ■ newspaper.<sup>10</sup>

But there is no doctrine of 'security of the State' in the United States, and the Legislature is powerless to override any individual right on the ground of safety

(2) Chalmers and Hood Phillips, *Constitutional Law*, p. 414.

(3) See my Article ■ 'The Indian Constitution through American eyes' in (1949) F.L.J. 163 (Jour).

(4) *Lee v. Bude Co.*, (1870) L.R. 6 C. P. 577, 582.

(5) *Fletcher v. Peck*, (1810) 6. Cr. 87.

(6) On this subject, there is an elaborate treatment in my article on 'The Indian Constitution through American eyes' in (1949) F.L.J. pp. 158-170 (Jour).

(7) *Nardone v. U.S.*, (1937) 302 U.S. 379.

(8) *Goldman v. U.S.*, (1941) 316 U.S. 129.

(9) *Schenck v. U.S.*, (1918) 249 U.S. 47.

(10) *Near v. Minnesota*, (1930) 283 U.S. 697



of the State. It is the Court, in its cold Chamber, to say whether there is a 'clear and present danger'<sup>11</sup> to the existence of the social order, so as to justify ■ curtailment of the individual. The Judiciary, which is proverbially conservative, is thus competent to override the wishes of the people's representatives, as the guardian of the 'fundamental' rights. The Court, of course, acknowledges that the Legislature has a power to regulate the exercise of the individual rights in the collective interests under the doctrine of 'Police powers'; but the 'determination by the Legislature of what constitutes proper exercise of Police powers is not final or conclusive, but is subject to supervision by the Courts'.<sup>12</sup>

The Fundamental Rights cannot be amended by the Legislature in the ordinary course of legislation, but only through the special process of amendment of the Constitution requiring concurrence of the State Legislatures [Article 5].

*Eire.*—The Constitution of Eire, 1937, cuts a *via media* between Parliamentary and Judicial Supremacy as regards Fundamental Rights. In section 15 (4), it makes the declaration that any law enacted by Oireachtas (Legislature) which is repugnant to any provision of the Constitution shall, to the extent of such repugnancy be void. But while the limitation upon the Legislature is absolute as regards some of the fundamental rights (*e.g.*, equality before the law, section 40 (1); abolition of titles, section 40 (2), the guarantees of liberties contained in section 40 (6) (*i. e.*, freedom of expression, of assembly, of association) are all subject to regulation and control by the Legislature, of course, within certain limits and for particular purposes. The Courts are not competent to interfere with such regulations under any doctrine of 'judicial review' as in the United States,—substituting its own notions about the need of such regulation. Apart from such regulation, however, the Legislature has no power to modify or abolish the declaration of fundamental rights in the Constitution. That can be done only by a constitutional amendment, requiring a referendum to the people (section 46).

### INDIA

The Indian Constitution seeks to make a balance between a written guarantee of fundamental rights and the collective interests of the community. It divides the provisions in Part III into different categories.

It has been already stated that so far as the provisions in the nature of constitutional limitations are concerned (*e.g.*, Articles 14, 15, 17, 18, 20, 24) they are binding upon both the executive and legislative authorities of the State and the Courts shall be competent to declare ■ law as void on the ground of contravention of these rights, as in the United States.

On the other hand, the right of life and personal liberty (Article 21) is practically left to the Legislature (in the manner provided in Article 114 of the Constitution of the German Reich), subject only to the limits imposed by Article 22. These rights will be available against the Executive but only within the limits allowed by law. So also the right to property [Article 31].

The individual rights guaranteed by Article 19, on the other hand, are in general binding upon both the Executive and the Legislature. But both the Executive and Legislative authorities are permitted by the Constitution to make valid exceptions to the rights within limits imposed by the Constitution. Such grounds, in brief, are security of the State, public order, public morality and the like. This exception may be said to be the adoption of the 'Police powers' in the body of the Constitution, but the powers are given not only to the Legislature but also to the Executive.

But even within the field left by the Constitution to the Judiciary to review legislation repugnant to the Fundamental rights, the Indian Judiciary will not

(11) *Bridges v. California*, (1941) 314 U.S. 252 (263).

(12) *Meyer v. Nebraska*, (1923) 262 U.S. 390 (400).



get that supremacy against the Legislature which obtains in the United States, for, the Legislature of the Union (*see* Article 368) is empowered to amend Part III of the Constitution by a special majority. No ratification of the State Legislatures is required for this purpose<sup>13</sup>. So, it will be possible for the Legislature to override unwholesome decisions without much difficulty. As regards fundamental rights, thus, the Indian Constitution attempts a compromise between the doctrines of Parliamentary supremacy and Judicial supremacy.

**12.** In this Part, unless the context otherwise requires, "the State," includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Definition.

#### OTHER CONSTITUTIONS

*Burma.*—S. 9 of the Burmese Constitution, 1948, says—

"In this Chapter and in Chapters III and IV, the term "State" means the executive or legislative authority of the Union or of the unit concerned according as the context may require."

#### INDIA

*The 'State' in Part III.*—The present article interprets the word 'State' as used in the different articles of Part III. Unless the context otherwise requires, the word shall refer to all 'authority',—including not only the Executive and Legislative organs of the Union and the Units, but also local bodies having 'authority', such as Village Panchayats, District Boards, Local Boards and the like. The context may, of course, restrict the meaning of the term. Thus, in article 31 (3), the Legislature of ■ State refers to the Legislature of a State in Part A, B, or C.

*'Authority'.*—Authority means the power to *make* laws, orders, regulations and bye-laws, etc., having the force of laws [Article 13 (3)], and also the power to *enforce* laws. That is why, the definition comprises both the legislative and executive organs, whether of the union, States or local authorities. The object of including all 'authorities' within the term 'State' in this Part is, of course, to enlarge the scope of the fundamental rights which shall thus be binding upon every authority in India which has the power to make laws, bye-laws, etc. But the widening of the scope of the word 'State' also widens the number of authorities who are entitled to impose limitations upon the fundamental rights, *e.g.*, those contained in Article 19.

*'Local authorities within the territory of India'.*—Local authorities are under the exclusive control of the States, by virtue of entry 5 of List II of the 7th Schedule. That entry contains a list of local authorities. See also definition of 'local authority' in section 3 (28) of the General Clauses Act X of 1897.

*'Other authorities'* refer to authorities other than those of local self-Government, who have powers to make rules, regulations, etc., having the force of ■ law, *e.g.*, ■ Bar Council constituted under the Indian Bar Councils Act (XXXVIII) of 1926 [*cf.* ss. 7, 9, 15].

*'Authorities under the control of the Government of India'.*—These words extend the application of the fundamental rights to areas outside the territory of India, which may be under the control of the Government of India for the time being, *e.g.*, mandatory and trustee territories which might be placed by international organisations under the control of the Government of India. This article explains that India would not discriminate, so far as the fundamental rights of man are concerned, between its own nationals and the people of other countries, which might come under the administration of India under some international arrangement, agreement or the like<sup>14</sup>.

(13) See my article on the Indian Constitution in (1949) F.L.J. 156 (Jour.).

(14) Dr. Ambedkar, Constitution Assembly Debates, Vol. VII, p. 607.

**13.** (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law ;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

#### OTHER CONSTITUTIONS

*Japan.*—Art. XCVIII of the Japanese Constitution says—

“This Constitution shall be the supreme law of the State, and no public law or ordinance and no Imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.”

#### INDIA

*Scope of article 13.*—Clause (1) read with clause (3) says that all laws, including customs and usages having the force of law, existing in India at the commencement of the Constitution which are inconsistent with the provisions relating to Fundamental Rights contained in Part III, would be to the extent of such inconsistency, void. [As to the meaning of ‘inconsistency’, see under Part XI, *post.*] Clause (2) on the other hand, provides that not only existing laws, but any future law enacted by any authority in India, which takes away or abridges any of the rights and provisions of Part III relating to Fundamental Rights, shall be void to the extent of repugnancy. In other words, Courts shall be entitled to declare such repugnant laws as void, of course, to the extent of repugnancy.

CLAUSES (2)-(3). ‘To the extent of the inconsistency or contravention’.—Only the repugnant provisions of the law in question shall be treated by the Courts as void, and not the whole statute or the like,—subject of course to the doctrine of severability. (On this point, see under Part XI, Chapter I, *post.*)

CLAUSE (3) : ‘Unless the context otherwise requires’.—These words make it clear that ‘laws’ in clause (1) include customs and usages, while customs and usages cannot possibly be included in laws made by Legislatures, within the meaning of clause (2).

SUB-CLAUSE (a) : ‘Having the force of law’.—The definition in this clause says that any rule of conduct having the force of law is a ‘law’. But it does not say what constitutes the ‘force of law’. For that we have to refer to the treatises on jurisprudence. The standard definition of ‘law’ is by *Holland*, who, improving on the definition of *Austin*, says—

“Law is a general rule of external human conduct enforced by a sovereign political authority”.<sup>1</sup>

But enforcement by a sovereign political authority in a modern State means enforcement by the Courts of Justice. Hence, *Salmond* puts it thus :

(15) *Holland, Jurisprudence*, 10th Ed., p. 40.

“Law is the body of principles recognised and applied by the State in the administration of justice.”

Hence, the answer to the question whether any rule of conduct has the force of law is to be found in the fact whether it is enforced by the Courts of law.<sup>16</sup>

*Bye-law.*—Bye-laws are rules made by some authority, subordinate to the Legislature (*e.g.*, municipal and other local bodies, the public utility corporations, empowered to make bye-laws), for the regulation, administration or management of some district, property, undertaking, etc., and binding on all persons who come within their scope. If, however, the subordinate authority exceeds the powers conferred upon it by the statute which empowered it to make bye-laws, such bye-laws are invalid as *ultra vires*. Hence, a ‘bye-law having the force of law’ obviously refers to *intra vires* bye-laws.<sup>17</sup>

In order to be valid and enforceable as law, a bye-law must, therefore, satisfy the following conditions<sup>18</sup>:

(i) It must be made, sanctioned and published in the manner prescribed by the statute which authorises the making. This condition only makes the bye-law formally good; it does not follow that a bye-law which is formally valid is *intra vires* the statute which authorises it.

(ii) A bye-law which is repugnant to the general laws of the land are void.<sup>19</sup> But it is not bad merely because it deals with something that is not dealt with by the general law, for, by nature, a bye-law is supplementary to the general law. What the rule means is that the bye-law—

“Must not alter the general law by making that lawful which the general law makes unlawful, or that unlawful which the general law makes lawful.”<sup>20</sup>

But if it is capable of two constructions, we must adopt that construction which would make it consonant with the principles of the common law.<sup>21</sup>

(iii) It must not go beyond, nor be repugnant to, the statute under which it has been made.

(iv) A bye-law is liable to be declared void if it is not certain and positive in its terms.<sup>22</sup>

(v) A bye-law must not be unreasonable. But unreasonableness does not mean that any particular Judge or Judges think it to be unnecessary or inconvenient; but means that the bye-law must not be partial and unequal in its operation between different classes; must not be manifestly unjust; nor involve such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.<sup>23</sup> Otherwise, bye-laws made by public representative bodies should be ‘benevolently interpreted’ and ‘credit ought to be given to those who have to administer them that they will be reasonably administered’<sup>24</sup>.

“Rule, Regulation, Order”.—These are all instances of subordinate law-making by the Executive, under statutory authority.<sup>25</sup> While a rule is general in scope, an order is specific in its application and its function relates more particularly to the execution or enforcement of some rule previously made.

Rules made under an Act. . . . . to be of the same effect as if contained in the Act and to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise, exactly as if they were in the Act. If there is a conflict between one of these rules and a section of the Act, it must be dealt with in the same spirit as a conflict between two sections of the Act should be dealt with. If reconciliation is impossible the subordinate provision must give way, and probably the rule would be treated as subordinate to the section.<sup>26</sup> Similarly *intra vires* regulations are to be regarded as though embodied in the Act itself.<sup>27</sup>

(16) Cf. Wade & Phillips, Constitutional Law, p. 3.

(17) Cf. *Kruse v. Johnson*, (1898) 2 Q.B. 91.

(18) Craies Statute Law, 4th Ed. (159).

(19) *Hall v. Nixon*, (1875) 10 Q.B. 152.

(20) *White v. Morley*, (1899) 1 Q.B. 34.

(21) *Scott v. Pilliner*, (1904) 2 K.B. 855.

(22) *Collman v. Mills*, (1897) 1 Q.B. 396 (399).

(23) *Kruse v. Johnson*, (1898) 2 Q.B. 91.

(24) *Vide* Osborne, Construction of Deeds and Statute, 1946, pp. 280-286.

(25) *Institute of Patent Agents v Lockwood*, (1894) A.C. at p. 360.

(26) *Wicks v. D.P.P.*, (1947) 1 All.E.R. 205 (H. L.).



[For definition of 'rule' and 'regulation', see section 2, clauses (46) and (47) of the General Clauses Act X of 1897].

*Sub-clause (b) : 'Laws in force'.—*These also include ordinance, order, bye-law, rule, regulation or notification, having the force of law (but not custom or usage). Cf. definition of 'existing law' in Article 366 (10), *post*.

### *Right to Equality.*

**14.** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Equality before law.

### OTHER CONSTITUTIONS.<sup>2</sup>

*United States of America.*—Section 1 of the 14th Amendment to the Constitution of the United States says—

"No State shall...deny to any person within its jurisdiction the equal protection of the laws."

While the 'Due process clause' (First Amendment) secures that no man shall suffer in life, liberty or property save in the 'due process of law', the 14th Amendment secures that there should be no discrimination in favour of any individual or class similarly situated.<sup>3</sup> This guarantee of equal protection extends even to foreigners resident within the jurisdiction of a State.<sup>4</sup> Equal protection, however, does not prevent reasonable legislative classification.<sup>5</sup>

*Eire.*—Section 40 (1) of the Constitution of Eire, 1937, says—

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

*Burma.*—Section 13 of the Burmese Constitution, 1948, says—

"All citizens irrespective of birth, religion, sex or race are equal before the law; that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another."

### INDIA.

#### EQUALITY BEFORE THE LAW AND EQUAL PROTECTION.

It is to be noted that while the phrase 'equal before the law' occurs in almost all written Constitutions that guarantee the right to equality, the Constitution of the United States (see above) uses the expression 'equal protection of the laws'. Our Constitution, on the other hand, uses both expressions.

The two expressions may seem to be identical, but in fact, as they are understood in the United States, and elsewhere, they mean different things. As to their origin, it may be said that 'equality before the law' is an expression of English Common law, while the other expression owes its origin to the American Constitution.

Before entering into a detailed discussion of the implications of the two expressions, it may be pointed out, broadly, that though both the phrases aim at establishing what is called "equality of status" in the Preamble of our Constitution (p. 27),—while equality before the law is a somewhat *negative* concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law (*Dicey*), "equal protection of the laws" is a more positive concept implying equality of *treatment* in equal circumstances.<sup>6</sup> The concept is, of course, fundamentally the same, *viz.*, equal justice, and, in fact, the idea of equality of treatment finds place in the English writer *Jenning's* exposition of the principle of equality before the law :

(2) See also article 128 (1) (4) of the Czechoslovak, article 4 of Yugoslav, article 73 (1) of Danzig and article 14 of the Japanese, article 4 of Swiss, article 109 of Weimar, Constitution.

(3) *Yick Wo v. Hopkins*, (1886) 118 U.S. 356

(4) *Truax v. Corrigan*, (1921) 257 U.S. 312 (332)

(5) *Magoun v. Illinois Trust*, (1898) 170 U.S. 283.



"Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike."<sup>6</sup>

*Equality before the law.*—Equality before the law does not mean an absolute equality of men, which is a physical impossibility, but the denial of any special privilege by reason of birth, creed or like in favour of any individual and also the equal subjection of all individuals and classes to the ordinary law of the land administered by the ordinary law Courts.<sup>7</sup> In the words of *Jennings*<sup>8</sup>, it means—

"The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status, or political influence."

Every State, however, recognises some exception to the rule of equality before the law.<sup>8</sup> Some of these exceptions are based on the comity of nations and some are based on political grounds.

The absence of special privileges by reason of birth, creed, religion or the like, does not mean that there should be an absolute identity of position as between one citizen and another, irrespective of his functions.<sup>9</sup> Thus, public officers, entrusted with the duty of maintaining public order, must, of necessity, possess powers wider than those of private citizens. What the rule of equality before the law means is that these powers of the public officers must be defined by law and that the officers, in the exercise of these powers, must not commit a *wrong*. In case they commit a wrongful act (*i.e.*, a breach of the law) or an abuse of powers, they shall be subject to be tried in the ordinary Courts of law just as a private citizen is, for his wrongful acts.<sup>10</sup>

As to the exceptions under *our* Constitution in favour of the executive heads of the Union and the States, and public officials, generally, *see under article 361, post*.

The exceptions founded on international law or comity of nations which will also be recognised under the Constitution of India (*Cf.* Article 51), may be referred to briefly :

(i) *Foreign Sovereigns.*—Every Sovereign of an independent country, while entering into the territory of another State, reserves the immunities due to his sovereign status, and is exempt from the jurisdiction of the Courts of the foreign country.<sup>11</sup>

But the exemption from process accorded by the law of nations to Sovereigns and to Ambassadors and Foreign Ministers, being for their benefit, may be waived by or with the permission of the Sovereign.<sup>12</sup> But the immunity is lost only by 'actively electing to waive the privilege', upon being sued.<sup>13</sup> Appearance to plead against jurisdiction is not such waiver.<sup>14</sup>

(3) *Ambassadors.*—An Ambassador represents his Sovereign, and enjoys, in general, all the immunities which his Sovereign could claim in the foreign territory [see under Entry 11 of List I, 7th Sch., *post*.]

(4) *Alien enemies.*—While alien enemies can be tried in respect of ordinary crimes in the ordinary Courts, as regards acts of war, they can be tried only under martial law and not by the ordinary Courts.

As to aliens, generally, see under Entry 17 of List I, 7th Schedule, *post*.

*Justice should be available to all.*

In recent times, it has been realised that there cannot be any real equality in the 'right to sue and be sued' in the same manner as others<sup>15</sup>, unless legal advice

(6) *Jennings, Law of the Constitution*, 3rd Ed., p. 49.

(7) *Dicey, Law of the Constitution*, 1939, p. 47.

(8) *Wade and Phillips, Constitutional Law*, pp. 51-54.

(9) *Cf.* second para. of section 40 (1) of the Constitution of Eire, at page 50, *ante*.

(10) *Wade and Phillips, Constitutional Law*, p. 51.

(11) *The Parlemente Belge*, (1880) 5 P.D. 197.

(12) *Suarez v. Suarez*, (1918) 1 Ch. 176.

(13) *Mighell v. Sultan of Johore*, (1894) 1 Q.B. 149.

(14) *Magdalena S.N. Co. v. Martin*, (1859) 3 E. & E. 94.

(15) The right to 'equal access to the Courts' is deduced from the 'equal protection' clause, in the United States [*Barbier v. Connolly*, (1885) 113 U.S. 27].

is available to the poorer people, whether in civil or criminal proceedings. This feeling has led to the passing, in England, of the Legal Aid and Advice Act, 1949.<sup>16</sup>

There is no such provision under the existing Indian law. It may be expected that the Legislature will attend to this matter, particularly in view of the guarantee of equality before the law.

*Subordinate legislation and Administrative tribunals.*—We have seen that, according to the classical interpretation of the doctrine of equality before the law by Dicey<sup>17</sup>, it means the “equal subjection of all to the *ordinary law* of the land administered by the *ordinary law Courts*”. But since the publication of his First Edition (1885), conditions in England have changed so as to make his classical view untenable on both the above points. For, by ordinary law, he meant the common law and statute law, *i.e.*, law made by Parliament. But subordinate or delegated legislation by the executive Departments has since come to form the bulk of the law. So, a problem has arisen how far the rule of the ordinary law of the land can be maintained consistently with the existence and development of such departmental legislation, *i.e.*, legislation by other than legislative bodies. On the other hand, by the ‘ordinary Courts’, Dicey meant the judicial tribunals. But owing to the complexity of modern social and economic conditions, Parliament has been compelled to entrust the Department responsible for administering a law, with the power of deciding administrative or quasi-judicial issues arising out of the administration of the Act. Here again arises the question whether this administrative justice is inconsistent with the subjection of all to the ordinary Courts of law. The two problems may be discussed separately, with reference to conditions under *our own* Constitution.

*Subordinate legislation.*—Subordinate or delegated legislation, as has been already explained, means that body of law which is made administratively by means of rules, orders and regulations, framed and promulgated by a Ministry or Government, in pursuance of a power conferred by an Act of the Legislature. Subordinate legislation has, to a certain extent, become inevitable<sup>18</sup>, owing to the increased pressure for legislation and the complexity of the subject-matter of legislation. The English<sup>19</sup> Parliament has, therefore, been compelled to lay down mere outlines of *policy*, leaving it to the discretion of the administrative Department, which is to administer the law, to fill up the details as well as to change them according to changing conditions. Though this is legislation *under* statutory authority, it no doubt detracts from the traditional legislative sovereignty of Parliament, for, in making orders and regulations under the statute, the limits of the statutory authority or the spirit of the legislation may be transgressed.

So long as the Courts are free to question the validity of the regulations, the individual may seek his remedy against such abuse of Governmental legislation, for it is a rule applicable to all subordinate legislation that it can be declared invalid by the Court of law on the ground that it is *ultra vires* of the statute under whose authority it purports to have been issued. But this salutary jurisdiction of the Judiciary has been sought to be ousted, in recent statutes, by enacting not merely that regulations may be made under the Act, but that “*they shall have effect as if enacted in this Act*”. By such a clause, Parliament seems to be “giving to the Executive a blank cheque”. The effect of such a clause would be that since the Court is powerless to pass judgment upon the Act of Parliament, it would be equally helpless as against departmental fiat. The English Judiciary, however, has risen to the occasion and held that the clause referred to saves only *intra vires* regulations; in other words, it does not prevent the Courts from scrutinising whether the regula-

(16) See (1949) 1 Dominion Law Reporter, Journal, p. 32. See in this connection, Art. XXXII of the Japanese Constitution.

(17) Dicey, Law of the Constitution, pp. 202-203.

(18) Jennings, Parliament, 1948, p. 656.

(19) So also the American Congress to a considerable extent, notwithstanding the doctrine of Separation of Powers under the American Constitution [*Bowles v. Willingham*, (1943) 321 U.S. 503 (530)]; see further under Part V Ch. I, *post*.

tion or the order conforms to the Statute.<sup>20</sup> In a recent case<sup>21</sup>, the Court of Appeal has further laid down that (i) it is a right of the citizen to know what the law is and that, accordingly, delegated legislation should be *published* and accessible; (ii) that sub-delegated legislation is bad. In other words, where a statute authorises a Minister to give directions 'as appear to be necessary and expedient', the Minister cannot again delegate such discretionary power to some third party, who is not required to publish the regulations. The limitation is, however, confined to legislative powers and does not extend to *administrative* matters.<sup>22</sup>

The dangers of the system were first brought into public discussion by the publication of Lord Hewart's *New Despotism* in 1929, which was followed by an enquiry by a Select Committee of the House of Commons.<sup>23</sup> Though the recommendations of that Committee have not yet been given effect to, the cases just cited<sup>21, 22</sup> show that the danger is tending to appear in newer manifestations.

Our Constitution visualises subordinate legislation by including 'order, rule, regulation, notification', in the definition of law in Article 13 (3)—[see p. 49, *ante*]. Further, there being no theory of Separation of Powers under our Constitution, which does not 'vest the legislative power' in Parliament (as does Article I, section 1, of the Constitution of the United States), it would be possible for our Parliament<sup>24</sup> or the State Legislature to delegate not only the formulation of administrative details, but also legislative details<sup>25</sup> as in England.<sup>1</sup> But, in order to be valid, such rules or regulations must be *intra vires* the statute, as in England (see above). In view of the dangers involved in the system, it may be recommended that the Indian Legislatures should early take into consideration the suggestions of the Report of the Committee on Ministerial Powers in England<sup>2</sup>, e.g., to require that the administrative rules, etc., must be laid in draft before the Legislature, and so on.

*Administrative Tribunals.*—The extension of governmental activities is responsible for entrusting to executive authorities the right of deciding *administrative and quasi-judicial issues*<sup>3</sup> in place of reference to ordinary Courts. The main arguments in favour of this system are that (a) the ordinary Courts are already over-burdened with work; (b) their procedure is technical and costs are prohibitive; (c) questions arising out of a social or industrial legislation are better decided by persons who have an intimate knowledge of the working of that Act.

Thus, in *England*, many recent Acts provide that questions arising out of the administration of the Act shall be decided by the Department or the Local Government authorities who administer it. For example, the Minister of Health is a tribunal of appeal under the Old Age Pensions Act, 1936. All is well so long as the administrative tribunal is subject to the control of the ordinary Courts of the land. The general rule of English law is that all inferior Courts or other tribunals unless there is any statutory provision to the contrary, are subject to the control and supervision of the High Court. Until recently, all these administrative tribunals and Departmental authorities were under such control, and there was in effect nothing like any 'Administrative Court' in England. But some Acts have also been passed by which the jurisdiction of the ordinary Courts has been totally ousted, by making the decision of the tribunal 'final and conclusive'; e.g., the Road and Rail Traffic Act, 1933, Old Age Pension Act, 1936.

It is remarkable that though the jurisdiction of the ordinary Courts is thus ousted, there is no provision for control by any superior Administrative tribunal

(20) *Minister of Health v. The King*, (1931) A.C. 494.

(21) *Blackpool Corporation v. Locker*, (1948) 1 All E.R. 85 (C.A.).

(22) *Lewisham Borough v. Roberts*, (1949) 1 All E.R. 815 (C.A.).

(23) Rep. of the Committee on Ministers' Powers, 1931-32 (C.M.D. 4060, Vol. XII).

(24) *Contra U.S.A.*, Cf. Cooley, *Constitutional Limitations*, 7th Ed., 1903, p. 163; *Field v. Clark*,

(1892) 143 U.S. 649.

(25) Cf. *R. v. Burah*, (1878) 1 A.C. 889; *Hodge v. Queen*, (1883) 9 A.C. 117.

(1) Jennings, *Parliament*, 1948, pp. 455-7.

(2) See Wade and Phillips, *Constitutional Law* p. ■; Jennings, *Parliament*, p. 490.

(3) e.g., questions of insurability, compensation for compulsory acquisition of land, licenses for running omnibuses, selling milk and drugs.



as in the Continental system. The question was therefore referred to the Committee on Ministers' Powers<sup>4</sup>, 1932, as to whether England should adopt a full-fledged system of Administrative Courts on the French model. But the Committee gave its opinion against such a proposal on the ground that it was opposed to the flexibility of the English Constitution and the jurisdiction of normal judicial control over administrative proceedings. Instead, the Committee recommended that these authorities should continue to exercise such judicial powers but that (i) the power of the High Court to keep them within limits by the prerogative writs such as mandamus, prohibition and *certiorari*<sup>5</sup>, should be retained ; (ii) these tribunals should observe the rules of natural justice ; (iii) there should be an appeal to the High Court on points of law. The recommendations of this Committee have not been accepted as yet *in toto*. But in some statutes, such as the Restriction of Ribbon Development Act, 1935, we find a provision that the Minister must give ■ summary of the facts and the reasons for his decision. Unless there is any such provision, the Minister or other tribunal is not bound to give any reasons for his decision. In *Local Government Board v. Arlidge*<sup>6</sup>, the House of Lords has laid it down that an administrative tribunal need not follow the procedure of ■ Court of law. It is free to follow that procedure which enabled the administrative authority to act efficiently. Hence an administrative tribunal is not bound to disclose to a party the report of an official<sup>7</sup> or to hear a party orally ; and it is not fettered by any rules of evidence for obtaining information.<sup>8</sup>

But though an administrative tribunal is not bound to follow the strict procedure of a judicial trial it is bound to observe what are called the rules of 'natural justice.' These are—

(i) A person must not be a judge in his own cause. This rule precludes ■ member of the tribunal to try a cause to which he is a party. It has been held<sup>9</sup> that members of a local or other body, who had taken part in promulgating an order or regulation, cannot afterwards sit for adjudication of a matter arising out of such order,—because of their disqualification on the ground of bias.

(ii) A person must not be condemned *unheard*.<sup>10</sup> This, however, means that the party must have reasonable notice of the case he has to meet and an opportunity of stating his case. It does not necessarily mean that he is entitled to *appear* in person and to be heard *orally* (unless of course, there is any statutory obligation to that effect).<sup>8</sup>

(iii) The decision must be made in *good faith*, i.e., it must not be made in order to achieve some object other than that for which the judicial or ■ quasi-judicial power is given.<sup>11</sup>

More recent writers<sup>12</sup> are of the opinion that the existence of administrative tribunals is not necessarily incompatible with the Rule of Law, provided these tribunals observe "the essential requirements of justice," and there is provision for appeal to the ordinary Courts, on points of law. The solution of the problem, in short, lies not in the abolition of administrative or other special tribunals but in bringing them under the *control* of the ordinary courts if they violate the essential principles of justice.

In *India*, under the existing law, the ordinary civil courts have jurisdiction to try all suits of a civil nature, excepting only those suits of which their cognizance is expressly or impliedly barred.<sup>13</sup> The exclusion of the jurisdiction of the

(4) Report of the Committee on Ministers' Powers, 1931-32 [C.M.D. 4060, Vol. XII].

(5) See under article 32 (2), *post*.

(6) *Local Govt. Board v. Arlidge*, (1915) A.C. 120.

(7) *Denby v. Minister of Health*, (1936) 1 K.B. 337.

(8) *Board of Education v. Rice*, (1911) A.C. 179.

(9) *Frome United Breweries v. Bath Justices*, (1926) A.C. 586.

(10) *R. v. Huntingdon Confirming Authority*, (1929) 1 K.B. 698.

(11) *Marshall v. Corporation of Blackpool*, (1935) A.C. 16.

(12) Wade and Phillips, *Constitutional Law*

p. 54.

(13) Section 9, Code of Civil Procedure.



Civil Court is not to be readily inferred and<sup>14</sup> the burden of proof is clearly on the part of those who maintain an exception to the general rule.<sup>15</sup> The legal right to bring a suit cannot be barred by considerations of policy or expediency.<sup>16</sup> Where a statute creates a special jurisdiction but no machinery is set up for the exercise of that jurisdiction, the general jurisdiction of the Civil Courts is not lost and no wider interpretation will be given to the terms of any special law so as to limit the powers of the ordinary Courts.<sup>17</sup>

But where a statute *creates* a liability not existing at common law and gives also a particular remedy for enforcing it, the party must adopt the form of the remedy given by that statute.<sup>15</sup> In other words, when a special tribunal is appointed by an Act to determine questions as to rights which are the *creation* of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is *exclusive*. In such a case there is no ouster of the jurisdiction of the ordinary Courts for they never had any—the rights having been created by a statute which created the tribunal.

If the statute creating a special tribunal makes its jurisdiction subject to the supervision of the ordinary Courts, evidently there is no encroachment upon the rule of law. But very often the statute makes the decision of the tribunal '*final*'. But even the Civil Courts can interfere with the decision of the special tribunal, *e.g.*, by way of *certiorari* [see under Article 32 (2), *post*], or by an independent suit<sup>18</sup> in the following cases :

(a) Where the special tribunal has acted without jurisdiction or has acted beyond the powers conferred upon it by the statute which created it<sup>18</sup>. No special or statutory tribunal can, by purporting to exercise a jurisdiction which it did not possess, make its order upon such a matter '*final*', and exempt itself from the control of the Civil Court<sup>18</sup>. In such a case, the tribunal cannot be said to have acted under the statute<sup>19</sup>.

(b) Where it acts within its statutory limits, *i.e.*, *intra vires*, but it acts in violation of the fundamental principles<sup>20</sup> of judicial procedure<sup>21</sup>, *e.g.*, where a tribunal makes a quasi-judicial order against a party without hearing any evidence at all<sup>21</sup>. But where the decision of the special tribunal is *intra vires*, mere irregularity or illegality<sup>22</sup> will not take away its final jurisdiction.

(c) Where the proceedings of the tribunal are vitiated by fraud<sup>23</sup>, or by dishonesty or caprice on the part of the tribunal itself.<sup>24</sup>

It should be noted that apart from a suit under the general law on the grounds stated above, *our* Constitution makes several other provisions for bringing the tribunals under the supervision of the ordinary Courts of the land. These are (a) the directions or orders or writs enumerated in Articles 32 (2)-(3) ; 139 ; 226 (1) ; (b) superintendence of the High Court [Art. 227 (1)] ; (c) appeal to Supreme Court by special leave [Article 136 (1)]. (See comments under these Articles, *post*).

*Special Criminal Courts.*—See under Article 21, *post*.

*Courts-Martial and Military Courts.*—See under Articles 33-34, *post*.

*Equal protection of the laws.*—As has been already explained, this expression means 'the right to equal treatment in similar circumstances,'<sup>25</sup>—

(14) *Secretary of State v. Mask*, A.I.R. 1940 P.C. 103 (110).

(15) *Ramayya v. Lakshminarayana*, A.I.R. 1934 P.C. 84 (86).

(16) *Maharaja of Jeypore v. Patnaik*, (1905) 28 Mad. 42 (P.C.).

(17) *Bhagwan v. Secretary of State*, A.I.R. 1940 P.C. 82 (86).

(18) *Secretary of State v. Fahdunnissa*, (1889) 17 Cal. 590 (P.C.). [Suit under section 9, Civil Procedure Code, read with section 42, Specific Relief Act]. *Bugga v. Emperor*, (1920) 6 I.C. 440 (P.C.).

(19) *Colonial Bank of Australasia v. William*, (1875) L.R. 5 P.C. 417.

(20) See Fundamental Principles of "Natural justice" at page 54, *ante*.

(21) *R. v. Kingston-upon-Hull Tribunal*, (1949) 1 All E.R. 260.

(22) *Balakrishna v. Simpson*, (1898) 25 Cal. 833 (842) (P.C.).

(23) *Duchess of Kingston's case*, 1 Smith's L.C. 7.

(24) *I. T. Commissioner v. Badridas*, A.I.R. 1937 P.C. 133 (138).

(25) *Hillsborough Township v. Cromwell*, (1945) 326 U. S. 620.

"equal security to everyone in his private rights....It implies not only that the ■■■ which the laws afford for such security shall be accesible to him, but that no one shall be subject to any burden or charges than such as are imposed upon all others under like circumstances."<sup>1</sup>

Equal protection, in short, means absence of any arbitrary discrimination by the laws themselves or in their administration. None should be favoured and none should be placed under any disadvantage, in circumstances that does not admit of any reasonable justification for a different treatment. Thus, it does not mean that every person should be taxed equally, but that persons under the same circumstances or property of the same character should be taxed by the same *standard*.<sup>2</sup> But if there is any reasonable basis for classification, the Legislature would be entitled to make a different treatment.<sup>3</sup> Thus, it may (i) exempt certain classes of property from taxation at all, such as libraries and the like ; (ii) impose different specific taxes upon different trades and professions ; (iii) tax real and personal property in different manners, and so on.<sup>4</sup> Similarly property specially benefitted may be subject to special taxation, if the taxation is equal within the class benefitted.<sup>5</sup> Again, there may be different *modes* of assessment for different kinds of properties, provided the rule of assessment is the same<sup>6</sup>.

Equal protection thus means, in short—

"that no impediment should be interposed to the pursuits by anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition;

that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."<sup>7</sup>

Nor does equal protection prohibit the granting of special privileges to particular enterprises or employments in the interests of the general welfare, provided there is no discrimination within that class, *e.g.*, in favour of national banks, insurance companies, railways and the like<sup>8</sup>. Similarly, corporations may be treated separately from individuals and foreign corporations may be classified separately from domestic corporations.<sup>9</sup>

"Class legislation discriminating against some and favouring others is prohibited, but legislation which, in carrying out ■ public purpose, is *limited* in its application, is not prohibited, if within the sphere of its operations it affects alike all persons *similarly* situated."<sup>10</sup>

A classification is reasonable when it is not an *arbitrary selection*<sup>11</sup> but rests on 'differences pertinent to the subject in respect of which classification is made'<sup>10</sup>; thus ■ particular business may be subjected to ■ special burden if there is reasonable relation between the burden imposed and the peculiar character of the business. Thus, railways may be made a special class for taxation<sup>12</sup> or safety to the public.<sup>13</sup> Similarly, certain professions may be limited to persons having particular qualifications.<sup>14</sup> Again, a classification having some reasonable *basis* does not offend against 'equal protection' merely because it is not made with mathematical nicety or because *in practice* it results in some inequality.<sup>15</sup>

The reasonableness of a classification would thus depend upon the purpose for which the classification is made. Thus,—

"Night work in laundries may be forbidden, though allowed in other businesses, ■ the ground of protecting the community against fire. Regulations may be imposed upon the dealing in, or the use of intoxicating liquor which are not imposed upon other products; and persons selling milk may be required to take out licenses and to conform to special sanitary provisions. Fertiliser plant

(1) *Santa Clara v. S. Pacific R. R. Co.*, (1886) 18 Fed. Rep. 385.

(2) *Magoun v. Illinois Bank*, 170 U.S. 283.

(3) On the subject of classification for 'taxation' see *Burdick*, Law of the American Constitution, pp. 600-603.

(4) *Bells R. R. Co. v. Pennsylvania*, 134 U.S. 232.

(5) *Walston v. Nerin*, (1888) 128 U.S. 578.

(6) *Winona Co. v. Minnesota*, 159 U.S. 526.

(7) *Barbier v. Connelly*, (1885) 113 U.S. 27.

(8) *Cooley*, Constitutional Law, pp. 281, 286.

(9) *Power Manufacturing Co. v. Saunders*, 274 U.S. 490.

(10) *Power Mfg. Co. v. Saunders*, 274 U.S. 490.

(11) *Gulf Ry. v. Ellis*, (1897) 165 U.S. 150.

(12) *Missouri Ry. v. Humes*, (1885) 115 U.S. 512.

(13) *St. Louis Co. v. Mathews*, 165 U.S. 1.

(14) *Re Lockwood*, 154 U.S. 116.

(15) *Lindsley v. Natural Carbonic Co.*, (1911) 220 U.S. 61 (78).

may be kept out of cities, and so may cow stables and dairies, and brick-making may be restricted to designated areas . . . . ."<sup>16</sup>

The burden of showing that a classification rests upon an arbitrary and not reasonable basis is upon the person who impeaches the law as a violation of the guarantee of equal protection.<sup>17</sup> Further, if any state of facts can be reasonably conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed.<sup>17</sup>

On the other hand—

(a) The guarantee of equal protection cannot interfere with the 'police power' of the State,<sup>18</sup>—to prescribe regulation to promote the health, peace, morals and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity, for which legislation of a special character is often necessary. Thus,—

"Special burdens are often necessary for general benefits" <sup>19</sup> (such as) for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for the purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little inconvenience as possible, the general good. Though in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions."<sup>20</sup>

On the same principle, though the equal protection extends to *aliens* resident within the jurisdiction of the State,<sup>21</sup> and aliens are not to be discriminated against simply on the ground of alienage, they may be subjected to special restrictions on the ground of peril to the public welfare.<sup>22</sup> Again, owing to difference in the nature of their allegiance to the State, classification may be made between citizens and aliens as regards acquiring land<sup>23</sup>. It is reasonable to deny aliens the use of shotguns for protecting game, but it is not reasonable to deny them the right to work for a living.<sup>22</sup>

(b) The guarantee of equal protection does not prevent the State from applying different laws or different systems of judicature to different parts or local sub-divisions of the country according to local circumstances, for the clause does not secure to all persons the benefit of the *same* laws and *same* remedies.<sup>24</sup> Equal protection of the laws is a pledge of the protection of *equal* laws.<sup>25</sup>

(c) Lack of equal protection is to be found in the *existence* of an invidious discrimination, not in the mere *possibility* that there will be like or similar cases which will be treated more leniently. The Legislature is entitled to hit the evil that *exists* and is not bound to take account of new and hypothetical inequalities, that may come into 'existence' as time passes or as conditions change.<sup>1</sup>

It is to be carefully noted that in the *United States*, it has been held that the equal protection clause is not intended to abolish *social* — distinguished from political inequality; hence racial segregation or provision of separate accommodation for the coloured races in the public carriers, etc., is not a violation of equal protection.<sup>2</sup> But under *our* Constitution, no such discrimination would be possible by reason of the fact that it will come within 'untouchability in any form' within article 17, *post*.

*The guarantee is in respect of legislation as well as of execution or administration of laws.*—It is to be noted that though the guarantee is of equal protection of the 'laws', it includes legislation — well — administration of the laws, and, accordingly, practi-

(16) See cases collected in Burdick, *Law of the American Constitution*, p. 605.

(17) *Lindsley v. Natural Carbonic Co.*, (1911) 220 U. S. 61 (78).

(18) See Burdick, *Law of the American Constitution*, pp. 603-611.

(19) See on this topic, Burdick, *Law of the American Constitution*, p. 595.

(20) *Barbier v. Connelly*, (1885) 113 U. S. 27.

(21) *Yu Cong v. Trinidad*, 271 U. S. 500.

(22) *Truax v. Raich*, (1915) 239 U. S. 33.

(23) *Terrace v. Thompson*, (1923) 263 U.S. 197.

(24) *Missouri v. Lewis*, (1879) 101 U. S. 22.

(25) *Yick Wo v. Hopkins*, (1886) 118 U. S. 356 (369).

(1) *Quenside Hills Co. v. Saxl*, (1945) 328 U. S. 80 (84).

(2) *Plassey v. Ferguson*, (1896) 163 U. S. 537,



cally all State action<sup>3</sup> which is *intended* to be discriminatory as distinguished from the mere incidental inequality resulting from the *operation* of a general legislation.<sup>4</sup> On the other hand, if a statute is not itself discriminatory but gives to designated officials a discretionary power, not to be exercised upon a consideration of the circumstances of the case, but a 'naked and arbitrary power to give or withhold consent not only as to places but as to persons', the statute is void as being a denial of equal protection.<sup>5</sup> But it must be shown that the unequal administration of the statute (which is itself fair) is 'intentional and purposeful'.<sup>6</sup> Thus, in a case of complaint of unequal assessment by public officials, it is not enough to show merely that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some tax-payers and a systematic over-valuation of the property of others, so that the *practical* effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute.<sup>6</sup>

**15. (1)** The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for woman and children.

#### OTHER CONSTITUTIONS.

*United States of America.*—Section 1 of the 19th Amendment (1920) to the Constitution of the United States says :

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

Article 4, section 2 (1), on the other hand, provides :

"The citizens of each State shall be entitled to privileges and immunities of citizens in the several States."

This provision ensures that there will be equality of treatment between the citizens of a State and those of another while temporarily sojourning in the former.<sup>7</sup> Previous residence may, however, be required for certain privileges and immunities, such as voting, fishing in the waters of the State.<sup>8</sup> The word 'privileges' has been interpreted to include only those privileges 'which belong to citizens of all free Governments' and not the *property* rights conferred by a State<sup>9</sup> or 'public' rights, such as the right of voting or holding office.<sup>10</sup> Again, the prohibition in this article has been held not to extend to discriminations which are 'just and convenient', e.g., requiring non-residents to give security for costs for bringing an action in a State Court,<sup>8</sup> or providing that a statute of limitation will run against a non-resident when it would not run against a resident.<sup>10</sup>

(3) *Ex parte Virginia*, (1880) 100 U. S. 339 (346).

(4) *Santa Clara v. S. Pacific R. R. Co.*, (1886) 18 Fed. Rep. 385.

(5) *Yick Wo v. Hopkins* (1886) 118 U. S. 303.

(6) *Snowden v. Hughes*, (1943) 321 U. S. 1.

(7) *Slaughter House Cases*, 16 Wall. 36; Von Holst, Constitutional Law, Vol. I, p. 247.

(8) *Blake v. McClung*, (1898) 172 U. S. 64.

(9) *McCready v. Virginia*, (1877) 94 U.S. 391.

(10) *Chemung Canal Bank v. Lowry*, 93 U.S. 72.



The 15th Amendment (1870), section 1, again, lays down :

"The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude."

*Switzerland*.—Article 60 says :

"Every Canton is bound to accord to citizens of the other Confederated States the same treatment as to its own citizens in regard to legislation and judicial proceedings."

Article 4, again, says :

"In Switzerland there are no subjects nor any privileges of rank, birth, person or family."

*Australia*.—Section 117 of the Constitution Act provides :

"A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

*Japan*.—Article 14 says :

"...there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status, or family origin."

*U. S. S. R.*—Article 122 of the Constitution of the Union of Soviet Socialist Republics, 1936, says :

"Women in the U. S. S. R. are accorded equal rights with men in all fields of economic state, cultural, social and political life. The realisation of these rights of women is ensured by affording women the right to work, payment for work, rest, social insurance and education, equally with men, by State protection of the interests of mother and child, granting pregnancy leave with pay, and by the provision of a wide network of maternity homes, nurseries and kindergartens."

Article 123, again, provides :

"Equality of rights of citizens of the U. S. S. R., irrespective of their nationality of race, in all spheres of economic, state, cultural, social and political life, is an indefeasible law. Any direct or indirect restriction of the rights of, or, conversely, any establishment or direct or indirect privileges for, citizens on account of their race or nationality, as well as any advocacy of racial or national exclusiveness or hatred and contempt, is punishable by law."

## INDIA.

*Scope of Article 15*.—While Article 14 offers equality before the law to all 'persons', including aliens, the present article is limited to citizens, but its scope is very wide. The prohibition in clause (1) is levelled against the 'State' in the distributive sense defined in Article 12. It also refers to the State in the collective sense contrasted with the individual. It prohibits discrimination against any citizen on any of the prohibited grounds only, in any matter at the disposal of the State. Cl. (2) on the other hand, is levelled not only against the State but also against private individuals, who may be in control of the public places mentioned in that clause.

'*Discrimination*.'—'Discrimination' shortly speaking, means difference in treatment. The prohibition contained in this clause is general and includes both benefits and burdens. Thus, the State cannot exclude a citizen from the Jury service merely on the ground of his race, religion, caste, sex or place of birth.<sup>11</sup> The prohibition comprehends civil, legal as well as political rights. The general guarantee contained in this clause is illustrated in numerous other provisions of the Constitution. Thus, the guarantee of equality of sexes is secured by providing—(i) adult suffrage (Article 326); (ii) equality in employment [Article 16 (2)]; (iii) equal eligibility for the office of President, Vice-President, membership of Parliament, Judge of Supreme Court, etc., which may be held by any citizen of India.

(11) Cf. *Ex parte Virginia*, (1879) 111 U. S. 339.

'Citizen'.—The words 'place of birth' make it clear that the prohibition against discrimination contained in this Article is not applicable to Corporations. A State is not debarred from conferring special privileges to corporations incorporated by its own grant.<sup>12</sup> (Cf. Entry 32, List II.)

*Discrimination as between the States or units of the Union.*—In India, there being no separate State citizenship, there is no need of any guarantee in the Indian Constitution of the nature of Article 4, section 2, of the United States Constitution. But discrimination as between one State and another, on the part of the Union or of the States has still to be guarded against.

The only prohibitions against discrimination as between the States are contained in Articles 15 (1), 19 (1) (d)-(g), 303 (1) and 304 (a). These provisions secure to a citizen born in a particular State of the Union the right 'to pass into any other State of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the Courts, and to be exempt from any higher taxes or excises than are imposed by the State'<sup>13</sup> upon persons born within its own borders.

There being no other bar against discrimination, it follows that it is possible for the Union or a State to discriminate against any citizen on the ground of 'residence.'<sup>14</sup> The use of the words 'only' and 'place of birth' in the present clause make that clear. Article 16 (3), thus, specifically empowers Parliament to prescribe residence within a State as a requirement for employment of any specified class or classes under the State. Scope of laying down a residence qualification for membership of a State Legislature is provided by Article 173 (c).

'Religion'.—While Articles 25-28 lay down the freedom of all persons within the territory of India in the matter of religion, the two clauses of the present Article and Art. 16 (2) ensure that religion shall not be the ground for any disqualification or discrimination in any public matter. Since 'discrimination' includes benefits or privileges as well, the present clause means that nobody can claim any special privilege from the State on ground of religion only. Thus, the people of the Namdhari States are not entitled to any 'exemption' from the vaccination rules on the ground of their religion.<sup>15</sup>

'Race'.—A step towards abolition of racial (dis)rimination has been taken on the eve of the commencement of the Constitution by the passing of the Criminal Law (Removal of Racial Discriminations) Act XVII of 1949)<sup>16</sup> by which the privileges<sup>17</sup> enjoyed by the Europeans and Americans under the British regime, in matters of criminal law and procedure, have been taken away. Europeans are, therefore, on the same footing as Indians or of people of other races, in these matters.

Nor will the State, in India, offer unequal treatment to any citizen because of his race. The liberality of this declaration can only be appreciated if we contrast the notorious policy of 'apartheid' in S. Africa.<sup>18</sup> The indigenous and coloured inhabitants of S. Africa have no political rights at all. No less notorious is the 'poll-tax' against Negroes in the United States, which persists notwithstanding the 15th Amendment relating to suffrage.<sup>19</sup>

'Sex'.—The Constitution of India offers unqualified political and civic equality with men to women, in matters of employment, suffrage, access to places of public resort, and so on. [As to 'economic' equality, see Article 39, *post.*]

(12) The position in the United States [*Paul v. Virginia*, 8 Wall. 168] and Australia [*T. & C. v. Howe*, (1922) 31 C.L.R. 290], is the same.

(13) Cf. *Ward v. Maryland*, (1870) 12 Wall. 418 (430).

(14) Mark the use of the word 'residence' in Article 16 (2), while it is absent from Article 15.

(15) Cf. Declaration of the Government of

India in the *Statesman*, 15-1-49, p. 1.

(16) *Vide* 4 D. L. R. Acts 43.

(17) Banerjee, *Constitutional Rights and Duties*, p. 55.

(18) Cf. *Statesman*, Calcutta, 21-1-50, p. 1.

(19) Cf. Beard, *American Government and Politics*, 1939, p. 491.

'Place of birth'.—These words occur in clauses (1) and (2) of Article 15 as well as in clause (2) of Article 16. These words in effect declare 'provincialism' to be unlawful. In no public matter is there to be any discrimination by any authority against a citizen of India on the ground of his *birth* in any particular part of India.

It is to be noted that the words 'place of birth' in this Constitution differ from the word 'resident' in section 117 of the Australian Constitution. The words 'place of birth' and 'only' in the present clause of our Constitution leave a State free to discriminate on the ground of 'residence'<sup>20</sup>, subject of course to the other provisions of the Constitution. Thus, Article 19 (1) (f) guarantees to a citizen the right to acquire property anywhere within the territory of India. So a State will not be entitled to impose a requirement of residence within its territory for acquiring property therein, unless such restriction may be justified under clause (5) of Article 19.

### CLAUSE (2)

*Scope of Clause (2).*—Sub-clause (a) offers equal access to shops, restaurants, hotels and places of public entertainment, owned by *private* persons. State aid to such institutions is not a condition requisite for availability of the right in respect of such places. Sub-clause (b) relates to places of public resort which are (i) either maintained by State funds, wholly or in part; or (ii) dedicated to the use of the general public. In the latter case, maintenance by State funds is not necessary.

"On grounds only of".—These words make it clear that discrimination is prohibited only where it is based on grounds of religion, race, caste, sex or place of birth. Beneficial discrimination in favour of women and children is excepted by clause (3). Apart from this, discrimination on grounds of *morality*, *health* or like grounds is not prohibited. Thus, an inn-keeper or a common carrier may refuse to accommodate an intoxicated person or one suffering from a contagious or infectious disease.<sup>21</sup>

'Race'.—The absolute prohibition against discrimination on ground of race even in public places managed by private individuals, places the Indian Constitution in advance of any other leading Constitution of the world.

In the *United States*, thus, it has been held that the 'equal protection clause' (see p. 57, *ante*) is intended against discriminatory State action and not against discrimination by individual action and that it does not aim at abolishing *social* ■ distinguished from political inequity.<sup>22</sup> So, while Negroes cannot be excluded from the public schools, statutes requiring them to attend separate schools maintained<sup>23</sup> for them or to occupy segregated accommodation in railways,<sup>24</sup> hotels, restaurants, etc., 'for the purpose of public order,' are not *ultra vires* the equal protection clause. Of course, of late, the Supreme Court has declared segregation to be illegal so far as *inter-State* transportation is concerned on the ground of its being ■ undue burden on inter-State commerce<sup>25</sup>; nevertheless, racial discrimination still persists in inter-State life. In 27 out of 48 States, marriage is not possible between persons of different colour and married couple belonging to different *races* are not allowed to live within some States.

Similarly, in *S. Africa*, separate carriages, waiting rooms, etc., are provided for 'Europeans' only<sup>1</sup> and the S. African Government is determined to maintain this racial discrimination notwithstanding all that the United Nations may say or do.<sup>2</sup>

(20) Cf. *Davies v. W. Australia*, (1904) 2 C. L. R. 29.

(21) Cooley, *Constitutional Law*, p. 303.

(22) *Plessy v. Ferguson*, (1896) 163 U. S. 537. *Mitchell v. U. S.*, (1941) 313 U. S. 80.

(23) *Missouri v. Canada*, (1938) 303 U. S. 580.

(24) *Chiles v. Chesapeake Ry.*, (1910) 218 U. S. 9.

(25) *Morgan v. Virginia*, (1945) 328 U. S. 373.

(1) *Vide* *Statesmen*, Calcutta, 15-8-48, p. 9.

(2) *Ibid.*, 21-1-50, p. 1.



All this will be impossible in *India* in view of the present clause.

'Caste'.—The object of this prohibition is to remove the abuses of the Hindu social system and to unify the nation. It is gratifying to note that on the eve of the passing of the Constitution, Bihar has passed the Harijan (Removal of Civil Disabilities) Act, 1949, providing for punishment of offences against Harijans (depressed classes or castes), such as preventing them from access to places of public amusements, entertainments, religious institutions, public conveyances, wells, tanks, etc.

See in this connection the complementary provision in Article 25 (2) (b), *post*.

'Places of public resort'.—What are such places are not exhaustively defined by the Constitution. It only mentions wells, tanks, bathing ghats and roads, and then adds the general expression "and places of public resort". The general expression should therefore be interpreted by the rule of '*ejusdem generis*'. Thus, by reason of the existence of this expression, a pond would be included in the word 'tank'. So, a 'burial place' would come within the article if it is maintained by the State or dedicated to the public. The scope of the words 'public resort' is thus to be determined with reference to the conditions following the expression, *viz.*, (i) maintenance out of State funds; or (ii) dedication to public user. Thus, a place of religious worship would not ordinarily come within the article, unless it is 'dedicated to the general public'. Private endowments are thus excluded.

A place of public resort is a place where the public go, *e.g.*, an omnibus or railway, a public street, ■ public park, ferry, a public urinal, a Court of law, ■ hospital, public guesthouses and the like<sup>4</sup>.

It is to be noted, in this connection that the provision against untouchability (Article 17), applies as regards all places and objects, *private* or *public*, and so ■ enumeration of public places is necessary in that article.

'State funds'.—These include the revenues of the Union and the States as well as the funds of the local and other authorities who are included in Article 42.

*What constitutes dedication to the public.*—This is a question of general law. Briefly speaking, dedication of a property to the use of the general public may take place in two ways: (a) There may be a *complete* dedication, when the owner of the property completely divests himself of ownership and vests the property in some religious, charitable or social institution or object. (b) It may be *partial* if the owner retains the property himself but grants to the community an 'easement' over it for certain specified purposes, *e.g.*, dedication of land on the bank of the Ganges for the purposes of a bathing ghat.<sup>5</sup> For our present constitutional purpose, either form of dedication will suffice. The word 'general' qualifying 'public' indicates that it is used in the English sense to denote the public at large, as distinguished from any class or special community or any limited part of the public.<sup>6</sup> Dedication is ■ irre-  
vocable licence granted by the owner to the use of the general public.<sup>7</sup>

#### CLAUSE (3).

*Scope of clause (3).*—This clause is an exception to the rule against discrimination provided by clauses (1) as well as (2). Thus, the provision of maternity relief for women workers (Article 42) will not be a contravention of the prohibition against discrimination under clause (1) of the present article; nor will be the provisions of free education for children (Article 45) or measures for prevention of their exploitation [Article 39 (f)]. Similarly, the provision of separate accommoda-

(3) Cf. Mulla, Hindu Law, 1936, section 1.  
(4) Cf. definition of "public place" in section 9 (1) of the Public Order Act, 1936 (Eng).  
(5) *Hemantakumari v. Gourishanker*, (1940) 45

C. W. N. 637 (641) (P. C.).

(6) *Pool v. Huskinson*, (1848) 63 R. R. 782.

(7) *Lakshmidar v. Rangalal*, (1949) 54 C. W. N. 143 (P. C.)



tion, entrances, etc., for women and children at places of public resort will not be a violation of clause (2) of the present article.

**16. (1)** There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Equality of opportunity in matters of public employment.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

#### OTHER CONSTITUTIONS<sup>8</sup>.

*U.S.A.*—Art. VI, s. 3 of the United States Constitution says—

“ . . . . . No religious test shall be required as a qualification to any office or public trust under the United States. ”

*Burma.*—S. 14 of the Burmese Constitution, 1948, provides—

“ There shall be equality of opportunity for all citizens in matters of public employment and in the exercise or carrying on of any occupation, trade, business or profession. ”

*Australia.*—Section 116 of the Australian Constitution says :

“ . . . . . No religious test shall be required as a qualification for any office or public trust under the Commonwealth. ”

*Government of India Act, 1935.*—Section 275 provided :

“ A person shall not be disqualified by sex for being appointed to any civil service of, or civil post under the Crown in India . . . . . ”

Section 298 (1), again, laid down :

“ No subject of His Majesty domiciled in India shall on grounds of religion, place of birth, descent colour or any of them be ineligible for office under the Crown in India. . . . . ”

#### INDIA.

*Scope of Article 16.*—Clauses (1) and (2) of this Article guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any

(8) See also Art. 16 of Argentina; Art. 128 Constitution of Czechoslovakia and Art. 91 of Danzig.

other employment, *under* the State. This is a corollary from the general declaration in Article 15 (1), Clauses (3)-(5), however, lay down several *exceptions* to the above rule of equal opportunity. These are :

(i) Though any citizen of India, irrespective of his *residence* is eligible for any office or employment under the Government of India (clause (2)), residence may be laid down as a condition for particular classes of employment under the States, by an Act of Parliament in that behalf [clause (3)].

(ii) The State (as defined in Article 12) may reserve any post or appointment in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the services under the State [clause (4)]. (iii) Offices connected with religious or denominational institutions may be reserved for members professing any particular religion or belonging to a particular denomination [clause (5)].

Certain other exceptions are engrafted by *other* articles ;

(a) The claims of members of the Scheduled Castes and Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, by the Union and the States, in the making of appointments in connection with their respective affairs (Article 335).

(b) The existing arrangements for reservation of certain posts for the Anglo-Indians shall continue for a period of 10 years after the commencement of the Constitution [Article 336].

#### CLAUSE (1).

' *Employment* ',—This word, in juxtaposition with ' *office* ', includes offices which are honorary, or do not carry any salary. It would also include such employments which do not relate to any ' *office* '. It may be noted in this connection that recruitment to the Indian Army has already been opened to all classes of citizens and that the fixed percentages for particular classes and communities have been abolished.<sup>9</sup>

#### CLAUSE (2).

' *Descent* ', ' *Residence* '.—These words are additions to the enumeration of the grounds in clause (2) of Article 15.

#### CLAUSE (3).

*Scope of Clause (3) : Residence for State Employment.*—This clause restricts the operation of clause (2), by making an exception in the matter of employment *under* a State in the First Schedule (*i.e.*, members of the Union). So far as employments under the Union are concerned, there will be no qualification of residence within any particular territory, but the Union Parliament would be competent to lay down that as regards any particular class or classes of employment *under* a State, domicile within that State shall be a necessary qualification. This restriction in the case of State employments has been engrafted for the sake of efficiency. Though an equality or universality of opportunity is guaranteed by clauses (1) and (2) which follow from the provision for ■ single citizenship for the whole of India, it is essential, in order to ensure efficiency of the State Services that ' mere birds of passage ' or fortune-seekers should not be allowed to seek employment in one State after another.<sup>10</sup>

It is to be noted that it is the Union Parliament which would be the only authority to legislate in this matter and that Provincial Legislatures shall have no voice. To this extent, invidious discriminations in different Provinces is sought to be avoided.

(9) Statesman, Calcutta, 2nd February 1949, p. 1.

(10) Dr. Ambedkar, Constituent Assembly Debates, Vol. VII, p. 700.

## CLAUSE (4)

*Scope of Clause (4) : Reservation for Backward classes.*—This clause empowers the State (as defined in Article 12) to reserve, in the services under it, appointments or posts in favour of any 'backward class of citizens'. The term 'backward', however, is not defined anywhere in the Constitution. The determination of the question whether any class is so backward ■ to require special representation in the services is left to the authority concerned. The authority has no discretion ■ to persons or 'members' within a specified class. If the State selects ■ particular class ■ backward within the meaning of this clause, any member of that class who is denied that reservation may go to the Court, in view of 'equal protection' [Article 14].

It ■■■■ that the absence of a definition of the word 'backward' or of centralisation of the authority to make such reservation, may lead to bitterness and "misuse of the provision to obtain preferential treatment". Of course, Dr. Ambedkar explained that the expression 'backward class' referred to the 'Scheduled Castes and Tribes' and not any other minority community. But the very fact that the words 'Scheduled Castes and Scheduled Tribes' are used in Article 335, while ■ different expression is used in the present clause would lead to a different legal interpretation, so that the present clause may include persons who do not belong to the Scheduled Castes and Tribes. As already stated, the choice of classes under the present clause is left to the authority concerned. It was observed by Dr. Ambedkar in the Constituent Assembly, that if the State included ■ very large number of classes within the reservation permitted by this clause, an individual who is aggrieved may go to the Court for a declaration that the reservation is *ultra vires*.<sup>11</sup> It is submitted that in such cases, the Court would be slow to interfere with the 'opinion' of the State unless it is an 'abuse' of the power or a fraud ■ the Constitution.<sup>12</sup> The Court would not, ordinarily, substitute its own view for that of the Legislature ■ to whether a class is 'backward' or not.<sup>13</sup>

*Analogous Provisions.*—The provisions of Article 335 should be taken into consideration along with the present clause. While that article relates specifically to Scheduled Castes and Tribes, the present clause refers to 'backward classes' generally. While the present clause authorises the State to make 'reservation' of posts by legislation, Article 335 authorises the State to appoint persons belonging to these Castes and Tribes to any post without such reservation, having regard only to the efficiency of administration. Of course, the present clause is also not a mandatory provision, but simply empowers the State to make such provision. The provision in Article 336 relating to Anglo-Indians is only temporary.

There is no reservation of posts for any other minority community under this Constitution.

## CLAUSE (5)

*Scope of Clause (5) : Office relating to denominational institution.*—Since every religious denomination is given the right to maintain its own institutions, subject to laws made by the State for the administration of their property [Article 26 (d)], the State shall have the authority to make laws relating to appointments in connection with such administration. The present clause says that in making such laws the State shall be competent to reserve such appointments to members of such particular denomination.

(11) Constituent Assembly Debates, Vol. VII, p. 702.

(12) Cf. *U.S. v. Pierce Lines*, (1945) 327 U.S.

515 (536) *A.-G. for Alberta v. A.-G. for Canada*, A.I.R. 1939 P.C. 53.

(13) Cf. *Colegrove v. Green*, (1945) 328 U.S.



**17.** “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

Abolition of Untouchability.

*Scope of Article 17: Abolition of Untouchability.*—The complete abolition of untouchability was one of the visions of Mahatma Gandhi in his ‘Ramrajya’. The present article adopts the Gandhian ideal without any qualification. ‘Untouchability’, however, is not defined in the Constitution, presuming that it is known to all. But the word is understood to cover different acts in different parts of India and the only common feature amongst them may be said to be the humiliation of the person who is ‘untouchable’. Mahatma Gandhi coined the word ‘Harijan’ to name these untouchables. Untouchability is a product of the Hindu caste system; but racial segregation in the U.S.A., South Africa (p. 61, *ante*) or other European countries is virtually a form of untouchability.

‘Untouchability’ in any form is made an offence. It may be submitted that in construing the meaning of the words ‘any form’ reference may be made to the ideal of ‘fraternity assuring the dignity of the individual’ in the Preamble. Any act or conduct by which a person is put to humiliation or social degradation merely on the ground of his birth would thus be an offence. The punishment for this offence is left to legislation by Parliament [Article 35 (a) (ii)], so as to ensure uniformity. It may be expected that in making such laws, Parliament will specify the different acts which would be punished as offence under the present article.

*Analogous Provision.*—Article 35 (a) (ii) confers the legislative power to Parliament, exclusively.

**18.** (1) No title, not being a military or academic distinction, shall be conferred by the State.

Abolition of titles.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

#### OTHER CONSTITUTIONS.<sup>14</sup>

*United States of America.*—Article I, section 9 (8) says—

“No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept any present, emolument, office, or title of any kind whatever from any king, prince, or foreign State.”

*Eire.*—Section 40 (2) of the Constitution of 1937 says—

“(1) Titles of nobility shall not be conferred by the State.

(2) No title of nobility or of honour may be accepted by any citizen except with the prior approval of the Government.”

(14) See also Article 73 of the Constitution of Danzig; Article 109 of the Weimar; Article 106 (3) of the Czechoslovak; Section 4, Swiss Constitutions.

*Japan.*—Article XIV says—

“Peers and peerage shall not be recognised. No privilege shall accompany any award of honour decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who holds or hereafter may receive it.”

### INDIA

*Object of Article 18: Abolition of Titles.*—This is a radical application of the principle of democratic equality. It seeks to prevent title being abused for corrupting the public life of the country ■ happened ■ India, particularly during the latter part of British rule. Since 1947, British Government accepted the principle that the Crown would not confer titles on any citizen of British India, except for military excellence. So, between 1947 and the commencement of this Constitution, no titles other than military and academic distinctions have in fact been conferred upon the citizens of India. The object of the Article is to maintain that state of affairs and to prevent the growth of any nobility in India.

*Analysis of the Article.*—Clause (1) is ■ prohibition upon the State, as defined in Article 12. So, no authority in India shall be competent to confer any title, barring academic or military distinctions. Clauses (2) to (4) relate to foreign States. Clause (2) prohibits ■ citizen of India to receive any title from any foreign State. This is an absolute bar and is more stringent than section 40 (2) of the Constitution of Eire. Clause (3) is a prohibition upon a citizen of ■ foreign State who may be in the employ under any authority in India; he is debarred from accepting any title from any foreign State without the consent of the President. Clause (4) is a prohibition upon citizens of India ■ well as of other States who hold office under any authority in India, against accepting, without consent of the President, any present, emolument or office of any kind from or under any foreign State. The scope of this clause is thus wider than that of clauses (1) to (3).

*‘Title’.*—A title is something that hangs to one’s name, ■ ■ appendage. Military or academic distinction are specifically excepted from the prohibition. What this clause seeks to prohibit is conferment of ‘titles’ by the State. It does not prevent the State from otherwise honouring a citizen for good work. It is to be noted that existing titles of Rulers of Indian States under pre-constitution covenants, are maintained by Art. 362, *post*.

*‘By the State.’*—This clause only prevents the State (as defined in Article 12) from conferring any title. It does not prevent other institutions such as Universities or other public institutions to confer titles or honours by way of honouring their leaders or men of merit. It merely prevents the Government of the day or the party in power to offer inducements or to corrupt people in order to build up their party.

*‘Foreign State’.*—See under Article 367 (3), *post*.

### Right to Freedom

Protection of certain rights regarding freedom of speech, etc.

**19.** (1) All citizens shall have the right—

- (a) to freedom of speech and expression ;
- (b) to assemble peaceably and without arms ;
- (c) to form associations or unions ;
- (d) to move freely throughout the territory of India ;
- (e) to reside and settle in any part of the territory of India ;
- (f) to acquire, hold and dispose of property ; and
- (g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

#### GENERAL

*Scope of Art. 19: Seven Freedoms.*—Art. 19 of the Constitution guarantees seven fundamental rights, which may be styled as the seven 'freedoms': viz., (1) freedom of speech and expression, (2) freedom of assembly, (3) freedom of association, (4) freedom of movement, (5) freedom of residence and settlement, (6) freedom of property, (7) freedom of profession, occupation, trade or business. The scope of the guarantee has, however, been defined by limitations contained in the Article itself. The Article, thus, may be said to consist of two parts—(a) the declaration of the rights, in Cl. (1), comprising seven sub-clauses; (b) the limitations contained in the five clauses, (2) to (6), each governing one or more of the sub-clauses of Cl. (1).

*The Limitations in general.*—Absolute or unrestricted individual rights do not, and cannot exist, in any modern State. This is the position in England<sup>15</sup> where there is no constitutional guarantee of fundamental rights. And this is

(15) *Liversidge v. Anderson*, (1942) A.C. 306 (261).



equally the position, as explained by the Courts, in the United States,<sup>16</sup> notwithstanding the constitutional guarantee of individual rights.

In the *United States*, there was no limitation imposed upon any of the fundamental rights added to the Constitution by the first Ten Amendments of 1791. But it was soon realised that for the maintenance of public order, to prevent corruption of the public morals, incitement to crime and the like, some limitations must of necessity be imposed upon the liberty of the individual. The Supreme Court, in interpreting the Constitution had, therefore, to invent,<sup>17</sup> the doctrine of 'Police Power' of the States, under which the States might impose such restrictions upon the fundamental rights as are necessary to protect the common good. "The liberty of the individual to do as he pleases, even in *innocent* matters, is not absolute. It must frequently yield to the common good."<sup>18</sup> In other words, the police power is founded on the theory that—"the whole is greater than the sum total of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State shall suffer."<sup>19</sup>

In an organized society, without which there cannot be any safeguard of individual rights, there cannot be any right which is injurious to the community as a whole. The police power is thus the authority to establish those rules of good conduct and neighbourliness which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as that is reasonably consistent with a corresponding enjoyment by others.<sup>20</sup>

Instead of leaving the question of limitation entirely to the Courts in each case as is presented before them, *our Constitution* improves upon the American Constitution, by outlining the *scope* of the limitations in the Constitution itself, and by authorising the State to restrict the exercise of the freedoms guaranteed by the earlier part of Art. 19, within the limits of the restricting Cls. (2) to (6), which may be said to be a codification of the doctrine of 'police powers'. The question that next arises is "how far, if at all, would the Courts be competent to adjudicate upon the validity of the restrictions so imposed by the State under any of the Cls. (2) to (6)?"

It might seem from Art. 13 (*ante*) that any law, whether previous or subsequent to the commencement of the Constitution (which may be in force for the time being), would be void if inconsistent with any of the fundamental rights guaranteed by the Constitution. If the matter stood thus, the Courts would have been entitled to declare any law abridging any of the seven freedoms under discussion, as *ultra vires* or unconstitutional, without any exception. But the words "Nothing in sub-clause . . ." at the beginning of each of Cls. (2) to (6) imply that the rights declared in Cl. (1) shall be subject to the *exceptions* mentioned in Cls. (2) to (6) and that any existing law or any law hereinafter made by the State in relation to these exceptional subjects shall be valid even though they may be inconsistent with the general declarations made in Cl. (1). For example, a law imposing civil or criminal penalty for a defamatory publication is good, even though it may be an apparent restriction of the right of freedom of expression.

But then, has the Court any power to pronounce a law as unconstitutional on the ground that it is not really covered by the exception clause under which the restriction is sought to be imposed? A difference, on this point, is to be

(16) *Schenck v. United States*, (1919) 249 U.S. 47.

(17) *Gillow v. New York*, (1925) 168 U.S. 652.

(18) *Adkins v. Children's Hospital*, (1923) 261 U.S. 525.

(19) *Holden v. Hardy*, (1896) 169 U.S. 366.

(20) Cooley, *Constitutional Law*, p. 289. See also *License Cases*, (1847) 5 How. 504; *Barbier v. Connelly*, (1885) 113 U.S. 27; *Noble State Bank v. Haskell*, (1911) 219 U.S. 104.

observed as between Cl. (2) on the one hand, and Cls. (3) to (6) on the other. In the *United States*,—"determination by the Legislature of what constitutes proper exercise of Police power is not final or conclusive, but is subject to supervision by the Courts."<sup>21</sup>

(a) Now, so far as Cls. (3) to (6) of Art. 19 of our Constitution is concerned, the addition of the word "reasonable" enables the Court to determine not only whether the impugned restrictive law is *in fact* in the interest of public order, morality, or health (as the case may be), but also *whether the restriction sought to be imposed by the legislation is reasonable*, having regard to the *objective* test, *viz.*, whether the restriction has reasonable relation to the authorised purpose or is an arbitrary<sup>22</sup> abridgement of the freedom guaranteed by the Article under the cloak of any of the exceptions. In short, under Cls. (3) to (6), the test of reasonableness is to be applied both as to the *necessity* for the "restriction" as well as to the *means* adopted for securing that end. Here, then, the Indian Constitution has adopted the principle of judicial supervision of legislative and executive action from the American Constitution.

To determine what is a "reasonable" restriction of individual liberty in the collective interest, would be however no easy task for the Court. To draw that line is an eternal problem of political society; it is "a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind."<sup>23</sup>

(b) But as regards Cl. (2),—once it is held by the Court that the impugned law relates to any of the matters referred to in that clause, *e.g.*, "security of the State," the Court would be powerless to question the *propriety* or *reasonableness* of the restriction imposed by that law. For example, once an enactment restricting the freedom of expression is found to relate to the "security of the State," the Court would be powerless to say that the *means* adopted by the legislation is bad, *e.g.*, demanding security from the Press, or imposing censorship in a time of peace,—things *which* do not exist in a free country like England or the U.S.A.

In the *United States*, a legislation abridging the freedom of expression or of the Press would be upheld as valid by the Courts only if the curtailment of liberty is justified by the "*clear and present danger test*"<sup>24</sup> *viz.*, that the utterance, if allowed, would *really* imperil safety,—"*the substantive evil must be extremely serious and the degree of imminence extremely high.*"<sup>25</sup>

But in *India*, if the State legislates that a particular measure is necessary in the interest of security of the State, the Court shall have no power to question whether the security of the State has, in fact, been in peril or, in other words, whether the legislation is uncalled for or unwarranted in the condition of the country. The utmost that the Court will be able to examine is whether the contents of the legislation in effect relate to security of the State or to some other matter; in other words, whether it is a *colourable* legislation to effect some other purpose.<sup>1</sup>

From the above standpoints thus, the criticism is justified that so far as these freedoms are concerned, the Constitution of India does not hold out any substantial advance over the existing state of affairs.

(21) *Meyer v. Nebraska*, (1923) 262 U.S. 390 (400).

(22) *Brushaber v. Union R.R. Co.*, (1916) 240 U.S. 1; *Wolff Packing Case*, (1923) 262 U.S. 532; *Nebia v. N.Y.*, (1934) 291 U.S. 502.

(23) *Harrison v. Schaffner*, (1941) 312 U.S. 579 (583).

(24) *Schenck v. United States*, (1919) 249 U.S. 47; *Thornhill v. Alabama*, (1940) 310 U.S. 88.

(25) *Bridges v. California*, (1941) 314 U.S. 252 (263).

(1) *G. W. Sadlery Co. v. The King*, (1921) A.C. 91; *Megh Rai v. Alla Rakhia*, (1942) 5 F.L.J. (F.C.) 33.

*The standard of 'reasonableness'.*—It has already been indicated that by the of the words 'reasonable restriction' in Cls. (3) to (6) of the present Article, the Indian Constitution has imported, within these clauses, the American doctrine of judicial review. What is a reasonable restriction of the freedom guaranteed by the various Cls. (1) (b) to (g) is a matter to be decided by the Court, when a case comes before it, in the light of the circumstances attending the case, and it is obvious that there being no fixed standard of reasonableness, the "Judges" who constitute the particular Court would be largely guided by their own economic and social philosophy,<sup>2</sup> subject, of course, to precedents. Of these the American precedents would be of particular value to our Courts at least so long as our own body of case-law does not build up. The concept of reasonableness is nothing but that of harmonising individual rights with collective interests. "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."<sup>3</sup> . . . "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no reasonable or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution".<sup>4</sup> In another case,<sup>5</sup> the Supreme Court observed—

"The fundamental rights of freedom of speech, of the press and of assembly, guaranteed by the Constitution may be abused by using speech or press or assembly in order to incite violence or crime. The people through their legislatures may protect themselves against that abuse. But the 'legislative intervention' can find constitutional justification only by dealing with the abuse. The rights themselves cannot be curtailed. . . ."<sup>5</sup>

Though the means employed must have a reasonable and substantial relation to the purposes of the restriction, the means must at the same time be adequate. Where the object of the restriction is necessary in the public interests, the Court must leave to the Legislature a large liberty in the choice of the means.<sup>6</sup> In extreme cases thus, a 'restriction' of the user of property may necessitate its total 'destruction', e.g., adulterated food, animals, etc., having contagious disease, a building on fire, gambling devices.<sup>7</sup> Again, protection of the fisheries of a State in the 'interests of the general public' may under particular circumstances justify a summary destruction of the fishing nets.<sup>8</sup> When property is thus destroyed under the present powers, no question of compensation arises.<sup>9</sup> This is clear from our Art. 31 (2), which provides for compensation only in the case of 'acquisition' for public purposes. On the other hand, destruction of a property under the 'police power' would be unreasonable, if there are legitimate purposes to which the contraband property may be put.<sup>8</sup> Of course, ordinarily 'restriction' will simply require "regulation", e.g., the regulation of the practice of medicine to protect the health of the community or the regulation of movements to prevent the spread of contagious diseases. In more serious cases, it would require "prohibition", e.g., of the sale of adulterated food or drugs, prohibition of brickyards in thickly populated cities.<sup>9</sup> In short, the extent to which regulation may reasonably go varies with different kinds of business. Thus, "the extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legis-

(2) Cf. Kelly & Harbison, American Constitution, 1948, pp. 522, 537 ff.

(3) *Lawton v. Steele*, (1894) 153 U.S. 133 (137).

(4) *Mugler v. Kansas*, (1887) 123 U.S. 623.

(5) *De Jonge v. Oregon*, (1937) 290 U.S. 353.

(6) *Lawton v. Steele*, (1894) 152 U.S. 133.

(7) See Burdick, American Constitution, 1922, pp. 561-562.

(8) Cf. Dissenting judgment in *Lawton v. Steele*, (1894) 152 U.S. 133.

(9) Vide, generally, Burdick, American Constitution, 1922, pp. 563-4.



lative discretion only. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared."<sup>10</sup>

But a restriction is "unreasonable" if it imposes an unreasonable limitation upon the freedom in question. Thus, a restrictive criminal statute is bad if it does not fix an *ascertainable* standard of guilt.<sup>11</sup>

*Who may impose the restrictions.*—The restrictions referred to in Cls. (2) to (6) of Art. 19 may be imposed by any of the authorities that come within the comprehensive definition of a "State", in Art. 12. The authority to impose limitations on the freedoms is thus wider in the Indian Constitution than in the American, since in the *United States*, the "Police Power" has been held to belong to the States, i.e., the units of the Federation to pass legislation restricting fundamental rights in the interest of the "health, morality, safety or general welfare" of its citizens.<sup>12</sup> Of course the Union may also exercise such powers within a limited sphere, as an *incident* of its powers over inter-State and foreign commerce.<sup>13</sup> But local authorities have no *powers* of this nature without legislation by the State Legislatures.

In *India*, the power of imposing limitations has been conferred not only on the States and the Union, but also on *local and other authorities*. To leave the local authorities free to impose limitations upon rights guaranteed by the Constitution, no doubt, undermines the value of the declarations. Further, not only legislative but *executive* authorities shall also have this power.

*"Existing law"*.—See definition in Art. 366 (10), *post*. It refers to any law, rule, etc., existing before the commencement of the Constitution.

The existing laws shall continue in force until repealed or amended by a competent Legislature or other competent authority [Art. 372 (1)]. Cls. (2) to (6) of Art. 19 validate the existence of those existing laws relating to the matters enumerated in these clauses, notwithstanding their conflict with the freedoms declared by Cl. (1),—subject, of course, to other provisions of the Constitution.

*Analogous Provisions.*—Suspension of these rights in emergencies,—see Art. 358, *post*.

## FREEDOM OF SPEECH AND EXPRESSION<sup>14</sup>

### OTHER CONSTITUTIONS<sup>15</sup>

*U. S. A.*—The First Amendment to the Constitution of the United States (1791) lays down—

"The Congress shall make no laws. . . . abridging the freedom of speech or of the press. . . ."

On this clause, the Supreme Court has observed—

"The safeguarding of these rights to the ends that men may speak as they think matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communications of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."<sup>16</sup>

(10) *Wolff Packing Co. v. Court of Industrial Relations*, (1923) 262 U.S. 522 (539).

(11) *Chine v. Frink Dairy*, 274 U.S. 445.

(12) *Gitlow v. New York*, (1925) 268 U.S. 652; Burdick, *Law of the American Constitution*, p. 559.

(13) *The License Cases*, (1847) 5 How. 504.

(14) As to the need of Freedom of Speech,

see my article on 'The Seven Freedoms' in (1949) F.L.J. p. 15 (Jour.).

(15) See also Art. 55, Switzerland, 1874; Art. 117 (1), Czechoslovakia; Art. 79, Danzig, 1922; Art. 125, Soviet Russia (U.S.S.R.), 1936; Art. 118, Weimar Constitutions.

(16) *Thornhill v. Alabama*, (1940) 310 U.S. 88.

*England.*—The right of freedom of discussion like all other individual rights, is, in England, not based on any declaration embodied in a constitutional document, or in any particular rule of statute or common law,—but is based on the ordinary rule of law that no man is to be punished except for a distinct breach of the law. Freedom of discussion thus means nothing more nor less than this that a British subject may speak anything he likes, so long as he is not guilty of (1) defamation, (2) sedition, (3) blasphemy, or (4) obscenity. As *Odgers* puts it,—“Our present law permits any one to say, write, and publish what he pleases; but if he make a bad use of this liberty he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment. In short, freedom of speech or discussion consists in the right of a citizen to speak or write what he chooses provided the law is not infringed (*Dicey*).”

*Eire.*—Sec. 40 (6) (1) of the Constitution of Eire says:—

“The State guarantees liberty for the exercise of the following rights, subject to public order and morality:—

(i) The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however a matter of such grave import to the common goods, the State shall endeavour to ensure that organs of public opinions, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law.”

*Japan.*—Art. XXI says—

“Freedom of assembly, association, speech, and press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.”

*Burma.*—Art. 17 (j) of the Constitution of the Union of Burma, 1948, says—

“There shall be liberty for the exercise of the following rights, subject to law, public order and morality:—

(i) The right of the citizens to express freely their convictions and opinions.”

## INDIA

### MEANING OF FREEDOM OF ‘SPEECH’ AND ‘EXPRESSION’

The words “speech” and “expression” may seem simple enough not to require any explanation. But no word is perhaps too plain for the purpose of a legal interpretation in the Courts.

Freedom of expression means the right to express one’s convictions and opinions freely, by word of mouth, writing, printing, picture or in any other manner<sup>17</sup> (addressed to the eyes or the ears). It would thus include not only the freedom of Press, but the expression of one’s ideas by any visible representation, such as by gestures and the like<sup>1-3</sup>. Expression, naturally, presupposes a second party to whom the ideas are expressed or communicated. In short, expression includes the idea of “publication”<sup>4</sup>.

We get a reliable interpretation of the significance of “freedom of expression” in the Covenant on Human Rights adopted by the United Nations in December, 1948:—“Every person shall have the right to freedom of thought

(17) Cf. Art. 118, Weimar Constitution; Art. 117 (1), Czechoslovakian Constitution; Art. 79, Danzig Constitution; Art. (6)

(1). Constitution of Eire.  
(1-3) Cf. Sec. 499, Indian Penal Code.  
(4) Chinese Constitution, Art. 11.

and expression without interference by governmental action: this right shall include freedom to hold opinions,) to *seek, receive and impart* information and ideas regardless of frontiers, either orally, by written or printed matter, in the form of Article, or by *legally operated visual or auditory devices.*"<sup>5</sup>

Now, once it is held that the freedom of expression includes the freedom of communication, it would follow that secrecy and freedom from censorship of all correspondence,—by the postal, telegraphic or telephone services should also be included in the guarantee of freedom of expression. Some of the Constitutions expressly guarantee the secrecy of correspondence,<sup>6</sup> subject to exceptions. In *England and the U. S. A.*, the right of the Postal authorities to exclude from the mails any objectionable or obscene matter is maintained, but beyond this, there is no practice of censorship of correspondence in time of peace.

(In our Constitution, there is no mention of the right to secrecy of correspondence, and an attempt to introduce it was lost in the Constituent Assembly.) But if eventually, the Courts hold that secrecy of correspondence is included in the freedom of expression, the interception and interruption of postal articles, telephonic messages, etc., shall be justifiable only if such interference is covered by any of the exceptions of clause (2) of the present Article. *e.g.*, that such interception is necessary in the interest of "security of the State."<sup>7</sup>

(Freedom of speech obviously includes the freedom of *discussion*, and in the *United States*, it has been interpreted to include all that may be said to be covered by 'freedom of expression'. Thus, freedom of speech has been interpreted to include *dissemination of knowledge*, according to one's own ideas, so long as that does not infringe the collective interests, or the object is not purely *commercial*.<sup>8</sup> Thus, it has been held that—(a) the State cannot levy a tax on the sale of religious literature from door to door,<sup>9</sup> or to prohibit it altogether;<sup>10</sup> (b) a Municipality cannot proscribe the distribution of any literature on the streets, save commercial advertisement,<sup>11</sup> though it can enact regulation in the interests of public safety, health and morality or to control obstruction of traffic.<sup>12</sup>

It has further been held, rather widely, that freedom of speech includes the right of labour to publicize the facts of a labour dispute even by peaceful picketing, for, picketing is an effective means whereby the people affected may enlighten the public on the nature and causes of the labour dispute.<sup>13</sup> Of course, picketing would be unlawful as soon as it becomes violent.<sup>14</sup>

(5) Such as the radio, cinematograph, gramophone, loudspeaker, etc.

(6) Art. 117, Weimar Constitution; Art. 116, Czech; Art. 17, Yugoslavia; Art. 78, Danzig; Art. 128, U.S.S.R.; Art. 12, China; Art. 21, Japan.

(7) In this respect, the provisions of Sec. 5 of the Indian Telegraph Act, 1885 and of Sec. 26 of the Post Office Act, 1898 are very wide. These authorise any officer specially authorised by the Government to intercept or to take possession of telegraphic messages and postal articles not only on the occurrence of a public emergency but also in the interest of the public safety or tranquillity, and that a certificate of the Central or Provincial Government as to the existence

of such interest is conclusive proof. There is no provision corresponding to this in times of peace either in the U.S.A. or in England.

(8) *Jameson Texas*, 318 U.S. 413.

(9) *Murdock v. Pennsylvania*, (1943) 319 U.S. 105.

(10) *Martin v. Struthers*, (1943) 319 U.S. 141.

(11) *Valentine v. Chrestensen*, (1942) 316 U.S. 52.

(12) *Schneider v. Irvington*, (1942) 308 U.S. 147.

(13) *Thornhill v. Alabama*, (1940) 310 U.S. 88; *Cafeteria Employees v. Angelos*, (1943) 320 U.S. 293.

(14) *Milk Wagon Drivers v. Meadowmoor Dairies*, (1941) 312 U.S. 287.



CL. (2): RESTRICTIONS UPON FREEDOM OF SPEECH AND EXPRESSION.—It has already been pointed out that in no country,<sup>15</sup> is there any absolute freedom of expression.

In *England*, the limit of the freedom is that imposed by the ordinary law relating to defamation, sedition, blasphemy and obscenity, contempt of Court.<sup>1</sup> [see p. 73, *ante*].

This is substantially the law also in the *United States*, where the restrictions have been imposed under the doctrine of 'Police power of the State'. There is, however, no reference to 'blasphemy', and instead of 'sedition', we have such words in the pronouncements of the Supreme Court, as "acts of violence and the overthrow by force of orderly government"<sup>16</sup>, "overthrow of established government by force or unlawful means"<sup>17</sup>; and the limitation imposed by the Constitution itself by the word "treason". [Art. III, Sec. 3 (1)].

Before referring to the restrictions in the Constitution of India, we may profitably refer to the United Nations Covenant on Human Rights, wherein we may expect the representative opinion of the civilised world relating to this matter:

("The right to freedom of expression carries with it duties and responsibilities. Penalties, liabilities or restrictions limiting this right may therefore be imposed for causes which have been clearly defined by law, but only with regard to—(a) Matter which must remain secret in the vital interests of the State; (b) Expressions which directly incite persons to alter by violence the system of government; (c) Expressions which directly incite persons to commit criminal acts; (d) Expressions which are obscene; (e) Expressions injurious to the fair conduct of legal proceedings; (f) Expressions which infringe rights of literary and artistic property; (g) Expressions about other persons which defame their reputations or are otherwise injurious to them without benefiting the public.")

The restrictions included in Cl. (2) of Art. 19 of *our* Constitution are—

- (i) Libel, slander, defamation;
- (ii) Contempt of Court;
- (iii) Any matter which offends against decency or morality;
- (iv) Any matter which undermines the security of the State;
- (v) Any matter which tends to overthrow the State.

I shall now explain these restrictions, with reference to existing laws. But this reference to existing laws is by no means exhaustive, as to exhaust the vast mass of the law is beyond the scope of this work.

(I) *Libel, Slander, Defamation*.—Defamation is ■■ injury to a man's reputation. The freedom of speech or expression does not entitle ■ person to injure another ■■ his trade or to lower him in the esteem of his fellow-beings, or to expose him to hatred, ridicule or contempt, by publishing ■ false statement regarding that other person, without lawful justification. Defamation is the generic term of which 'libel' and 'slander' are species, known to English law. In the *existing law of India*, the criminal law of defamation as contained in Sec. 499 of the Indian Penal Code recognizes no distinction between defamation in the spoken and the written forms, or between defamatory statement addressed to the ear or to the eye. Even ■■ regards the civil remedy of damages, so far as the mofussil ■ concerned, the High Courts are agreed that the artificial distinction

(15) For the restrictions contained in S. 40 (6) (1) of the Constitution of *Eire*, see p. 73, *ante*.

(16) *Gompers v. Buck's Stove*, (1911) ■■

U.S. 418.

(17) *Gillow v. New York*, (1925) ■■ U.S. 652.

of English Common law is not applicable and action lies for spoken defamation without special damages. Of course, so far as the Presidency towns are concerned, there is some difference of opinion.<sup>18</sup> But even in the English law of damages, one part of the common law rule was branded as 'unsatisfactory' and 'barbarous',<sup>19</sup> and that led to the supersession of that rule by the Slander of Women Act, 1891. Nor is the distinction between 'libel' and 'slander' an easy matter where both the ear and the eye are simultaneously addressed.<sup>20</sup>

*Existing Indian Law.*—The criminal law relating to defamation is contained in Sec. 499 of the Indian Penal Code. The civil law relating to defamation is still uncoded in India and follows the English common law,<sup>21</sup> subject to differences noted above.

*Legislative power.*—The legislative power relating to defamation is *concurrent* under the Constitution, being included in Entry 8 of List III, Sch. VII, *post*, relating to 'Actionable wrongs'.

(II) *Contempt of Court.*—There are three sorts of contempt of a Court<sup>22</sup>: (a) one kind of contempt is scandalising the Court itself; (b) there may be likewise a contempt of the Court in abusing parties who are concerned in causes in the Court; (c) there may also be a contempt in prejudicing mankind against persons before the cause is heard. But the above classification is by no means exhaustive. Broadly speaking, it consists of any conduct, that tends to bring the administration of justice into disrespect or to obstruct or interfere with the due course of justice.<sup>23</sup>

These three kinds of contempt are known as 'criminal contempt' as distinguished from 'contempt in procedure,' or civil contempt' consisting in disobedience to a Court's order or process involving a *private injury*.<sup>24</sup>

(a) *Scandalising the Court.*—Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or lower his authority, is a contempt of Court,<sup>25</sup> *e.g.*, imputing corruption, misconduct or incapacity in the discharge of his public duties.<sup>1</sup> Hence, any criticism which tends to bring into ridicule and contempt the administration of justice is contempt.<sup>2</sup> The object of the punishment is not the protection of the Judges but the protection of the public themselves from the mischief they will incur if the authority of the tribunal is impaired.<sup>3</sup> But the above rule is subject to important *qualifications*:

(i) The power to punish for scandalising the Court is a weapon to be used sparingly and always with reference to the administration of justice<sup>4</sup> and not for vindicating personal insult to a judge, not affecting the administration of justice: "No doubt it is galling for any judicial personage to be criticised publicly as having done something outside his judicial proceedings which was ill-advised or indiscreet. But if a Judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them."

(18) Cf. 51 Bom. 167; 62 M.L.J. 608; *contra* 28 Cal. 452.

(19) *Lynch v. Knight*, (1861) 9 H.L.C. 577.

(20) Cf. *Yousouf v. Metro-Goldyn*, (1934) 50 T.L.R. 581 (C.A.).

(21) See any Text-Book on the Law of Torts, *e.g.*, by Pollock, Salmond, Clark & Lindsell, Winfield; Odgers on Libel & Slander.

(22) *Read v. Huggonson*, (1742) 26 F.R. 683.

(23) *R. v. Gray*, (1900) 2 Q.B. 36 (40).

(24) Halsbury, 2nd Ed., Vol. 7, p. 2.

(25) *R. v. Grey*, (1900) 2 Q.B. 36 (40).

(1) *Surendranath v. Chief Justice*, (1885) 10 Cal. 109 (P.C.).

(2) *The King v. Editor of Statesman*, (1928) 44 T.L.R. 301.

(3) *R. v. Almon*, (1765) Wilmot's Notes 243.

(4) *Debi Prasad v. King-Emperor*, (1943) 48 C.W.N. 44 (P.C.); *Shamdasani v. Emperor*, A.I.R. 1945 P.C. 134.

(ii) *Fair and reasonable* criticism of ■ judicial act in the interest of the public good does not amount to contempt. "Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against ■ judicial act ■ contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the *liberty of the press is no greater than the liberty of every subject*."<sup>5</sup>

"Whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and *not acting in malice or attempting to impair the administration of justice*, they are immune. Justice is not ■ cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."<sup>6</sup>

(b) *Obstruction of or interference with the due course of justice.*—Any speech or conduct which tends to influence the result of a pending trial, civil or criminal, or otherwise tends to interfere with the proper course of justice, amounts to contempt of Court.<sup>7</sup> (i) Anything which prejudices the Court against any party *before* the cause is heard, is contempt. Whether the Court is actually influenced by the act or statement is not material. The gist of the offence is conduct *calculated* to produce, so to speak, an atmosphere of prejudice in the midst of which the proceeding must go on."<sup>8</sup>

(ii) Similarly, it is contempt to prejudice ■ party to ■ *pending* trial. "The publication of injurious misrepresentations concerning parties to proceedings in relation to those proceedings may amount to contempt of Court, because it may cause those parties to discontinue or to compromise, and because it may deter persons with good causes of action from coming to the Court, and is thus likely to affect the course of justice".<sup>9</sup>

(iii) Words or action used in the *face* of the Court or in the course of proceedings may be a contempt, provided they *interfere* with the *course of justice*,<sup>10</sup> e.g., persisting in a line of conduct or use of language in spite of the ruling of the presiding Judge,<sup>11</sup> or threatening or attempting violence on the opponent or using language so outrageous and provocative as to be likely to lead to a brawl in Court.<sup>10</sup> But ■ mere insult to counsel or to the opposing litigant is very different from ■■ insult to the Court itself or to members of the jury. The power to punish for contempt should not be used to suppress merely *offensive* methods of advocacy.

*Existing Indian law.*—The Contempt of Courts Act (XII) of 1926, as amended by Act XII of 1937, gives the law regarding the powers of ■ High Court to punishing contempt either of itself or of its subordinate Courts.

Secs. 480-487 of the Criminal Procedure Code confer summary powers upon any Civil, Criminal or Revenue Court to punish contempts 'committed in the view or presence of' such Court.

Sec. 228 of the Indian Penal Code provides for the regular trial and punishment of the offence of 'offering any insult, or causing any interruption to any

(5) *R. v. Grey*, (1900) 2 Q.B. 36 (40).

(6) *Ambard v. Attorney-General of Trinidad*, A.I.R. ■■ P.C. 141.

(7) *R. v. Calra*, (1873) 9 Q.B. 219.

(8) *R. v. Tibbits*, (1902) 1 K.B. 77.

(9) *In re Thomas*, (1930) 2 Ch. 368.

(10) *Parashuram v. Emperor*, A.I.R. 1945 P.C. 134.

(11) *Ex parte Pater*, (1864) 5 B. ■ S. 299.



public servant, while such public servant is sitting in any stage of ■ judicial proceeding.' It thus provides for the punishment of certain contempts of inferior Courts otherwise than under the Contempts of Courts Act. But Sec. 228, I.P.C. professes to deal with these acts as a specific offence which is not styled as 'contempt of Court.'

*Legislative power.*—The legislative power as regards 'civil contempt' is included in Entry 13 of List III (see *post*), 'relating to 'civil procedure', while 'criminal contempt' of Court falls within the exclusive jurisdiction of Parliament as regards contempt of the Supreme Court [Entry 77 of List I]; but contempts of other Courts is a concurrent subject [Entry 14, List III].

(III) *Matter offending against decency or morality.*—In English law, the word 'obscenity' is used. But the Dictionary meaning of 'indecent' is identical with 'obscenity.' The word 'indecent' is also used in the same sense in the English statutes relating to obscenity such as the Indecent Advertisements Act and the Post Office Act. It has been held that the offence of obscenity consists in writing, making or publishing obscene books, pictures, etc., which have a tendency to deprive and corrupt those whose minds are open to immoral influence.<sup>12</sup> Purity of motive is no excuse for publication of indecent matter, but, if the manner and extent of the publication are within appropriate bounds, it is a good defence that the publication is for the public good as being necessary or advantageous to religion, science, literature or art.<sup>13</sup>

In the *U. S. A.*, the State, under its police powers, has the right to punish utterances tending to corrupt 'public morals',<sup>14</sup> such as indecent exposure, obscene language and obscene publications; to proscribe the distribution of obscene literature,<sup>15</sup> to prevent their publication,<sup>16</sup> or to deny them the use of the mails.<sup>17</sup> It has also been held that the freedom from previous censorship would not extend to theatrical performances, exhibition of moving picture or radio broadcasting, which are carried on as a business of profit.<sup>18</sup>

'Morality' is a far more vague word than 'indecent.' The difficulty of determining as to what would offend against 'morality' is enhanced by the fact that not only does the conception of immorality differ between man and man, but the collective notion of society also differs amazingly in different ages. Thus, it was not long ago that birth control *per se* was regarded as immoral. But since the Malthus doctrine of Population, birth control is regarded as a legitimate means of checking overpopulation. Annie Besant was convicted for publishing literature advocating contraception.<sup>19</sup> But in England or India, the publication of such literature from ■ scientific or medical standpoint is no longer regarded as an offence.

It is interesting to note that on the basis of the words 'public morality' in Art. 9 of the 1922 Constitution, the *Irish Free State*,<sup>20</sup> had passed the Censorship of Publications Act, 1929, establishing a Censorship of Publications Board to recommend the prohibition of publication of literature advocating methods of birth control, considering the 'literary, artistic, scientific or historic merit' of the publication.<sup>21</sup>

(12) *R. v. Hicklin*, (1868) 3 Q.B. 360.

(13) *R. v. Barracrough*, (1906) 1 K. B. 201.

(14) *Gillow v. N. Y.*, (1925) 268 U.S. 652.

(15) *Schneider v. Irvington*, (1942) 302 U.S. 147.

(16) *Near v. Minnesota*, (1931) 283 U.S. 697.

(17) *Popper v. U.S.*, (1899) 98 Fed. Rep.

423.

(18) *Mutual Film Corporation v. Industrial Commission*, (1915) 236 U.S. 230.

(19) *Rex v. Bradlaugh*, 3 Q.B.D. 607.

(20) The same words appear in Sec. 40 (6) (1) of the 1937 Constitution (see p. 72, ante).

(21) Vide *Kohn's Constitution of the Irish Free State*, 1932, p. 168.

*Existing Indian laws.*—Secs. 292-294 of the Indian Penal Code prohibit the sale ■ distribution of obscene literature and the doing of obscene acts or the uttering or singing of obscene songs, etc., in public places. Works of religion such ■ sculpture, painting, etc., in temples are exceptions to the above law. Secs. 20-23 of the Post Office Act (VI) of 1898, prohibit the transmission by post of obscene matter; while Sec. 18 (c) of the Sea Customs Act (VIII) of 1878, prohibits import of obscene literature. The Cinematograph Act (II) of 1918 provides for the censorship of films, while the Dramatic Performances Act (XIX) of 1876, similarly relates to dramatic performances.

*Legislative Power.*—*Vide* Entry 1 of List III, relating to 'Criminal law, including all matters included in the Indian Penal Code,' which is ■ concurrent power. Sanctioning of cinematograph films is ■ Union power [Entry 60, List I]; subject thereto, the States have power over theatres, dramatic performances, cinemas, amusements [Entry 33, List II.]

(IV) *Matter which undermines the security of the State.*—Perhaps the greatest trouble that any particular word of Art. 19 is capable of giving to the Courts under the Constitution, is likely to be created by the word 'security,' for ■ do not get any precise definition of this word which may be taken as indisputable. The Dictionary meaning of the word 'secure' is "untroubled by danger or apprehension, safe against attack, impregnable"<sup>22</sup> It would thus comprise both *external* and *internal* security of the State.<sup>23</sup> This is also clear from the use of the word 'security' elsewhere in the Constitution itself, *e.g.*, in Art. 352 (1), where it is stated that the 'security of India' may be threatened, "whether by war or domestic violence." At the same time, the use of the word 'security' in juxtaposition with the words "overthrow of the State" implies that acts undermining the security of the State need not necessarily be associated with violence. *Prima facie*, it seems that the phrase "security of the State" refers to acts less serious than those referred to by the other phrase "overthrow of the State." One thing may be mentioned at once. Any act which aims at disturbing 'public order' would affect or undermine the security of the State. As to what is meant by the maintenance of public order, we have got a useful guide in the English Public Order Act, 1936. Public order in this statute appears to be used more or less in the same sense ■ public peace. This statute makes the following acts illegal—(a) carrying unauthorised weapon, (b) wearing political uniform, (c) unlawful drilling or training in the arms, (d) disorderly conduct such as ■ of abusive words, etc., at public places, meetings and processions.<sup>24</sup> In short, the Act seeks to restrain quasi-military organisations for political purposes.

The expression 'public order,' however, is wider than 'public peace.' Thus, in India, while it has been interpreted to include prevention of communal disturbances<sup>25</sup> and strikes promoted with the sole object of causing unrest among workmen,<sup>2</sup> which ■ offences against public peace, it has also been held to include the prevention of internal dangers affecting 'public safety' such as adulteration of foodstuffs and other goods essential to the community, prevention of epidemics, etc.;<sup>3</sup> ■ propaganda for ■ State at war with India.<sup>3</sup>

(22) Oxford English Dictionary.

(23) Cf. *Tabarak v. Prov. of Bihar*, A.I.R. 1950 Pat. ■ (231).

(24) See also Unlawful Drilling Act, 1819; Public Meeting Act, 1908.

(25) *Rex v. It---* (1949) 4 D.L.R. 11 (All.); *Noor Mohammad v. Rex*, A.I.R. 1949 All. 120; *R. v. Majid*, (1949) F.

L.J. 133 (F.C.).

(1) *Om Prakash v. King-Emperor*, A.I.R. 1948 Nag. 199.

(2) *Nek Mohammad v. Province of Bihar*, A.I.R. 1949 Pat. 1 (F.B.).

(3) *R. v. Amir Hassan*, (1949) F.L.J. 137 (F.C.).

'Public order,'<sup>4</sup> has been held to include also 'public tranquillity', for if public tranquillity is disturbed, there would be a breach of the public order.<sup>5</sup> The expression 'public tranquillity' is not defined in the Indian Penal Code, but from the offences included in Chap. VIII of that Code, we may gather what is understood by this expression by the framers of the Code. These are—(1) Unlawful assembly; (2) Rioting; (3) Promoting enmity between different classes; (4) Affray.

If these unlawful acts affect the security of the State, incitement to commit these acts would also forfeit the freedom of expression guaranteed by the Constitution. Incitement to commit a crime<sup>6</sup> such as murder, may be said, in general, to undermine the security of the State.

According to the canons of interpretation, it is permissible to refer to previous and contemporary legislation in order to appreciate the meaning of a legal term or the power conveyed by it.<sup>6-a</sup> Now, at the time when the words "security of the State" were incorporated by the Constituent Assembly in Art. 19 (2), we had several Provincial enactments relating to Public Security, and we may refer to their contents to have an idea of the acts which may broadly speaking be referred to as affecting the "security of the State". Of course, it should not be supposed that the mere fact that any particular act is included in any of these Acts would preclude the Court from determining whether such act is an Act "undermining the security of the State" within the meaning of Art. 19 (2) of the Constitution.

According to the Bombay Public Security Measures Act (VI) of 1947, security of the Province includes—

"public safety, maintenance of public order, and the preservation of peace and tranquillity."

The West Bengal Security Act (W. B. A. III) of 1948, gives a list of such acts as endanger the "safety and stability of the Province". These include—

(a) Prevention of illegal acquisition, possession or use of arms. (b) Suppression of subversive acts, endangering communal harmony or safety or stability of the Province, such as looting, sabotage, prejudicing the recruitment or attendance of members of the Police force, fire brigade or other public servants or to tamper with the loyalty of such persons. (c) Suppression of goondas. (d) Maintenance of production, supplies and distribution of essential commodities, including means of their transport. (e) Prevention or control of entry in a protected place or area. (f) Control of quasi-military camps, unlawful drilling, unauthorised use of military uniforms at public places, etc.

The Act also punishes the publication of any statement or report which incites the commission of any of the subversive acts above-mentioned, and provides for *censorship* of the Press to prevent publication of such matter.

*Legislative power.*—See Entry 1, List II, Entries 1 and 3 of List III, of the 7th Sch.

(v) *Matter which tends to overthrow the State.*—The 'State', in the present context, is an abstract conception. The political existence of the State

(4) As to 'public order', see further under Entry 1 of List II, 7th Sch., *post*.

(5) *Om Prakash v. Emperor*, A. I. R. 1948 Nag. 199 (201); *Noor Mohammad v. Rex*, A.I.R. 1949 All. 120 (123).

(6) Cf. *Frohwerk v. U. S.*, (1919) 249 U.S. 204 (206).

(6-a) *Wallace v. I. T. Commissioner*, (1948) 2 M.L.J. 62; L.R. 75 I.A. 86: 2 D.L.R. 848 (P.C.); *Re. C.P. & Berar Motor Spirit Taxation*, (1938) 2 F.L.J. 6; *Ralla Ram v. Province of East Punjab*, (1949) 4 D.L.R. (F.C.) 8. (See p. 14, *ante*.)



is manifested in the existence of ■ established or orderly government, maintaining law and order in the society to which it relates.<sup>7</sup> To overthrow the State would thus mean "to overthrow *the established government by force or unlawful means.*"<sup>8</sup> It would thus include such acts as levying war against the State, adhering to the enemies of the State or giving them aid<sup>9</sup> and comfort, resisting the execution of law in the shape of an armed rebellion,<sup>10</sup> which are comprised within the term 'Treason' in England<sup>11</sup> ■ well ■ in the United States.<sup>12</sup>

This offence is also included in Secs. 121-123 of the Indian Penal Code, if ■ substitute the word 'Queen' by the word 'State'.

The words 'tending to' implies that the actual result of the act is immaterial and acts which may indirectly bring about an overthrow of the State, *e.g.*, an *incitement* to ■ armed revolution or an infructuous attempt to create ■ rebellion, inciting foreigners to invade the realm,<sup>13</sup> attempting to overawe by force or show of force the Governments of India and the States or the Executive Heads such ■ the President and his Ministers or the Governors and their Ministers, in the exercise of their powers,<sup>14</sup> would come within this expression. So also would the offences included in Secs. 128-138 of the Indian Penal Code, *e.g.*, abetment of mutiny, aiding escape of prisoner of State or of war and offences under the Official Secrets Act. Interference with the legitimate programme of the Government for the raising of the forces<sup>15</sup> or the conduct of the war, *e.g.*, publication of information as to the movement of troops,<sup>16</sup> may also come within the scope of this expression (provided, of course, there is a 'clear and present danger'<sup>17</sup> to the safety of the State). Thus, in the U.S.A., it has been held that the propagation of political or economic theories by ■ fanatic<sup>18</sup> or the circulation of anti-war literature among *all* sections of the public generally<sup>19</sup> ■ distinguished from the armed forces specifically, cannot be punished as acts tending to overthrow the State.

This brings us to the interesting question of 'sedition' or 'seditious libel'. Sedition, ■ understood in *England* is a comprehensive term<sup>20</sup> and includes much that may be termed ■ "offence against the State."

"Sedition embraces all those practices whether by word, deed or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to subvert the Government."<sup>20</sup>

These principles of the English law of sedition would be valid under the Constitution of India, being covered by the words "security of the State" or "overthrow of the State".

But what is understood as 'sedition' in India, and is embodied in Sec. 124-A of the Indian Penal Code, is only one aspect of the English Law of sedition, *viz.*, seditious libel, or publication of matter calculated to bring the Sovereign or the Government into hatred or contempt or to excite disaffection towards them.

(7) Salmond's Jurisprudence, 1948, p. 130; Willoughby, Nature of the State, p. 8.

(8) So it has been interpreted in the U.S.A. *Gompers v. B. & S. Stove*, (1911) 221 U.S. 418; *Gitlow v. N. Y.*, (1925) 268 U. S. 652.

(9) For ■ list of such acts, see Willoughby, Constitutional Law, Vol. II, p. 1129.

(10) *United States v. Vigol*, (1795) 2 Dallas, 346.

(11) Chalmers ■ Hood Phillips, Constitutional Law, pp. 439-441.

(12) Article III, Sec. 3 (1), Constitution of the U.S.A.

(13) Cf. Treason Felony Act, 1848

(Eng.).

(14) Cf. Secs. 121-A, 124, Indian Penal Code.

(15) Cf. *Schenck v. U. S.*, (1919) 249 U. S. 47; *Schaefer v. U. S.*, (1920) 251 U. S. 466.

(16) *Near v. Minnesota*, (1931) ■ U. S. 697.

(17) *Pierce v. U. S.*, 252 U.S. 239.

(18) *Hartzel v. U.S.*, (1943) 322 U.S. 680.

(19) Vide Chalmers ■ Hood Phillips, Constitutional Law, p. 446.

(20) *R. v. Sullivan*, (1868) 11 Cox, C. C. 54 (55).

In modern practice in England, prosecution for seditious libel has become rare, unless it is accompanied by an *incitement to violence*.<sup>21</sup> Mere criticism of the Government, however, actuated by malice or spite, is no offence.<sup>22</sup>

Of course, Expl. 3 to Sec. 124-A of the Indian Penal Code also provides that comments expressing disapprobation is no offence if it does not excite or attempt to excite 'disaffection' towards the Government. But the word 'disaffection' is a very wide term, and it has been interpreted to mean mere 'absence of affection' or 'bad feeling' towards the State<sup>23</sup>, whether it has any connection with violence or not. Even an unsuccessful attempt to excite disaffection towards the Government is equally an offence under this section. In *Niharendu v. Emperor*,<sup>24</sup> the Federal Court sought to turn the tide of decisions by holding that mere criticism or even ridicule of the Government is no offence unless it is calculated "to undermine respect for the Government in such a way as to make people cease to obey it and obey the law, so that only anarchy can follow . . . . Public disorder or the reasonable anticipation or likelihood of public disorder is the gist of the offence."<sup>25</sup>

But the Judicial Committee would not give up its previous views notwithstanding the change in the set-up of affairs. So, in *Sadashiv v. Emperor*,<sup>1</sup> they overruled the decision of the Federal Court, and affirmed the previous line of decisions as to the meaning of 'disaffection.'

The framers of the Constitution have refused to follow the decision of the Judicial Committee and have accordingly deleted 'Sedition' from Art. 19 (2) as it stood in the Draft Constitution. The result is that criticism of the Government will be an offence under the Constitution only when it is attended with violence or would be calculated to bring about 'disorder' or 'anarchy'—either undermining the 'security of the State' or 'tending to overthrow' it.

It may be noted in this connection, that the Privy Council also held, overruling the decision of an Indian High Court<sup>2</sup>, that criticism of an individual Minister is also sedition under the existing law. But this will no longer be so, under the Constitution, as has been clear from the above.

In this connection, we may have a short glance to the state of affairs in America. In the U. S. A., the individuals who carry on the government have never been indentified with the State, except in 1798, when Congress passed the Sedition Act, a temporary Act, penalising defamation of the President, members of the Government or of the Congress. But President Jefferson discharged all the accused. And since then there is in the United States no special protection of the administrators in times of peace, and they must seek protection for their dignity and prestige, under the private law of defamation.<sup>3</sup>

Again, any advocacy to change the form of government, short of the abolition of the republican institutions, and without the use of force, is tolerated in the United States, for, the "right of the people to change their institutions is expressly recognized by the Federal and State Constitution".<sup>4</sup> The mere

(21) See History of the law, in Burdick, Law of the American Constitution, 1922, pp. 344-355.

(22) *R. v. Aldred*, (1909) 22 Cox. C. C. 1.

(23) *Emperor v. Jogendra*, (1891) 19 Cal. 34; *Emperor v. Tilak*, (1897) 22 Bom. 112; on appeal 22 Bom. 528 P.C.

(24) *Niharendu v. Emperor*, (1942) 46 C.W.N. (F.R.) 9.

(25) Such action would be an offence

under the Constitution as "tending to overthrow the State."

(1) *Sadashiv v. Emperor*, (1947) L. R. 74 I.A. 89.

(2) *Emperor v. Sibnath*, 1945 F. L. J. 222 (P.C.), overruling *Emperor v. Hemendra*, (1939) 43 C.W.N. 950.

(3) *Near v. Minnesota*, (1931) 283 U.S. 697.

(4) Cooley, Constitutional Law, p. 348.

display of the red flag "as a sign, symbol or emblem of opposition to organized government", cannot be prohibited by a State law.<sup>5</sup> But, it is within the police power of a State to declare it a felony to "teach, advocate, aid or abet the commission of a crime, sabotage or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change, or knowingly to become a member of any organization that so teaches and advocates."<sup>6</sup> In short, while the American Court recognizes the right of the State to protect itself against sabotage and revolutionary activities, it refuses 'to be swept into a hysterical acceptance of political persecution of radicals.'

**FREEDOM OF THE PRESS.**—The Press is one of the organs through which thoughts and ideas are expressed and discussed. The attitude towards the Press differs in England from that in the United States and many other countries.

In *England*, the law does not recognise any special privilege attaching to the profession of the Press as distinguished from the members of the public. As *Dicey* put it,—“The simplest way of setting forth broadly the position of writers in the Press is to say that they stand in substantially the same position as letter-writers.”

The reason has been explained by the Privy Council, in a case from India<sup>7</sup> thus: “The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful: but the range of his assertions, his criticisms or his comments, is as wide as, and no wider than, that of any other subject.”

In the words of Blackstone,—“The liberty of the press . . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published.”

The *Constitution of the United States*, and of the other countries which have followed it,<sup>8</sup> specifically guarantees the freedom of the Press on the recognition of the special importance of the Press as an organ of publicity.

The difference in attitude, however, does not produce much difference in the result, inasmuch as the Constitution of all these countries provide that the freedom of the Press must be exercised subject to the ordinary limits imposed by the law on the freedom of expression. Thus, though the 1st Amendment of the United States does not itself lay down any qualifications to the liberty of the Press guaranteed therein, it has been reiterated by the Supreme Court, over and again, that the guarantee does not exempt the Press from the ordinary law of civil and criminal libel, contempt of Court, obscenity,<sup>10</sup> or in respect of acts of violence against the State and organized governments.<sup>11</sup>

As in England, so in the United States, there is no licensing or censorship of literature of any kind in time of peace.<sup>12</sup> Any provision which even indirectly amounts to censorship is also bad, e.g., a statute by which power is given to

(5) *Stromberg v. California*, (1931) 283 U.S. 359.

(6) *Whitney v. California*, (1927) 274 U.S. 357.

(7) *Kelly and Harbison, American Constitution*, 1948, pp. 805-6.

(8) *Arnold v. King-Emperor*, (1914) 18 C.W.N. 785 (789) P.C.

(9) E.g., Switzerland, Czechoslovakia, Yugoslavia, U.S.S.R., and Japan.

(10) *Near v. Minnesota*, (1931) 283 U.S. 697.

(11) *Gompers v. Buck's Stove Co.*, (1911) 221 W.S. 418.

(12) *Lovell v. Griffin*, (1938) 303 U.S. 444.



certain Courts to suppress as ■ nuisance, after an enquiry, ■ newspaper on the ground that it "habitually indulges in the publication of scandalous ■ defamatory matter."<sup>13</sup>

The *Constitution of India* follows the law of England and maintains the existing law (as explained in *Arnold v. King Emperor*, quoted at p. 83, *ante*), in omitting to mention freedom of the Press specifically in the guarantee of fundamental rights, but the position of the Press under our Constitution may not be as free ■ in England or in the U.S.A., for, there is nothing in Art. 19 of the Constitution to invalidate censorship of the Press even in time of peace, if it is necessary to preserve the security of the State.

Few people will question the necessity and justification for previous restraint upon publication of prejudicial statements in times of war, which may affect the safety of the State. Thus, the *United States*<sup>14</sup> Supreme Court justified it by saying—"Many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight . . . no Court could regard them as protected by any constitutional right."

That such a thing would be constitutional also in *England* is evident from the fact that censorship of the Press was established under Defence Regulation 39-B, at the outbreak of World War II, but it is to be noted at the same time that ere long, the scope of censorship was restricted to matters relating to transactions with foreign countries, leaving the publication of other matters free from previous restraint, subject to prosecution under the law after publication.

Be that as it may, censorship of the Press in time of *peace* is something unimaginable either in England or in the United States in modern times. Censorship except in time of War is also prohibited by the Constitutions of Jugoslavia (Art. 13); Czechoslovakia (Art. 113); Danzig (Art. 79); Japan (Art. 21).

The provision in Art. 19 (2) of the Constitution of India, authorising the State to make 'any law' relating to any matter which "offends against the security of the State or tends to overthrow the State" seems to follow Sec. 40 (6) (1) of the Constitution of Eire, 1937, which authorises the State to ensure that the Press "shall not be used to undermine *public order* or morality or the *authority of the State*." (See p. 73, *ante*.) Censorship not being prohibited expressly, censorship is valid in the Eire in the interest of the 'authority of the State' whether in time of war or of peace.

But we should also note the observations of *Dr. Keith*<sup>15</sup> as regards the effects of the provision in the new Constitution of Eire—"The censorship of literature already exhibits all the traits of a retrograde moral outlook, and there is great danger to the freedom of the Press in efforts to uphold the authority of the State."

Let us read, side by side, the observations of the U. S. Supreme Court<sup>16</sup>—"To act as good citizens, they must be *informed*. In order to enable them to be properly informed, their information must be *uncensored*."

*Existing Press Laws.*<sup>17</sup>—There is a large number of Acts, relating particularly to the Press, to ensure that the Press does not exceed the ordinary limits of freedom of discussion, such as obscenity, safety of the State and the like. The more important of these are—The Press and Registration of Books Act (XXV of

(13) *Near v. Minnesota*, (1931) 283 U. S. 697.

(14) *Schenck v. U. S.*, (1919) 249 U.S. 47 (52). Also, *Gompers v. Buck's Stove Co.*, 221 U.S. 444; *Near v. Minnesota*, (1931) 283 U.S. 697.

(15) Keith, *Constitutional Law*, p. 1939,

p. 519. (16) *Marsh v. Alabama*, (1945) 326 U. S. 501 (508).

(17) On this subject, generally, see the Report of the Press Laws Enquiry Committee, 1948 (H.D. 48).

1867); the Post Office Act (VI of 1898), (Secs. 20-23); the Police (Incitement to Disaffection) Act, 1922; the Official Secrets Act (XIX of 1923); the Foreign Relations Act (XII of 1932); the Indian Press (Emergency) Powers Act<sup>18</sup> (XXIII of 1931), as amended in 1935; and the (Central) Press (Special Powers) Act (XXXIX of 1947) and the series of Provincial Public Security Acts<sup>19</sup> that have followed in its trail, such as the U. P. Maintenance of Public Order Act (IV of 1947); the Madras Maintenance of Public Order Act (I of 1947); the Bombay Public Security Measures Act (VI of 1947); the C.P. & Berar Maintenance of Public Order Act (XV of 1946); the Assam Maintenance of Public Order Act, 1947; Orissa Maintenance of Public Order Act (IV of 1948); East Punjab Public Safety Act (V of 1949); the West Bengal Security Act (III of 1948) as amended by W. B. Act (XIX of 1948) (later replaced by the W. B. Security Ordinance). The object of these Acts of 1947-48 as a body is to empower the Executive with certain special powers including pre-censorship, to control the dissemination of undesirable matter, *e.g.*, tending to promote enmity between different classes of subjects, subversive acts, etc.

### CL. (1) (b): FREEDOM OF ASSEMBLY.<sup>20</sup>

#### OTHER CONSTITUTIONS.<sup>21</sup>

*U. S. A.*—The first Amendment to the Constitution of the U. S. A. says:—

"Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble."

Hence, an assembly or meeting becomes unlawful if it resorts to violence or incites the commitment of violence or crime. If it does neither, it does not become unlawful merely because it is held under the auspices of a particular party whose object is to secure political or social changes by violence.<sup>22</sup> In this case, it was observed—"The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals. The question, if the rights of free speech and assembly are to be preserved, is not as to the *auspices* under which the meeting is held but as to its *purpose*; not as to the relation of the speakers, but whether their *utterances* transcend the bounds of the freedom of speech which the Constitution protects."<sup>23</sup>

Again, though there is no general prohibition against the carrying of arms in public meetings or assemblies, in the United States, restrictions may be imposed to that effect, by the States, if necessary, in the interests of public order. It might be supposed that the second Amendment to the United States Constitution, which guarantees the "right of the people to keep and bear arms," also offers the people ■■■ unrestricted right to bear arms in a public meeting or assembly. But it has been held that that article only means, that "a well-regulated militia being necessary. . . ." the militia may not be disarmed by ■ Federal Act. It does not prevent the States from controlling the bearing of arms for private use, in the exercise of the "Police Power."<sup>23</sup> Thus, the State may altogether prohibit the

(18) *As to the validity of this Act under this Constitution*, ■ my article on the 'Seven Freedoms' in (1949) F. L. J., pp. 27-29 (Jour.).

(19) Bihar Maintenance of Public Order Act (V of 1947), as extended by Bihar Act (V of 1949), declared *ultra vires* (*Jatindra v. Province of Bihar*, A.I.R. 1949 F.C. 175). It has been replaced by Bihar Maintenance of Public Order Act (III of 1950).

(20) As to the need of Freedom of Assembly, see my article on the 'Seven Freedoms' in (1949) F.L.J. p. 31 (Jour.).

(21) See also Art. 113 (2), Czechoslovak; Art. 84, Danzig; Art. 123, Weimar; Art. 125 (c), U.S.S.R., Constitutions.

(22) *De Jonge v. Oregon*, (1937) 299 U.S. 353.

(23) *United States v. Miller*, (1939) 307 U.S. 174.

carrying or selling of arms by private citizens,<sup>24</sup> unless Congress enacts that private possession of arms is necessary to ensure an efficient militia for the nation.<sup>25</sup> The State may also control and regulate all organisations drilling and parading as military or quasi-military bodies, without authority under the militia laws of the United States.<sup>25</sup> Similarly, it may prohibit the carrying of concealed weapons.<sup>1</sup>

*England.*—Like other individual rights, the right of assembly is not based on any declaration of such a collective right. It is the sum total of the right of every individual "to meet another given person or an indefinite person or an indefinite number of persons so long as the law is not thereby broken" (*Dicey*). An enquiry into the right of assembly in England, is thus an enquiry into the law relating to 'unlawful assembly.' Apart from the law of trespass and nuisance, it may be said that in England, any number of persons may assemble or meet together, provided they do not constitute an unlawful assembly or violate any statute. To take part in an unlawful assembly is a common law misdemeanour. An assembly becomes unlawful when three or more persons assemble together—(i) to commit a crime; (ii) to commit, or when assembled, do actually commit, a breach of the peace; (iii) for any purpose, lawful or unlawful, resorts to such conduct (*e.g.*, by carrying arms or the like) as to cause reasonable persons in the neighbourhood to fear that a breach of the peace will be committed.<sup>2</sup>

An unlawful assembly may also be dispersed by the Magistrates, with the application of as much force as may be necessary, to meet the situation, and even peaceful citizens have the duty to assist in the act of dispersing the assembly, when called upon to do so.

Under the common law of England, carrying of arms in an assembly did not *per se* make it an unlawful assembly. But it would make the assembly unlawful if by reason of that fact, reasonable persons might be caused to fear that a breach of the peace was likely to be committed.<sup>3</sup> But by the Public Order Act, 1936, the carrying of unauthorised weapons at public meetings or processions has been altogether prohibited.

*Eire.*—Sec. 40 (6) (1) of the Constitution of 1937 says—

"The State guarantees liberty for the exercise of the following rights, subject to public order and morality:—

(ii) The right of the citizens to assemble peaceably and without arms."

Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

*Japan.*—See Art. XXI, quoted at p. 73, ante.

*Burma.*—S. 17 (ii) of the Constitution of Burma, 1948, says—

"There shall be liberty for the exercise of the following rights, subject to law, public order and morality."

#### INDIA

*Freedom of assembly and its limitations.*—"The very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect of public affairs."<sup>4</sup>

Our Constitution guarantees the above right subject to three limitations [reading Cl. (1) (a) with Cl. (3)]—

(24) *Biffer v. City of Chicago*, (1917) 278 Ill. 562.

(25) *Presser v. Illinois*, 116 U.S. 252.

(1) *Robertson v. Baldwin*, (1897) 165 U.S. 275.

(2) *Chalmers & Phillips*, Constitutional

Law, p. 490; *Keith*, Constitutional Law, p. 451.

(3) *R. v. Neale*, (1839) 9 C. & P. 431.

(4) *U. S. v. Cruikshank*, (1875) 92 U.S. 542.



- (a) the assembly must be peaceable;
- (b) it must be unarmed;
- (c) the State may impose any reasonable restrictions as may be deemed necessary in the interests of public order.

These restrictions exist more or less in all the leading Constitutions. We have already noticed (pp. 85-6, *ante*), the law of England and the U.S.A. relating to the first two conditions.

*Existing Indian Law—I. Unlawful assembly.*—Chap. VIII of the Indian Penal Code lays down the conditions when an assembly becomes "unlawful." A mere assemblage of men in any number cannot be illegal even under the existing law. But an assembly of 5 or more persons becomes an unlawful assembly under Sec. 141 of the Indian Penal Code, if the common object of the persons composing the assembly is any of the following:

- (a) By means of criminal force or show of criminal force—
  - (i) to overawe the Governments, or any public servant in the exercise of his lawful powers;
  - (ii) to take possession of any property or to deprive any person of the enjoyment of his incorporeal rights, or to enforce any right or supposed right;
  - (iii) to compel any person to do what he is not legally bound to do or to omit what he is legally entitled to do.
- (b) To resist the execution of any law or legal process.
- (c) To commit any mischief or criminal trespass or other offence.

An assembly of less than 5 persons may also be an offence if they, by fighting in a public place, disturb the public peace. This offence is called 'affray.' In all the above cases, the assembly is not 'peaceable' and so there would be no guarantee in its favour, also under the *Constitution*.

*II. Carrying arms.*—Under the existing law, there is no general right to bear arms, and the possession of arms by individuals is subject to the restrictions imposed by the Arms Act. The mere carrying of arms to an assembly which is lawful, by a person who is authorised to possess the arms is not unlawful, but if the assembly becomes unlawful, the possession of a deadly weapon by a member of such unlawful assembly aggravates his offence (Sec. 144, Indian Penal Code).

The *Constitution* maintains the existing law by denying any general right to carry arms, and even goes further than the existing law by providing that a citizen has no right to carry arms to any assembly, whether it is lawful or unlawful.<sup>5</sup> So, unless he is an official on duty, a licensed owner of arms has no right, under the *Constitution*, to bear arms, while joining an assembly.

CL (3) c RESTRICTIONS IN THE INTEREST OF PUBLIC ORDER.—The attitude of the *American Law* towards the present right may be best summed up in the words of the Supreme Court: "The privilege of a citizen of the United States to use the streets and parts for the communication of views on national questions may be regulated in the interests of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."<sup>6</sup>

(5) Compare the Public Order Act, 1936 of England (at p. 86, *ante*).

(6) *Hague v. Committee for Industrial Organisation*, (1939) 307 U.S. 499.

Thus, ■ statute which empowered ■ official to grant or refuse 'permits' for the holding of public meetings, solely according to his *personal opinion* or discretion to 'prevent riots and disturbances' has been declared to be invalid on the ground that it can be made "the instrument of *arbitrary* suppression of free expression of views on national affairs."<sup>6-a</sup>

On the other hand, a municipal authority has been held competent to require ■ license or impose other regulations "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travellers, and to minimize the risk of disorder," provided such regulation was fair and undiscriminating.<sup>7</sup> In this case<sup>7</sup> it was observed—"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."

*In England.*—The law not only prohibits the holding of an unlawful assembly as defined by the common law, but also authorises the executive and police authorities to *regulate* and *restrict* certain assemblies which may not be 'unlawful assemblies' according to common law. Certain statutes have been passed to supplement the common law relating to assemblies and meetings:

(1) Of these, the most important is the Public Order Act, 1936, which we have already referred to (*see* p. 86, *ante*). Under this Act, a constable may at the request of the chairman of the meeting, require a member of ■ meeting to give his name or address, and, if the person refuses to give his name and address or if the constable reasonably suspects him of giving a false name and address, the constable may arrest him without warrant. This Act also authorises the Police, with the consent of the Home Secretary, to prohibit processions within particular areas, for a specified period, 'in reasonable apprehension of serious public disorder.'<sup>8</sup> (2) Under the Tumultuous Petitions Act, 1662, not more than ten persons can 'repair' to the Crown or either House of Parliament under the pretence of delivering any petition, complaint, etc.<sup>9</sup> (3) The Seditious Meetings Act, 1817, makes the meeting of more than 50 persons unlawful if held within one mile of Westminster Hall, while either House of Parliament is sitting.<sup>8</sup> (4) Attending illegal meetings for drilling or training in the use of arms is an offence, under the Unlawful Drilling Act, 1819.

Cl. (3) of the present article of our Constitution empowers the State (as defined in Art. 12) to impose *reasonable* restrictions upon the right of assembly, in the interest of 'public order'. [As to 'public order', *see* under Entry 1 of List II, 7th Sch., *post*; also pp. 79-80, *ante*]. As to what is 'reasonable restriction', *see* p. 71, *ante*.

*Public meeting and Procession.*—The Indian Constitution does not specifically enumerate the right of public meeting or that of public procession though these are guaranteed by some Constitutions.<sup>9</sup> The reason of this omission is that the rights of meeting or procession are really included in the right of assembly. Where the assembly has got for its object the discussion of matters of *public interest*, it becomes a public meeting.<sup>10</sup> The right of procession, on the other

(6-a) *Hague v. Committee for Organisation*, (1939) 30 U.S. 496.

(7) *Cox v. New Hampshire*, (1941) 312 U.S. 569.

(8) There is no need of such special legislation under our Constitution since there is no guarantee of any right to petition [as in

England, *see* pp. 10 & 95 of Keith, Constitutional Law, 1939; or in the U.S.A., 1st Amendment; or in Japan.—Art. XVII.

(9) *E.g.*, Art. 125 (c) (d) of U.S.S.R.; Art. 84 of Danzig.

(10) *Cf.* Chalmers and Hood Phillips,

hand, follows from the ordinary right of each individual to pass and repass along the highway. But when the right of user of the highway is made collectively by an assembly, it may in certain circumstances turn into an unlawful assembly, or cause a public nuisance if it interferes with the right of other individuals to use the highway. The following is a statement of the existing law relating to processions in India—

(a) There is no right of procession as such. It is a corollary from the right of assembly and the individual right of user of a highway. Since the use of a highway is for the purpose of passing and repassing, any number of men may pass together in a procession so long as the corresponding right of others is not substantially affected, that is, so long as there is not a *material* obstruction of traffic.<sup>11</sup> It has got nothing to do with custom<sup>12, 13</sup> or religion.<sup>11</sup>

(b) The limitations of the right to carry public processions are thus: (i) The law of public nuisance. (ii) The greater advantage of the public to restrict the right.<sup>12-13</sup> Thus, the right of a section of Mahomedans to carry procession of tazias along the streets may be limited if it is not possible to carry the tazias without removing the wires of a public utility Electric Company.<sup>12-13</sup> (iii) Such directions as Magistrates may lawfully give in order to prevent obstructions of the thoroughfare or breaches of the public peace.<sup>12-13</sup>

(c) People of all sects are entitled to conduct religious processions through public streets, subject only to the above limitations. Persons of a rival sect or religion cannot claim as of right that the function of a public procession should cease as it passes places of worship belonging to the former.<sup>11</sup> The prejudices of particular sects ought not to influence the law.<sup>14</sup> Nor can the Magistrate restrain the lawful processionists simply because he thinks that he would be powerless against the oppositionists.<sup>14</sup> The authorities cannot abdicate and confess impotence before the *law-breakers*.<sup>15</sup>

*Existing Indian Law.*—(i) Any assembly, meeting or procession, otherwise lawful, may be restrained by the Magistrate under Sec. 144, Criminal Procedure Code, if there is a “risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray.”

(ii) Section 107 of the Criminal Procedure Code empowers a Magistrate to obtain security for keeping the peace from any person who is ‘likely to commit a breach of the peace,’ even though nothing has yet been actually committed in that direction.

(iii) The Prevention of Seditious Meetings Act (X of 1911) has for its object the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity. It empowers the Provincial Government to declare the whole or any part of a Province a ‘proclaimed area.’ On such declaration, the ‘District Magistrate or Commissioner of Police’ is invested with the power to—“prohibit any public meeting in such proclaimed area, if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity.” Further, no public meeting ‘for the furtherance or discussion of any subject likely to cause disturbance or public excitement’ shall be held in such area without written notice to the District Magistrate or Commissioner of Police. ‘Public meeting’ is defined in this Act as a “meeting which is

Constitutional Law, p. 486; also see our Prevention of Seditious Meetings Act (X of 1911).

(11) *Mansur v. Zaman*, (1924) 29 C.W.N. 486 (P.C.).

(12-13) *Martin and Co. v. Fajias*, (1943)

48 C.W.N. 307 (P.C.).

(14) *Sundaram v. The Queen*, (1883) 6 Mad. 203 (217).

(15) *Subbaya v. Falaudhin*, (1926) 101 I.C. 893.



*open* to the public or any class or portion of the public. A meeting may be a public meeting notwithstanding that it is held in a private place and notwithstanding that admission thereto may have been restricted by ticket or otherwise." Any public meeting which has been prohibited under this Act is deemed to be an 'unlawful assembly' within the meaning of the Indian Penal Code and Criminal Procedure Code. [The portion of this Act relating to 'sedition and disaffection' shall have to be amended after commencement of the Constitution. The words 'public excitement' also would not come within the words "interests of public order" in Art. 19 (3) of the Constitution.]

(iv) The Police Act, 1861, authorises a Police Officer to direct the conduct of and prescribe the route and time for all assemblies and processions along the public roads and also to require the members to apply for a previous licence.

WHEN DOES A LAWFUL MEETING BECOME UNLAWFUL.—Sec. 127 of our Code of Criminal Procedure authorises the Magistrate or the Police to disperse not only an unlawful assembly, but also a lawful assembly,—“if it is *likely* to cause a disturbance of the peace.” Section 151 of the Indian Penal Code, further, makes it an offence not to disperse after a *lawful* command to disperse has been given. There is not much doubt that the Court is entitled to determine whether a command was lawful or not. So, the question arises, when is a Magistrate or Police lawfully entitled to command to disperse a meeting which was held for a lawful purpose?

In *England*, it has been held that where there is nothing unlawful in the purpose or conduct of the meeting, it does not become unlawful merely because *others* may be excited by it to commit a breach of the peace.<sup>16</sup> But a lawful meeting may be *dispersed* on the ground that others are likely to cause a disturbance of the peace, if it is *impossible* for the authorities to preserve the peace than by dispersing the meeting.<sup>17</sup> After such an order members of the meeting may be guilty of obstruction of the police in the execution of their duty, by refusing to disperse.<sup>18</sup>

In *India*, in facts similar to those in *Beatty v. Gilbanks*,<sup>16</sup> it was held,<sup>19-20</sup> that a lawful meeting may be dispersed if it is likely to excite such opposition as *may* endanger the public peace. But this decision cannot be supported with reference to the English decision in *Beatty v. Gilbanks*, or Irish cases.<sup>17-21</sup> In one of these cases,<sup>21</sup> it was observed that to interfere with the private rights of individuals on anything short of the *strongest necessity*<sup>22</sup> would make—“not the law of the land but the law of the mob supreme.”

The principle has been clearly explained by an American writer<sup>23</sup> as follows: “The breach of the peace theory is peculiarly liable to abuse. It makes a man criminal simply because his neighbours have no self-control, and cannot refrain from violence. The *reduction ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow-settlers at 'Fruitlands,' not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until law and order were maintained by shutting him up.”

(16) *Beatty v. Gilbanks*, (1882) 9 Q.B.D. 308.

(17) *O'Kelly v. Harvey*, (1883) 14 Ir. 105 (109).

(18) *Duncan v. Jones*, (1936) 1 K.B. 218.

(19-20) *Emperor v. Tucker*, (1882) 7 Bom. 42.

(21) *Humphries v. O'Connor*, (1864) 17 Ir. C.L.R. 1.

(22) Also see Keith, *Constitutional Law* p. 453.

(23) Chafee, *Freedom of Speech*, 1920, p. 172 quoted in Kohn's *Constitution of the Irish Free State*, 1932, p. 167.

Now, since Art. 19 (3) of the Constitution of India authorises the State to impose only *reasonable* restrictions on the freedom of assembly in the interests of public order, it seems that the above Bombay decision,<sup>24</sup> or so much of Sec. 127 of the Criminal Procedure Code, as supports the conclusion made therein, will not be good law under the Constitution.

## CL. (1) (c): FREEDOM OF ASSOCIATION<sup>25</sup>

### OTHER CONSTITUTIONS<sup>1</sup>

*U.S.A.*—There is no guarantee in the American Constitution of any right of association. Thus, even as late as 1908, trade unions were held to be illegal, being restraints on inter-state commerce.<sup>2</sup> But in 1937, the Supreme Court has recognised their legality and the right of the workers to join them, since their object is a 'legitimate' one, *viz.*, the improvement of the conditions of their members as wage-earners.<sup>3</sup> Similarly peaceful picketing,<sup>4</sup> unattended with violence,<sup>5</sup> to publicise a labour dispute, as well as the right of employees to strike and to persuade others to strike, if not actuated by malice,<sup>6</sup> have been upheld to be lawful. But there is no right to picket a 'neutral', *i.e.*, an employer who is not involved in a labour dispute; in order to bring pressure upon another employer who is so involved.<sup>7</sup> On the other hand, there being no specific right of association, there is no specific restriction upon association as such; hence a person may be penalised only for his *personal* guilt and not for 'guilt by association', *i.e.*, merely for his 'affiliation' with any particular society.<sup>7a</sup>

*England.*—Broadly speaking, it is not in England illegal to associate for a lawful object, unless some unlawful means is adopted. The limitations upon the right of association are thus introduced by unlawful conduct, and may be considered under the heads:

(i) Conspiracy; (ii) Trade disputes; (iii) Quasi-military organizations.

(i) *Conspiracy.*—Conspiracy is both a crime and a tort. (a) The agreement of two or more persons to do any unlawful act or to do a lawful act by unlawful means, is a crime. The unlawful act which the conspirators agree to do may be either a crime or a civil wrong. The gist of the offence is the fact of such agreement or combination; it is not necessary that some overt act should have been done in furtherance of the agreement. (b) The tort of conspiracy on the other hand, is constituted only if the agreed combination is carried into effect and damage to the plaintiff is thereby caused.<sup>8</sup>

(ii) *Trade Disputes.*—Trade unions are lawful institutions, having a legal personality and certain privileges. They have statutory protection against liability for inducing breach of contract or interference with business (Trade Disputes Act, 1906). But general strikes and lock-outs which seek to paralyse the government or to inflict hardship on the community, have been declared illegal, by the Trade Disputes and Trade Unions Act, 1927.

(24) *Emperor v. Tucker*, (1882) 7 Bom. 42.

(25) As to the need of Freedom of Association, see my article on 'The Seven Freedoms' in (1949) F.L.J. p. 1 (Jour.).

(1) See also Arts. 56 of the Swiss, 113-114 of the Czech, 85 of the Danzig, 14 of the Yugoslav, 21 of the Japanese, Art. 125, Weimar, Constitutions.

(2) *Adair v. U.S.*, (1908) 1 U.S. 178.

(3) *National Labour Relations v. Jones*, (1937) 301 U.S. 1.

(4) *Thornhill v. Alabama*, (1940) 310 U.S. 88.

(5) *Milk Wagon Drivers v. Dairies*, (1941) 312 U.S. 287; *American Federation v. Swing*, (1941) 312 U.S. 321.

(6) *American Steel Foundries v. Central Trades Council*, 263 U.S. 457.

(7) *Carpenters v. Ritter's Cafe*, (1942) 315 U.S. 722.

(7-a) *Bridges v. Wixon*, (1945) 326 U.S. 135.

(8) *Crofter v. Veitch*, (1942) A.C. 435.

(iii) *Quasi-military organization*.—Militant Fascist organisations of private persons cannot be tolerated by the State, in the interest of public order. Hence, the Public Order Act, 1936, was passed to enact that any association is illegal and its members are guilty of an offence, if they are organized or trained or equipped—(a) for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown or (b) for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object.

Besides the above, certain other associations are declared unlawful by statute (Unlawful Societies Act, 1799; Seditious Meetings Act, 1817): (a) A conspiracy having a seditious object, including societies formed for illegal drilling. (b) A society taking an oath or engagement which is unlawful under the Unlawful Oaths Acts. (c) A secret society, the names of whose members, etc., are kept secret.

The Trade Disputes and Trade Unions Act, 1927, on the other hand, restricts the freedom of association of civil servants by enacting that civil servants may not be members of organisations whose primary object is to influence the remuneration or conditions of employment of their members, unless their membership is confined to persons employed by the Crown, and they are not affiliated to organisations of different composition, nor have political objects or association with any political party.

*Eire*.—Art. 40 (6) (iii) guarantees, subject to public order and morality:—

“The right of citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in *public interest* of the exercise of the foregoing right. Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain *no* political, religious or class discrimination.”

It has been held by the Irish Supreme Court<sup>9</sup> that to deprive a person of the choice of the persons with whom he will associate, is not a ‘control’ of the exercise of the right of association, but a *denial* of the right altogether. Hence, a law which allows the citizen only to join one or more ‘prescribed’ associations, and thereby prohibits the right of forming associations, is not a valid regulation or control of the exercise of the right guaranteed by the Constitution and is accordingly repugnant to the Constitution.<sup>9</sup> The object of the Trade Union Act, 1941, was to limit the number of trade unions and to prevent trade unions from accepting new members. The effect of a ‘determination’ by the Tribunal set up by the Act, in favour of a particular union was that during a period of 5 years no other union could accept new members. *Held*, the Act was repugnant to the right of association guaranteed by Art. 40 (6) (1) of the Constitution and therefore void.

*Burma*.—Art. 17 (iii) of the Constitution of Burma, 1948, guarantees,

“subject to law, public order and morality—The right of the citizens to form associations and unions. Any association or organization whose object or activity is intended or likely to undermine the Constitution is forbidden.”

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CL. (4): RESTRICTIONS UPON THE FREEDOM OF ASSOCIATION.—An association, according to *Cole*, is “any group of persons pursuing a common purpose or system or ‘aggregation of purposes by a course of co-operative action extending beyond a single act, and for this purpose, agreeing together upon certain methods

(9) *National Union v. Sullivan*, (1947) I.R. 77.



of procedure and laying down, in however rudimentary form, rules of common action." Freedom of association, thus, includes the right to form companies, partnership societies, trade unions, political parties.<sup>10</sup>

Form a review of all the written Constitutions referring to the above right, it becomes evident that the right of association of the citizens is subject to control by laws in the public interest, and that there is no right of association having for its objects or conduct anything which is prohibited by the laws in the interests of public order, peace and the like. The restrictions imposed by the law may be either punitive or preventive. The law may also lay down certain conditions or formalities, such as registration, licensing, working hours and the like.

Cl. (4) of our Constitution empowers the State to make reasonable restrictions upon the above right on two grounds—(a) Public order. (b) Morality.<sup>11</sup>

*Existing laws.*—The existing law of India relating to associations and unions broadly follows the lines of English law. Thus:

(i) There is a group of statutes which regulate the formation, organization and working of particular associations, in the public interest, *e.g.*, the Companies Act (VII of 1913); Co-operative Societies Act (II of 1912); Insurance Companies Act (XX of 1922); Partnership Act (IX of 1932); Provident Insurance Societies Act (V of 1912); Red Cross Society' Act (XV of 1920); Religious Societies Act (I of 1889); Societies Registration Act (XI of 1860); Universities Act (VIII of 1904).

(ii) Of restrictive laws, we may mention—

(a) Sec. 120-A of the Indian Penal Code which penalises criminal conspiracy, which means an agreement between two or more persons to do or cause to be done, (a) an illegal act; or (b) an act which is not itself illegal, by illegal means, followed by an overt act, in pursuance of such agreement.

(b) The Indian Criminal Law Amendment Act (XIV of 1908) has for its object the prohibition of 'associations dangerous to the public peace.' An 'association' in this Act is defined as 'any combination or body of persons, whether the same be known by any distinctive name or not,' and an 'unlawful association' means an association which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or which has been declared to be unlawful by the Provincial Government under the powers hereby conferred.' If the Provincial Government is of opinion that any association interferes or has for its object interference (i) with the administration of the law, or (ii) with the maintenance of law and order, or (iii) that it constitutes a danger to the public peace, the Provincial Government may declare such association to be unlawful. Acts done under the Act cannot be questioned by any Court, save as provided in the Act itself.

(c) The provisions of the Indian Trade Unions Act (XVI of 1926) are similar to those of the English Trade Unions Act, 1906. The Industrial Disputes Act (XIV of 1947), which has recently replaced the Trade Disputes Act, 1929, has declared illegal strikes and lock-outs, if they are in contravention of the provisions of this Act, which aims at settling industrial disputes by conciliation and adjudication.

(d) The Provincial Security Acts, referred to already, aim at checking quasi-military organisations, unlawful drilling and the like, in the manner provided in the English Public Order Act, 1936.

(10) *Chalmers and Hood Phillips*, pp. 410, 482.

(11) As to the meaning of these expressions, see pp. 78-80, *ante*.

*Legislative Power.*—See Entries 61 of List I, 34 of List II, 21-22, 26 of List III.

## CL (1) (d)-(c): FREEDOMS OF MOVEMENT AND RESIDENCE

### OTHER CONSTITUTIONS<sup>12</sup>

*U.S.A.*—The rights of movement, residence and settlement are not specifically mentioned in the Constitution of the *United States*, but are sought to be secured by Sec. 1, 14th Amendment, which confers dual citizenship and prohibits the States from making any law which abridges the 'privileges or immunities' of citizens of the United States. Amongst these privileges are: (a) the right to acquire and possess property of every kind,<sup>13</sup> (b) to pass through or reside in another State, for purposes of trade, agriculture, professional pursuits or otherwise,<sup>13</sup> and to enjoy, without discrimination against him, all the benefits and the protection of the Constitution, laws and treaties of the United States.<sup>14</sup> These privileges cannot be denied to the citizen either by the Federal or State Governments (except under the 'Police powers',—see below).

*England.*—According to *Blackstone*,<sup>15</sup> the right of personal liberty includes—"the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law."

*Switzerland.*—Art. 45 says—

"Every Swiss citizen has the right to settle in any part of Switzerland, subject to the production of a certificate of origin or similar document. The right of settlement may, by way of exception, be refused to or withdrawn from persons who have been deprived of their civic rights as a result of a penal conviction. The right of settlement may also be withdrawn from persons who have been repeatedly sentenced for grave misdemeanours, and from persons who become a permanent burden upon public charity, and whose Commune or Canton of origin refuses to provide adequate assistance for them after having been officially requested to provide it. In Cantons in which domiciliary relief is provided, permission for settlement may be made conditional, in the case of citizens of the Canton, upon the person being capable of work and not having been a permanent charge upon public charity in their former domicile in the Canton of origin. The Canton in which a Swiss citizen settles may not require from him any security or impose any special charge upon him in respect of such settlement. Similarly, Communes may not impose on Swiss citizens domiciled within their area any charges other than those imposed upon their own citizens".

*Japan.*—Art. XXII of the Japanese Constitution, 1946, says—

"Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."

*Burma.*—Art. 17 (iv) of the Constitution of Burma, 1948, guarantees,

"subject to law, public order and morality,—the right of every citizen to reside and settle in any part of the Union."

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*Freedoms of Movement and Residence.*—The rights enumerated in Cls. (d) and (e), being allied, may be taken up together. Both these rights have for their object the removal of all internal barriers in the country and to make India as a whole the abode of the citizen of India. These provisions are thus complementary to Art. 5 which provides a single citizenship.

CL. (5): RESTRICTIONS UPON THE FREEDOMS OF MOVEMENT, RESIDENCE AND DOMICIL.—Like other individual rights, these rights cannot be absolute. Restriction—

(12) See also Art. 108. Czechoslovak; Art. 10 of Yugoslav; Art. 75 of Danzig; Art. 111 of Weimar; Constitutions.  
(13) *Corfield v. Coryell*, 4 Wash.C.C. 371 (380).  
(14) McLain, Constitutional Law of the U.S., p. 281.  
(15) Quoted in Chalmers ■ Hood. Phillips, Constitutional Laws, p. 407.

tions must be placed in the interests of the public order, health, morality and the like. Thus, both in *England* as well as *India*, the individual's right of free movement and access is denied in the case of 'prohibited places' and protected areas under the Official Secrets Acts, already referred to (*ante*). These restrictions are essential in order to preserve the security of the State. Similarly restrictions on movement and travelling may be imposed by law in all countries, in order to prevent or control epidemics, contagious diseases or the like. For example, Sec. 71 of the Indian Railways Act (IX of 1890) restricts the right of a person suffering from infectious or contagious disorder, to travel by rail<sup>16</sup>. Of Acts which seek to restrict or control the movements of dangerous characters, we may mention the Bengal Goondas Act (Ben. I of 1923); the Criminal Tribes Act (VI of 1924).

Similarly, ■ State in the *United States* may, in the exercise of its 'police powers' exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases.<sup>17</sup>

Similarly, as Art. 45 of the *Swiss Constitution* shows, the right of a citizen to reside and settle anywhere may be refused or withdrawn in respect of any locality if he has been sentenced to a penal conviction by ■ Court of law, or who has been repeatedly sentenced for misdemeanours, or has become a permanent burden on public charity. In the U.S.A., however, ■ State cannot prohibit the influx of *healthy* persons, seeking employment within its borders, on the ground that they would become a charge on the public treasury.<sup>18</sup>

Public interests may also justify the total suppression of houses of ill-fame or the segregation of prostitutes<sup>19</sup> within a designated area.<sup>20</sup>

The *Constitution of India* empowers the State to impose restrictions upon the above freedoms only in two cases—(a) in the interests of the general public; (b) for the protection of the interests of any Scheduled Tribe.

Some statutes relating to condition (a) have just been noted.

The latter condition is based on obvious grounds. The Scheduled tribes are as a class backward in the sense of not being initiated into the ways of modern life, so that if people of the so-called enlightened sections are allowed to settle amongst them without any restriction, there is evident likelihood of the aboriginal tribes losing their distinctive culture, and of their being exploited.

It is to be noted that the restrictions which the State is authorised to impose, must be 'reasonable' and not arbitrary. They must not also, be discriminatory, in favour or against people belonging to particular units [cf. Art. 15 (1), *ante*]. The *Swiss Constitution* also prohibits the Cantons to require from any settlor any security or special charge in respect of his settlement which is not required from the Canton's own citizens.

'Scheduled Tribe'.—See Arts. 342 and 366 (25), *post*.

Legislative Power.—See entries 81 of List I, 7 of List II, 15, 29 of List III.

(16) See also the Epidemic Diseases Act (III of 1897); the Lepers Act (III of 1898).

(17) *Railroad Company v. Husen*, (1877) 95 U.S. 465.

(18) *California v. Edwards*, (1941) 314

U.S. 160.

(19) *L'Hote v. New Orleans*, (1900) 177 U.S. 587.

(20) Cf. Bengal Suppression of Immoral Traffic Act (Ben. Act VI of 1933).



## CL. (1) (f): FREEDOM OF PROPERTY.

OTHER CONSTITUTIONS<sup>21</sup>

*U.S.A.*—In the 14th Amendment to the Constitution of the U.S.A., the word 'property' is used in juxtaposition with 'liberty,' and the Courts have interpreted property to be an essential condition of liberty.

Property in its broader sense is not the physical thing which may be the subject of ownership, but is the right of *dominion, possession, and power of dispossession* which may be acquired over it; and the right of property preserved by the Constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful pursuit, which the citizen in the exercise of the liberty guaranteed may choose to adopt."<sup>22</sup>

*England.*—In *England*, Blackstone mentions the right of private property as one of the three absolute rights 'inherent in every Englishman'<sup>23</sup> and it is said to consist—

"in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land*".

Of the three absolute rights maintained by *Blackstone*<sup>24</sup>, viz., of personal security, personal liberty and of private property, the right of property 'inherent in every Englishman', was stated to consist "in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land".

*Eire.*—Art. 43 of the Constitution of Eire, 1937, runs as follows:

"1. (1) The acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. (ii) The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

2. (i) The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of the article ought, in civil society, to be regulated by the principles of social justice. (ii) The State, accordingly, may as occasion requires, delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

*U. S. S. R.*—The Soviet Constitution combines private property in the fruits of personal labour with socialist ownership of the means of production. Thus, Art. 4 says—

"The economic foundation of the U. S. S. R. is the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of private ownership of the instrument and means of production, and the elimination of the exploitation of man by man."

Art. 10, on the other hand, provides—

"The personal property right of citizens in their incomes and savings from work, in their dwelling houses and subsidiary home enterprises, in articles of domestic economy and use and articles of personal use and convenience, as well as the right of citizens to inherit personal property, is protected by law."

*Burma.*—Art. 17 (iv) of the Constitution of 1948, guarantees to every citizen 'the right to acquire property, subject to law, public order and morality.'

*Government of India Act. (1935).*—Sec. 298 of the Act (as it stood before the amendment in 1942) provided—

(21) See also Art. 109, Czech; Art. 37, Yugoslav; Art. 110 Danzig; Art. 29, Japanese; Art. 153, Weimar, Constitutions.  
(22) *Ritchie v. People*, 155 Ill. 98.

(23) The other two being personal security and personal liberty.  
(24) Quoted in Chalmers ■ Hood Phillips, *Constitutional Laws*, p. 406.

"(1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited, ■ any such grounds from acquiring, holding or disposing of property ■ carrying ■ any occupation, trade, business or profession in India.

(2) Nothing in this section shall affect the operation of any law which—(a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area and owned by ■ person belonging to some class recognised by the law as being ■ class of persons engaged in or connected with agriculture in that area to any person not belonging to that class;"

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*Nature of the right to property.*—The ideology behind this right is that of individualism and private property. It means that a man is free to *acquire* any property (including means of production), either by inheritance, personal earning or other lawful means, to hold it as his own, and to dispose of it, limited only by the exigencies of public welfare. 'Dispose of' means—(a) to determine the fate of, to exercise the power of control over, to fix the condition, employment, etc., of, to direct or assign for a use; (b) to exercise finally one's power of control over, to pass over into the control of, someone else by selling, to get rid of.<sup>25</sup>

*What is Property.*—"Whatever a man produces by the labour of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use, enjoyment, and disposition of.<sup>1</sup> So nothing can be the subject of property which is not recognized by law to be such. And when law withdraws such recognition, a thing ceases to have the attribute of property.<sup>1-2</sup>

Thus, the State may provide that an individual cannot have a right of property in certain things, e.g., in public offices.

CL. (5): RESTRICTIONS UPON THE RIGHT OF PROPERTY.—Clause (5) of Art. 19 authorises the State to impose reasonable restrictions on the exercise of the rights of property—

(i) in the interests of the general public;

(ii) for the protection of the interests of any Scheduled Tribe.

I. *Interests of the general public.*—The expression "interests of the general public" in Cls. (5) and (6) of Art. 19 differs from the expression "interests of public order" in Cls. (3) and (4). So, the State shall be competent to impose restrictions under Cls. (5) and (6) not only ■ ground of public order but also ■ grounds of social and economic policy or on the ground of the "common good,"<sup>3</sup> e.g., for securing the objects referred to in Cls. (b) to (c) of Art. 39.

As to other restrictions on the exercise of the right of private property, in the interests of the general public, we may summarise certain principles of the Anglo-American law, which are embodied also in the existing Indian law: The State has the right (a) to *tax* private property for raising the revenues of the State.

(25) Webster's Dictionary.

(1) Cooley, Constitutional Law, p. 392.

(2) Bentham, Theory of Legislation, p. 113.

(3) See my Article on 'the Seven Free-  
C-13

doms' in (1949) F.L.J. at p. 49 (Jour.);  
cf. Art. 43 (2), Constitution of Eire; Art.  
145, Constitution of China, 1946.

(4-5) Stephen's Commentaries, Vol. I,  
p. 54.

(b) to fine a person for breach of a law or to confiscate his property in the case of serious offences against the State; (c) restrict the user of property to secure that it does not become a *nuisance* to another person, i.e., injurious to the health, comfort or property of the latter person, or to the public at large;<sup>6</sup> (d) to prohibit the user of property which may injure the public *morals*, e.g., implements of gambling, obscene literature, painting and the like; or which may be dangerous to public *safety*;<sup>7</sup> (e) to prevent the waste of natural resources.<sup>8</sup>

II. *Interests of Scheduled Tribes*.—The present clause improves upon the provision of Sec. 298 (2) (a) of the Government of India Act,<sup>9</sup> 1935, in the following respects:<sup>10</sup> (i) The Constitution makes no exception in favour of 'agricultural tribes.' The only exception made by it on the freedom of property is in favour of scheduled tribes. (ii) It saves existing laws, and also empowers the State to make laws to the same effect. (iii) It does not use the word 'prohibit' but authorises the 'imposing of *reasonable* restrictions.'

'Scheduled Tribe'.—See Arts. 342 and 366 (25), *post*.

*Analogous Provision*.—See the right of the State to acquire private property for public purposes, under Art. 31 (2), *post*.

## CL. (1) (g): FREEDOM OF PROFESSION

### OTHER CONSTITUTIONS<sup>11</sup>

*U.S.A.*.—In the Constitution of the United States, there is no specific provision guaranteeing this right; but freedom of trade, business and profession has been held by judicial interpretation, to follow from the rights of liberty and property, subject to restrictions imposed by the State in the interests of the common good.<sup>12</sup>

*Switzerland*.—Article 31 of the Constitution of *Switzerland* guarantees "freedom of trade and industry throughout the Confederation," but reserves the following to the State:

"(a) The salt and gunpowder monopolies, the federal duties, the import duties of wines and other alcoholic beverages, ■ well as the consumption duties expressly recognized by the Confederation under Art. 32; (b) The manufacture, import, ratification, sale and taxation of distilled liquors, in conformity with Arts. 32 (a) and 32 (c); (c) Everything that concerns taverns and the trade in alcoholic beverages in conformity with Art. 32 (d); (d) The sanitary police measures concerning contagious diseases, very common diseases and diseases particularly dangerous for the human and animal races; (e) Provisions concerning the exercise of commercial and industrial *professions*, the relevant taxes and the regulation of highways. These provisions shall contain nothing contrary to the principle of the freedom of trade and industry."

*Burma*.—Art. 17 (iv) of the Constitution of 1948 guarantees to every citizen,

"subject to law, public order and morality—the right to follow any occupation, trade, business or profession."

(6) *Queenside Hills Co. v. Saxl*, (1945) 328 U.S. 80. [See any Text-Book on Torts].

(7) *Runman v. Little Rock*, (1915) 237 U.S. 171; *Hadecheck v. Sebastian*, (1915) 239 U.S. 394.

(8) *Ohio Oil Co. v. Indiana*, (1900) 177 U.S. 190; *Walls v. Midland Carbon Co.*, (1920) 254 U.S. 300.

(9) As interpreted in *Punjab Province v.*

*Daulat*, (1946) 50 C.W.N. 429 (P.C.), affirming *Punjab Province v. Daulat*, (1942) 5 F.L.J. 73.

(10) See my Article on 'the Seven Freedoms', (1949) F.L.J. at pp. 47-48 (Jour.).

(11) Also see Art. 25, *Jugoslav*; Art. 151, *Weimar*; Art. 22, *Japanese Constitutions*.

(12) *Ritchie v. People*, 155 Ill. 98, quoted in *Cooley's Constitutional Law*, p. 281.



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*Scope of Cl. (1) (g): Freedom of Profession.*—This freedom means that every citizen has the right to choose his own employment or to take up any trade or calling, subject only to the limits as may be imposed by the State in the interests of the public welfare. This right is related to the right to reside and settle guaranteed by Cl. (e) in this way that the citizen who has a right to reside in any part of India has also the right to practise any profession or to carry on any occupation at the place of his residence.

CL. (6): RESTRICTIONS ON THE FREEDOM OF TRADE, PROFESSION, ETC.—Cl. (6) of Art. 19 of our Constitution (a) authorises the State to impose reasonable restrictions upon the freedom of trade, business, occupation or profession—in the interests of the general public; and (b) also authorises the State to prescribe—the professional or technical qualifications necessary for carrying on any occupation, trade or business.

(A) Professional and technical qualifications.

Freedom of profession does not mean the freedom to carry on any trade or profession without having the requisite qualification or fitness, or the carrying on of the trade or profession in a manner prejudicial to the public interests.

In many countries, there are statutory professional councils or Boards having disciplinary power over its members and the power to make rules, etc., for the control of the profession,—laying down qualifications, defining acts of misconduct, etc.

I. Thus, in *England*,<sup>13</sup> there is the General Medical Council having such powers over medical practitioners, under the Medical Acts, 1858 to 1886; Dentists Act, 1921. Similarly, the Law Society controls solicitors under the Solicitors Acts, 1932 to 1936. The objects of these statutes<sup>13</sup> are—

(a) to secure that none but properly qualified candidates be admitted to the profession; (b) to maintain a proper standard of efficiency and character in the duly qualified members of the profession; and (c) in return for the labour and expense involved in preparing and practising the profession, to protect its members (as well as the public) against unauthorised intruders and competitors.

II. Similar regulation of the professions of law,<sup>14</sup> dentistry, medicine and other like employments which involve the safety and health of the general public also obtains in the *U.S.A.*<sup>15</sup>. In the absence of fraud or arbitrary refusal of opportunity for fair test, the findings of the boards empowered to regulate the qualifications and training relating to a profession may be made final.<sup>16</sup> In the case of a trade or business, the State, in requiring technical qualifications, may lay down regulations necessary to secure the *confidence* of the public in such business when it is a business for the utility of the public and it is essential that it should have the confidence of the public, e.g., the business of bankers, common carriers and the like.<sup>16-17</sup> But in imposing these qualifications or restrictions, the State cannot make any discrimination between citizens of the same class. Thus, a statute which exempted ex-military personnel from the intellectual and moral requirements of the Bar examination, was held bad.<sup>18</sup>

(13) Stephen's Commentaries, Vol. I, United States, p. 300.  
p. 241.

(14) *Bradwell v. The State*, 16 Wall. 189. (16-17) *Hawker v. New York*, 170 U.S.

130. (18) *Humphrey, In re*, (1929) 227 N.W.

(15) *Cooley*, Constitutional Law of the 179.

III. Under the existing law of *India*, the following Acts may be mentioned as regulating professions, etc., for requiring qualifications, discipline, etc.—Bar Councils Act (XXXVIII of 1926); Legal Practitioners Acts (I of 1846); (XX of 1853); (XVIII of 1879); (XXIII of 1923); Indian Medical Degrees Act (VII of 1916); Medical Council Act (XXVII of 1933); Pharmacy Act, 1948; The Usurious Loans Act (X of 1918); the Provincial Money Lenders' Acts; The Bengal Medical Act (VI of 1914); Bengal Dentists Act (XII of 1939); The Bengal Touts Act, and so on.

The words 'empowering any authority to prescribe' in clause (6) imply that Parliament may itself lay down the conditions for the regulation of a profession by statute, or empower some other authority such as the Bar Council, for example, to lay down such conditions. But in the exercise of its discretionary powers, such statutory bodies must not act in an arbitrary manner nor should violate the ordinary judicial method.<sup>19</sup> [See under Art. 32 (2), *post.*]

(B) Restrictions in the interests of the general public.

Under this power the State may—

(a) prohibit inherently dangerous or immoral occupations which cannot be allowed to exist at all, *e.g.*, gaming, sale of intoxicating drugs and beverages;

(b) forbid the employment of women and children in certain employments, mines, etc., in the interests of their health or safety; or to lay down a minimum age or limited hours of employment in certain callings;<sup>20</sup>

(c) subject a business to regulations such as obtaining a license, requiring evidence of good character from a dealer, obtaining security or making him responsible for any injury resulting to the public from such business; or for the carrying of any trade or calling which might cause annoyance to neighbours;<sup>21</sup>

(d) impose regulations for public safety, *e.g.*, in the case of public carriers and require them to fix and publish their charges periodically;<sup>22</sup>

(e) impose regulations regarding the manufacture of foods and drugs, in the interest of health, *e.g.*, requiring that 'ice cream' shall contain a particular quantity of butter fat;<sup>23</sup> requiring ingredients to be stated on each package.<sup>24</sup>

(f) itself retain the monopoly of undertaking some business or trade, *e.g.*, the manufacture of salt in India or to confer such right by legislation<sup>25</sup>. But apart from such legislative grant, no citizen may claim any monopoly or sole trading privilege, which is contrary to public policy<sup>1</sup>. Unless Parliament legislates otherwise, in the interest of public order, morality or health, all citizens shall have an equal right to trade within the territory of India, under Art. 19 (1) (g). An exception to the equality of trading right is engrafted by the law of patents, which provides for the grant of patents for a limited period to 'the true and first inventor of a new manufacture.'<sup>2</sup>

(g) Nor would the freedom of trade or profession, enable a man to commit such offences as follows (Ch. XIV of the *Indian Penal Code*):

(19) Wade & Phillips, Constitutional Law, pp. 49-50.

(20) Cf. the Indian Factories Act (LXIII) of 1948, already referred to.

(21) Cf. *Antonio v. Inez*, (1948) 53 C. W.N. 386 P.C.

(22) Cooley, Constitutional Law, p. 384.

(23) *Hutchinson Ice Cream Co. v. Iowa*, (1916) 242 U.S. 153.

(24) *Corn Products v. Eddy*, (1919) 249

U.S. 427.

(25) *New Orleans Gas Co. v. Light Co.*, 115 U.S. 650; *Slaughter House Case*, 16 Wall. 36.

(1) *Darcy v. Allain*, (1602) 11 Co. Rep. 84.

(2) Statute of Monopolies, followed by the Patents & Designs Act, 1907 (Eng.); The Indian Patents & Designs Act (II of 1911).

(i) To commit ■ nuisance,—private or public. (ii) To do an act likely to spread infection or dangerous disease. (iii) To adulterate food, drink, drug or medical preparations. (iv) To sell obnoxious food or drink or adulterated drugs; or medical preparations passing off as of a different make. (v) Not to take sufficient care as regards dangerous things likely to cause injury to others, *e.g.*, poisonous substance, fire or combustible matter, explosive substance, machinery, animal, pulling down or repairing buildings.<sup>3</sup> (vi) To sell or distribute obscene literature. (vii) To keep an unauthorised lottery house.<sup>4</sup>

(h) Nor would the freedom of trade or business entitle the parties to enter into illegal contracts or contracts contrary to public policy, *e.g.*, wagering contracts; marriage brokerage contracts amounting to trafficking in marriage; agreements in restraint of legal proceedings; monopolistic combinations.

(i) Every agreement by which any person is *restrained* from exercising a lawful profession, trade or business of any kind, is to that extent void, already under Sec. 27 of the Indian Contract Act. There is no doubt that such contract would also be void under Art. 19 (1) (g) of the Constitution. There are certain exceptions in the case of partnership business [Exc. 1 to Sec. 27 of the Indian Contract Act; Secs. 36, 53-55, of the Partnership Act (IX of 1932).]

*The American doctrine of 'business affected with public interest' not followed in the Indian Constitution.*—Under the 'due process clause' of the American Constitution, a person cannot be deprived of his property without the due process of law. It has already been noted that 'property' in this clause has been interpreted to include 'trade, business or enterprise'. But as against this clause, a doctrine has been established<sup>5</sup> that when a person devotes his property to a use in which the public has interest, his business becomes 'affected with ■ public interest' and then it can be controlled by the State in the exercise of its 'Police power' in the interest of the common good.

Following this decision, there has been much conflict of judicial opinion in America, as to when a business becomes 'affected with public interest' so that the State would be justified in interfering with it. The Courts have so far failed to lay down any concrete or definite standard for determining that question, but the cases where the State has been held to be justified in regulating a private business, may be grouped under the following heads<sup>6</sup>—

(i) Businesses which cannot be carried on as a matter of right, but may be permitted only under license of the State, *e.g.*, setting up of lotteries, sale of liquor. (ii) When for the accommodation or use of the business, public property or special privileges in respect of such property is offered by the State, *e.g.*, hawkers, vendors, stall-keepers on the streets and public places, railways. (iii) When the business is carried on under the authority of a public grant conferring privileges on the express condition of rendering service to the public, which cannot be otherwise available, *e.g.*, railways, other public utility concerns such as electricity, gas and like supplies.<sup>7</sup> (iv) When the business is not held under public grant or authority, but *becomes* 'clothed with a public interest', *e.g.*, a

(3) See the English Common law principles of Torts in the following cases, which would apply in India, generally; *Rylands v. Fletcher*, (1868) 3 H.L. 342; *Ellis v. Loftus Iron Co.*, (1874) 10 C.P. 10; *May v. Briddett*, (1846) 9 Q.B. 101; *Black v. Christchurch Finance Co.*, (1894) A.C. 48; *Donoghue v. Stevenson*, (1932) A.C. 562; *Grant v. Australian Knitting Co.*, (1936) A.C. 85; *Indermaur v. Dames*, (1866) 1

C.P. 274; *Francis v. Cockrell*, (1870) 5 Q.B. 134; *Gautret v. Egerton*, (1867) 2 C.P. 371 and so on.

(4) Cf. Bengal Gaming Act, 1867.

(5) Since the majority decision in *Munn v. Illinois*, (1876) 94 U.S. 113.

(6) Cf. Cooley, Constitutional Law of the United States.

(7) *Wolff Packing Co. v. Court of Industrial Relations*, (1923) 262 U.S. 522.



business of elevating and storing grain,<sup>8</sup> insurance,<sup>9</sup> rents of houses in emergencies,<sup>10</sup> employment agencies,<sup>11</sup> and sale of milk.<sup>12</sup>

But the following business have been held to be not affected with public interest, though the distinguishing principles are not always clear; theatres and other places of public amusement;<sup>13</sup> packing houses;<sup>14</sup> gasoline and oils;<sup>15</sup> ice.<sup>16</sup>

In recent cases, the Supreme Court has taken the view that the theory of 'being clothed with public interest' is little more than a fiction and forms only an unsatisfactory test. The true rule is that any industry is "for adequate reason subject to control for the public good."<sup>17</sup>

It is upon this consideration expressed in the case last cited<sup>11</sup> that the *Constitution of India* rejects the test of 'clothed with public interest' in Cl. (6) of Art. 19. Any business or trade, irrespective of its nature is liable to be controlled or restricted by the State if it is necessary in the interest of public order, morality or health. But the restrictions imposed must be *reasonable* as in the United States, where it has been held that the reasonableness of a regulation in restraint of a trade or business is open to challenge in the Court. Thus, the State cannot impose arbitrary or discriminatory regulations<sup>14</sup> [Cf. Art. 15 (1), *ante*], or regulations having no reasonable relation to some proper legislative purpose which the Legislature is competent to undertake,<sup>12</sup> or regulations which amount to the taking of private property for public use without just compensation<sup>18-19</sup> [in contravention of Art. 31 (2), *post*].

*Legislative Power.*—See Entry 26, List III, Sch. VII, *post*; also 65 of List I; Entries 31, 34 of List II, etc.

*Analogous Provisions.*—As to the inter-State aspect of this freedom, see Arts. 301-307, *post*.

**20.** (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

CL. (1) :

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. 9 (3) of the Constitution of the U.S.A. says—"No . . . *ex post facto* law shall be passed."

This Article has been so liberally interpreted as to prohibit "all laws which in any way operate to the detriment of one accused of a *crime* committed prior

(8) *Munn v. Illinois*, (1876) 94 U.S. 113.

(9) *German Alliance Ins. v. Lewis*, (1914) 233 U.S. 389.

(10) *Block v. Hirsch*, (1921) 256 U.S. 135.

(11) *Olsen v. Nebraska*, (1941) 313 U.S. 236, overruling *Ribnik v. McBride*, (1928) U.S. 350.

(12) *Nebbia v. New York*, (1934) 291 U.S. 502.

(13) *Tyson v. Banton*, (1927) 273 U.S. 418.

(14) *Wolf Packing Co. v. Court of Ind. Relations*, (1923) 262 U.S. 522.

(15) *Williams v. Standard Oil Co.*, (1929) 278 U.S. 235.

(16-19) *Railroad Commission Cases*, 116 U.S. 307 (331).

to the enactment of such laws."<sup>20</sup> Thus, the expression *ex post facto* law has been interpreted<sup>21</sup> to include—

(i) Every law that makes an action done before the passing of the law and which was innocent when done, criminal; and *punishes* such action. (ii) Every law that *aggravates* a crime, or makes it greater than it was when committed. (iii) Every law that *changes* the punishment and inflicts a *greater punishment*, than the law annexed to the crime when committed. (iv) Every law that alters the legal *rules of evidence*, and receives less, or different testimony, than the law required at the time of commission of the offence, in order to convict the offender.

To the above 4 rules, *Cooley*<sup>22</sup> adds two others:

(v) Every law which, assuming to regulate *civil* rights and remedies only, in effect imposes a penalty or the deprivation of ■ right for something which when done was lawful. (vi) Every law which *deprives* persons accused of crime of some *lawful protection* to which they have become entitled: such as the protection of ■ former conviction or acquittal, or the proclamation of amnesty.

But the prohibition against *ex post facto* law—(a) does not apply against retroactive laws which may operate to the *advantage* of the accused, *e.g.*, by modifying the procedure or reducing the punishment;<sup>23</sup> (b) does not apply against laws which merely change the *practice*, without affecting the *substantial* rights of the accused;<sup>24</sup> or which take away merely technical privileges;<sup>25</sup> or change the place of trial;<sup>1</sup> or provide for a longer period of incarceration between conviction and the execution;<sup>2</sup> (c) does not invalidate a statute permitting punishment to be enhanced on proof of a previous conviction, even though the *previous conviction* took place before the passing of the statute;<sup>3</sup> (d) does not invalidate a statute declaring that no person after conviction of a felony shall carry on a business (*e.g.*, practice of medicine), even though the person was convicted before the passage of the law.<sup>4</sup>

*England.*—Under the English Constitution, there is no *legal* bar to the power of Parliament to enact any law whatsoever, and it is competent to give retrospective effect to any of its laws.

Nevertheless *Blackstone*<sup>5</sup> denounced this method of legislation as 'unreasonable':

"There is a still more unreasonable method....which is called making laws *ex post facto*; when after an action (indifferent in itself) is committed, the Legislature then for the first time declares it to be a crime, and inflicts punishment upon the person who committed it".

So, though it is within the competence of the English Parliament to enact *ex post facto* legislation, the Courts ■■ loth to give such an interpretation to ■ statute unless such effect is clearly intended and expressed by the Legislature.<sup>6</sup> The rule of interpretation is that ■ new Act which penalises what otherwise is not

(20) Willoughby, *Constitutional Laws of the United States*, (1929), pp. 458, 683, 1135.

(21) *Calder v. Bull*, (1798) 3 Dall. 386.

(22) *Cooley*, *Constitutional Law*, p. 357.

(23) *Rooney v. N. Dakota*, (1906) 196 U.S. 319.

(24) *Duncan v. Missouri*, 152 U.S. 377.

(25) *Commonwealth v. Hall*, 97 Mass. 570.

(1) *Cook v. United States*, 138 U.S. 157.

(2) *Rooney v. N. Dakota*, (1906) 196 U.S. 319.

(3) *McDonald v. Massachusetts*, (1901) 180 U.S. 311.

(4) *Hawker v. N.Y.*, 170 U.S. 189.

(5) *Blackstone*, *Commentaries*, Vol. I, p. 46; see also *Phillips v. Eyre*, (1871) 6 Q.B. D. 1 (23).

(6) *Moon v. Durden*, (1848) 2 Ex. 22.

an offence must be so construed as to make it strike at future acts or omissions, unless the Legislature has clearly said so.<sup>7</sup> If, however, the Legislature expressly gives retrospective effect to the penal provision, the Court would be powerless to protect the subject from the operation of the law on the ground that it is *ex post facto*.<sup>8</sup> In fact, during World War II, statutes have been passed increasing the penalty for offences committed before the passing of such statutes, and their validity has been upheld.<sup>9</sup>

*Dominions*.—Like the English Parliament, the Dominion Parliaments are competent to pass *ex post facto* laws.<sup>10</sup>

*Eire*.—Art. 15 (5) of the Constitution of 1937 says—

"The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission."<sup>12</sup>

*Burma*.—Art. 24 of the Constitution of 1948 says—

"No person shall be convicted of crime except for violation of a law in force at the time of the commission of the act charged as an offence, nor shall he be subjected to a penalty greater than that applicable at the time of the commission of the offence."

*Japan*.—Art. XXXIX of the Japanese Constitution of 1946 says—

"No person shall be held criminally liable for an act which was lawful at the time it was committed. . . ."

*Government of India Act, 1935*.—There was no prohibition in this Act or in any law prior to the commencement of this Constitution, against *ex post facto* laws. So the Legislature was competent to pass such laws.<sup>13</sup> The Courts, however, used to lean against a retrospective interpretation.<sup>14</sup>

## INDIA

*Scope of Cl. (1): Prohibition of retroactive criminal laws*.—A sovereign Legislature has the power to enact prospective as well as *retrospective* laws. But the present article sets two limitations upon the law-making power of every legislative authority in India as regards retroactive *criminal* legislation. The present clause thus follows the American system but it does not use the expression "*ex post facto*" laws; it merely enumerates the two consequences which a *Criminal* law must avoid. These are—

(I) No person shall be *convicted* of any offence under any law not in force at the time of the commission of the offence.

Hence, it is clear that the prohibition is only against prescribing judicial punishment with retrospective effect. It does not prohibit the enforcement of any other sanction, *e.g.*, the loss or deprivation of any business or cancellation of naturalisation certificate<sup>15</sup> by reason of act committed prior to the operation of the Act. *Secondly*, it would seem that the above prohibition would not prevent the Legislature from altering matters of *procedure*,<sup>16</sup> which do not make an act which was not an offence to be an offence. *Similarly*, a change in the rules of *evidence* made after the commission of an offence would not offend against this prohibition,<sup>17</sup> for such change would not create a new offence.

(7) *Butchers, Hide Co. v. Seacombe*, (1913) 2 K.B. 401.

(8) Allen, *Law in the Making*, p. 383.

(9) *Director of P. P. v. Lamb*, (1941) 2 K.B. 89; *Buckman v. Button*, (1943) K.B. 405.

(10) *R. v. Kidman*, (1915) 20 C.L.R. 425; Lefroy, *Canadian Constitutional Law*, p. 70; Halsbury, Vol. II, p. 87.

(12) Cf. Kohn, *Constitution of the Irish Free State*, 1932, pp. 169-171, as to interpretation of corresponding provision in the Con-

stitution Act of 1922.

(13) *Chunilal v. Corporation of Calcutta*, (1933) 37 C.W.N. 737; *Jnan Prasanna v. H. Bengal*, A.I.R. 1949 Cal. 1.

(14) *Gadai v. Emp.* A.I.R. 1943 Pat. 361.

(15) *Johannessen v. U.S.* (1912) 225 U.S. 227.

(16) *Thompson v. Utah*, (1898) 170 U.S. 343.

(17) *Contra* rule in *Calder v. Bull*, (1798) 3 Dall. 386 [see p. 103, ante].



(II) No person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Hence, there is no doubt that a statute which provides for a more severe penalty for an offence in the case of a habitual offender, previously convicted of the same crime, cannot be impeached as *ex post facto*, even though the previous conviction had been for an offence committed prior to the passing of the statute; for, the heavier penalty is not an additional punishment for the earlier offence, but a punishment for the *new* offence,—“but is heavier if he is a habitual criminal.”<sup>18</sup> Again, where the penalty is not greater, any change in the mode of execution or of the penalty itself is not bad for its being *ex post facto*.<sup>19</sup>

It is to be noted that the present prohibition is a prohibition against legislation and not against judicial decisions.<sup>20</sup>

“Offence”.—Cf. definition in Sec. 40, Indian Penal Code.

CL. (2) :

#### OTHER CONSTITUTIONS

*U. S. A.*—The Fifth Amendment to the Constitution of the U.S.A. says—

“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.”

The protection has been held to be not only from punishment but also from a second trial, which commences when a man is *charged* before a competent tribunal.<sup>21</sup> Conviction or acquittal at the previous trial will equally bar a second prosecution. But a person is not put in jeopardy (i) by prosecution in a Court which has no jurisdiction to try the case,<sup>21</sup> or (ii) upon an indictment which is so defective that no judgment can be given upon it.<sup>22</sup>

Again,—

(a) A *re-trial* does not come within the rule.<sup>23</sup> When a person appeals from conviction in a lower Court, he waives his protection, and he may be tried again, at the direction of the Appellate Court, even for an offence of a higher degree.<sup>23</sup>  
(b) When the same act or transaction involves separate offences, separate prosecution lies for the separate offences,<sup>21</sup> *e.g.*, Conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy.<sup>24-25</sup>

*England.*—The above provision of the United States Constitution is indeed founded on the English Common Law rule ‘*nemo debet bis vexari*’, which means that a man may not be put twice in peril for the same offence. It enables an accused to raise a plea not only of *autrefois convict* but also of *autrefois acquit*. The principle upon which *autrefois acquit* is founded is, of course, somewhat different from that of double jeopardy as the former is one of finality of judgment: “Where an offence has already been the subject of judicial investigation and adjudication, and there has been an acquittal, the acquittal is conclusive, and it would be a very

(18) *McDonald v. Massachusetts*, (1901) 180 U.S. 311.

(19) *Holden v. Minnesota*, 137 U.S. 483; *Rooney v. North Dakota*, (1905) 196 U.S. 319.

(20) *Ross v. Oregon*, (1913) 227 U.S. 150.

(21) *Kepner v. United States*, (1904) 195 U.S. 100.

(22) *Gerard v. People*, 4 Ill. 363.

(23) *United States v. Josef*, (1824) 9 Wheaton 579.

(24-25) *United States v. Rabinowich*, 238 U.S. 78.

dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the accused."<sup>1-3</sup>

*Japan.*—Art. XXXIX provides—

"No person shall be held criminally liable for an act. . . . of which he has been acquitted nor shall he, in any way, be placed in double jeopardy."

*Government of India Act, 1935.*—There is no provision in that Act itself relating to this matter, but the existing law of Criminal Procedure (Sec. 403 of the Code of Criminal Procedure) already embodies the principles of *autrefois convict* and *autrefois acquit*.

But the provisions of this section are somewhat different from the English rule, in respect of *autrefois acquit*. Under the English law, in order to raise the plea of *autrefois acquit*, the accused must show that (a) he was previously *tried*, and also that (b) he was *acquitted* at that trial. But under the Criminal Procedure Code,—

(i) There are certain cases where statutory acquittal without trial is sufficient to sustain the bar of *autrefois acquit* under Sec. 403. These cases are (a) Acquittal for non-attendance of the complainant (Sec. 247). (b) Composition of ■ offence [Sec. 345 (6)]. (c) Withdrawal of prosecution by the Public Prosecutor in cases where no charge is required by the Code; or where charge is required,—after the framing of the charge [Sec. 494 (b)].

(ii) On the other hand,—certain cases are excluded from the scope of the plea by the *Explanation* to Sec. 403, even though these cases are rather analogous to the cases above-mentioned:

(a) Dismissal of the complaint under Sec. 203. (In this case, though there has been no *trial*, the complainant has failed to substantiate his case, *prima facie*, on his own evidence. (b) 'Discharge' of the accused; and in this respect no distinction is made between a discharge where all the evidence for the prosecution has been heard and a discharge where it has not been heard. Thus, 'discharge' of the accused takes place under the Code, in the following cases:

(a) Discharge of accused in a warrant-case which is compoundable, or non-cognizable, for non-appearance of complainant (Sec. 259). (b) Discharge of the accused in a warrant case when the evidence for the prosecution has failed to make out a case [Sec. 253 (1)]. (It is to be noted that in this case, the discharge takes place after hearing *all* the evidence for the prosecution). (c) Discharge at the enquiry stage, in cases triable by ■ Court of Sessions or the High Court [(Sec. 209 (1))]. (d) Discharge on entry of *nolle prosequi* (Sec. 333).

#### INDIA

*Scope of Cl. (2): Bar against double prosecution.*—The principle underlying this clause is the same as underlies the 'double jeopardy' clause of the Constitution of the U.S.A., but the words used are different.

The word 'prosecuted' was said to have been introduced in the present clause in order to make it clear that the bar relates to punishment by a Court of law and not to other kinds of punishment, besides ■ judicial penalty, *e.g.*, departmen-

tal action in the case of public servants, or proceedings under the Legal Practitioners Act, in the case of lawyers.<sup>4</sup>

But there is difficulty as to the interpretation of the conjunction 'and'. Is it to be construed in the ordinary conjunctive sense or in the disjunctive sense of 'or'?

(i) If it is construed in the literal conjunctive sense, it would mean that a second trial would not be barred unless the accused had been both prosecuted ■ well as *punished* on ■ former occasion, for the same offence. In that case, the Constitution would exclude the protection under *autrefois acquit*. It is difficult to hold that this is the intention of the framers of the Constitution.

(ii) If, however, the Court interprets it as 'or',—the clause would not only include the plea of *autrefois acquit*, but would also prevent a fresh 'prosecution', which I believe is a wider term than 'trial'. In that case, the constitutional provision would be more beneficial than the existing state of the law.

It has been held that a person has been 'tried' within the meaning of Sec. 403 when proceedings have been commenced in Court against the accused,<sup>5</sup> *e.g.*, (a) In a summons-case, when process has been issued under Sec. 247, whether such process is served or not.<sup>6</sup> In another case, however, the same High Court has held that the trial does not commence until the accused is brought before the Court and the particulars are stated to him, under Sec. 242.<sup>6</sup> (b) In a warrant-case, after the charge is framed under Sec. 254 and the accused is called upon to plead (Sec. 255). (c) In a Sessions case, after a charge is framed by the Magistrate, under Sec. 210, for committing the accused 'for trial'.

It is thus clear that ■ trial does not commence until there has been some 'hearing' by a Court. But a 'prosecution', though that term has not been defined in the Cr. P. Code, obviously starts from before a trial. From a reading of Secs. 195-199 of the Cr. P. Code, it appears that ■ prosecution takes place when ■ Court of competent jurisdiction takes *cognizance* of an offence, either upon a private or a public complaint, or upon ■ report of ■ Police-officer or otherwise. Prosecution, thus, simply means the setting of the machinery of criminal justice to be in motion.

So, if the present clause of the Constitution seeks to prohibit a second prosecution, it would prevent ■ Court from taking cognizance of an offence, even in cases where there has been ■ previous dismissal of the complaint under Sec. 203, or discharge of the accused under Sec. 253 (1) or Sec. 259.<sup>7</sup>

'Same Offence'.—The Constitution bars double punishment for the same offence. But where the same act constitutes different laws,<sup>8</sup> or where the consequence following from one act constitutes a separate offence, there is nothing under the Constitution to bar separate trial and punishment. But there are some limitations under the *existing law*: see Sec. 403 (4) of the Code of Criminal Procedure, and Sec. 26 of the General Clauses Act, 1897.

### CL. (3):

#### OTHER CONSTITUTIONS

*England*.—It is ■ fundamental principle of the English system of criminal justice (which differs from the inquisitorial procedure obtaining in France and some other Continental countries), that it is for the prosecution to prove the guilt

(4) Cf. Ram Govind, A.I.R. 1931 Pat. 369 (F.B.).

(5) *Dudekula*, (1917) 40 Mad. 976.

(6) *Kotayya v. Venkayya*, (1917) 40 Mad. 977 (f.n.).

(7) Cf. Expl. to Sec. 403 of the Code of Criminal Procedure, at p. 106, *ante*.

(8) Cf. *U.S. v. Rabinowich*, 238 U.S. 78.



and the accused need not make any statement against his will. "It is the business of the Crown to prove him guilty, and he need not do anything but stand by and see what case has been made out against him. . . . He is entitled to rely on the defence that the evidence, as it stands, is inconclusive, and that the Crown is bound to make it conclusive without any help from him."<sup>9</sup> The principle of immunity from self-criminating evidence is thus founded on the 'Presumption of innocence' which characterises the English system of criminal trial. The principle is now embodied in statute,—the Criminal Evidence Act, 1898, which says that though the accused is competent to be a witness on his own behalf, he cannot be compelled to give evidence against himself. If he gives evidence on his own behalf, the prosecution may comment upon such evidence, but his failure to give evidence cannot be commented upon.

*U.S.A.*—The Fifth Amendment to the Constitution of the U.S.A. adopts the above principle by laying down—

"No person . . . shall be compelled in any criminal case to be a witness against himself."

So, an accused is permitted to give evidence on his own behalf if he so elects. But if he elects not to give evidence, that fact cannot be used to his prejudice.<sup>10</sup> Nor can a man be convicted on testimony obtained by compulsory discovery: "Any compulsory discovery by extorting the party's oath is contrary to the principles of free government";<sup>11</sup> it is "shocking to the universal sense of justice and offensive to the common and fundamental ideas of fairness and right."<sup>12</sup>

In the United States, judicial interpretation has enlarged the scope of the privilege. Thus,—

(i) The privilege has been held to include not only oral evidence but also *documentary* evidence which is self-incriminating.<sup>13</sup> But the privilege is confined to private papers<sup>14</sup> and does not extend to *public* papers in the custody of the accused.<sup>15</sup> (ii) Again, the privilege has been used to protect a mere *witness* as fully as it does apply to protect a party defendant.<sup>15-16</sup> (iii) Above all, though the Fifth Amendment refers to a 'criminal case', it has been held to include both *civil* and criminal proceedings 'wherever the answer might tend to subject to criminal responsibility him who gives it'.<sup>15-16</sup>

But the provision against self-incrimination has been held to be subject to the following limitations:

(a) It is open to the accused to waive the privilege. But if he waives the privilege and gives testimony on any point, he must give the whole of it.<sup>17</sup> (b) Where an accused has been pardoned or otherwise given immunity from prosecution, he may be compelled to give evidence. But before the accused may so be compelled, he must be given complete immunity, not only from the criminal charge directly in question but also from the liability for other criminal offences that may be revealed by the evidence of the witness.<sup>17</sup> (c) The immunity is merely from giving evidence against the consent of the accused. The *prosecution* is not debarred from *exhibiting* the *person* of the accused to the Jury, comparing his finger-prints, photographs, etc.<sup>18</sup> (d) A corporation, being an artificial person,

(9) *Macne*, Criminal Law.

(10) *Wilson v. United States*, 149 U.S. 60.

(11) *Boyd v. United States*, (1886) 116 U.S. 616.

(12) *Bells v. Brady*, 316 U.S. 455.

(13) *U. S. v. White*, (1944) 322 U.S.

694.

(15-16) *McCarthy v. Arundstein*, 246 U.S. 34 (40).

(17) *Brown v. Walker*, (1896) 161 U.S. 591.

(18) *Holt v. United States*, (1910) 218 U.S. 245.

is not entitled to this immunity<sup>19</sup> but it cannot be directed to produce its books, causing suspension of its business, unless there is good reason for the order.<sup>20</sup>

*Japan.*—Art. XXXVIII of the Japanese Constitution, 1946, provides—

“No person shall be compelled to testify against himself. . . .”

#### INDIA

*Scope of Cl. (3): Immunity from self-incriminating evidence.*—The present Cl. follows the language of the Fifth Amendment of the American Constitution, but the rule laid down in our Constitution is narrower than the American rule as expanded by interpretation. Thus,

(i) The words ‘accused of an offence’ make it clear that the privilege under the Constitution of India is confined to an accused in a criminal proceeding and does not apply to witnesses nor to civil proceedings. (It may be noted in this connection, that the *existing Indian law* relating to witnesses differs from the English law. Under the English law, not only an accused in a criminal proceeding, but a witness in any proceeding is protected from answering questions which may tend him to a criminal prosecution, or any other penalty or forfeiture.<sup>21</sup> But in India, a mere witness to any proceeding has no such protection. Under Sec. 132 of the Evidence Act, no witness is excused from answering any question on the ground that it would expose him to criminal liability or penalty or forfeiture; but at the same time, the law gives him indemnity from any criminal liability for such evidence except for perjury. It should be noted that the privilege conferred by Art. 20 (3) of the Constitution will not affect the existing law relating to witnesses).

(ii) The expression ‘accused of an offence’ also indicates that the privilege is confined to a proceeding before a Criminal Court under the Criminal Procedure Code, where a person is charged with having committed an Act which is *punishable* under the Indian Penal Code or any special or local law. The Court issues process against the ‘accused’ if it does not dismiss the complaint under Sec. 203, Cr. P. C. A person against whom no process has been issued is not an accused.<sup>22</sup> The word ‘accused’ in the present clause will, accordingly, mean the accused who is on trial in the proceeding to which the provision is sought to be applied.<sup>23</sup>

(iii) The words “to be a witness”, on the other hand, make it clear that the privilege against self-incrimination under the Indian Constitution is confined to oral evidence of the accused and *does not extend* to documentary evidence. For, the definition of evidence in Sec. 3 of the Evidence Act explains that the evidence of a ‘witness’ comprises all *statements* which the Court permits or requires to be made before it, as distinguished from ‘documents produced for the inspection of the Court’. The provision in question also leaves undisturbed the existing law of India on the point. The *existing Indian law*, it may be pointed out, permits the issue of summons upon an accused person to produce any document or thing, even though its production may incriminate him; for, the word ‘person’ in Sec. 94 of the Cr. P. C. is wide enough to include an ‘accused’ person.<sup>24</sup> Consequently, by refusing to produce a document so called for, the accused renders himself liable, like any other person, for contempt of Court, under Sec. 485, Cr. P. C., apart from any adverse finding in the trial itself.

(iv) Not only can the accused be compelled to produce a document,—his premises may be *searched* by warrant for any document deemed essential for

(19) *Wilson v. United States*, (1911) 1453.  
221 U.S. 361.

(20) *Hale v. Henkel*, (1906) 201 U.S.  
43.

(21) Best Evidence, Art. 125; Taylor

(22) *Sk. Chand v. Hanif*, 8 Cr.L.J. 20.

(23) *Md. Yusuf*, (1931) 58 Cal. 1214.

(24) *Bissar Misser*, (1913) 41 Cal. 261;

*Khonda Reddi*, (1912) 37 Mad. 112.

his conviction, under Sec. 96 of the Cr. P. C. In this connection, we may recall that the Fourth Amendment to the Constitution of the *United States* guarantees "the right of the people to be secure in their persons, houses, *papers* and effects against *unreasonable* searches". Construing this provision with the provision against self-incrimination in the Fifth Amendment, the Supreme Court has laid down that a man's *private* books and papers cannot be seized to be used in evidence to incriminate him.<sup>25</sup> Not only is the accused not immune from search for and seizure of his papers under the existing Indian law, there is also no immunity from what is called a '*general*' warrant. It is interesting to note that though '*general warrants*' were condemned in *England* by the famous trio of General Warrant Cases ending with *Entick v. Carrington*<sup>1</sup>, modern *England* tends to be in favour of more '*Police power*' as is evidenced by the decision in *Elias v. Pasmorc*<sup>2</sup> and Sec. 9 of the Official Secrets Act, 1911. In *Elias v. Pasmorc*,<sup>2</sup> it has been held that upon the arrest by lawful process of an accused person, the police can search the premises where the prisoner is arrested and seize *any* material which is relevant to the prosecution for *any* crime committed by *any* person, even other than the prisoner himself.

Be that as it may, the Constitution of *India* does not promise any advance upon the existing law relating to the present matter and there is no protection of an accused person as against '*unreasonable searches*'. All this is left to the Legislature.

(v) On the other hand, it should be noted that the above constitutional bar would not affect the existing law as to approvers contained in Sec. 337 and 339 of the Cr. P. C. For, the bar is against being '*compelled*'. There is no bar to the accused's *waiving* the privilege in lieu of pardon or immunity. So, once an accused has accepted a tender of pardon, he is bound to make a full disclosure, or he may be tried for the original offence,—having forfeited the benefit of the pardon.

(vi) We should not leave the present topic without a reference to the provisions of Cl. (3) of S. 342 of the Code of Criminal Procedure. The object of Cl. (1) of this section is rather laudable. It seeks to give the accused an *opportunity* of explaining any circumstances which may tend to incriminate him if he does not speak or of stating in his own way anything which he may be desirous of stating.<sup>3</sup> The object thus is not inquisitorial and Cl. (2) says that the accused shall not render himself liable to punishment either for refusing to answer the questions put by the Court under Cl. (1) or by giving false answers. But the question is, what use should be made of his answers if he avails himself of the opportunity offered to him. Cl. (3) says that "the answers may be *taken into consideration* at such inquiry or trial". The expression "*take into consideration*" is very wide and under this clause, the Court may take the statement into consideration in order to determine whether the issue of guilt is proved or not, and to that extent it stands practically on the same footing as other evidence, although technically it is not evidence within the meaning of the Evidence Act, inasmuch as it is not made on oath<sup>4</sup>. It has, in fact, called for a judicial pronouncement to the effect that a conviction based on such a statement alone is bad<sup>5</sup>; or that the accused's statement cannot be used to fill up the gaps or vagueness in the evidence laid by the prosecution.<sup>5</sup> But even if it be said that "when neither the prosecution nor the accused is able to procure direct evidence and the case hangs upon circumstantial evidence, the accused's statement must be taken into consideration"<sup>4</sup> the provision runs counter to the fundamental rule of presumption of in-

(25) *Boyd v. United States*, 116 U.S. 616.

(1) (1765) 19 St. Tr. 1030.

(2) *Elias v. Pasmorc*, (1934) 2 K.B. 164.

(3) *Hossein Bux*, 6 Cal. 96; *Pramatha-*

*nath* 50 Cal. 518.

(4) *Abdul Gani*, 49 Bom. 878.

(5) *Rholanath*, (1928) 51 All. 313.



nocence of the accused which is the foundation of the English system and under which the accused has no obligation to 'procure' any evidence at all. In accordance with this principle, under the English law, the Court is not competent to ask the accused any question except questions incidental to the trial *viz.* whether he wishes to cross-examine a witness. The answers of the accused cannot be used against himself, for the whole burden of proving his guilt is upon the prosecution. The rule in S. 342 (3) of the Cr.P.C. departs from the English principle and ■ Sir Fitzjames Stephen characterised the provision as 'embarrassing, illogical and hypothetical'.

Now that Cl. (3) of Art. 20 of the Constitution accepts the English rule of burden of proof by prohibiting self-incriminating evidence altogether, it would, it is submitted, *render unconstitutional* the provision of the earlier part of S. 342 (3) of Cr.P.C., in so far as the use of the answers given by the accused to Court questions against him would amount to compel him to give evidence against himself.

(vi) On the other hand, the word 'compelled' suggests that the prohibition is against *compulsion*. There is no constitutional bar against the accused being a witness on his behalf. We have seen that in England, under the Criminal Evidence Act, 1898, ■ accused is competent to be a witness on his own behalf. But under the *existing law of India*, an accused cannot give evidence even on behalf of the defence.<sup>6</sup> For, S. 342 (4) of the Code of Criminal Procedure says that no oath shall be administered to the accused. Again in view of Ss. 5-6 of the Indian Oaths Act, no witness can be examined without oath or affirmation and ■ oath or affirmation cannot be administered to an accused at ■ criminal trial. In the result, the accused in a criminal trial, cannot give evidence as a witness at all,—even on his own behalf. This disability of the accused in India is not only contrary to the English law, it is also an exception to the general proposition enacted in S. 118 of the Indian Evidence Act that all persons shall be competent to testify. Since the constitutional bar under Art. 20 (3) of the Constitution is only against making the accused a witness against himself against his will,—it may be expected that on the commencement of the Constitution, the *disability of the accused to testify on his own behalf* will be removed by suitable amendment of S. 342 (4) of the Cr.P.C. and S. 5 of the Oaths Act..

(vii) 'Against himself' makes it clear that ■ accused cannot refuse his testimony on the ground that it might incriminate a *third* person even though he were an agent of such third person.<sup>7</sup> The word 'person' in this clause cannot, obviously, include a corporation.<sup>8</sup>

*Applicability to military personnel*—See under Art. 33, *post*.

**21.** No person shall be deprived of his life or personal liberty except according to procedure established by law.

#### OTHER CONSTITUTIONS<sup>8</sup>

**U.S.A.**—The Fifth Amendment to the Constitution of the U.S.A. (1791) declares—

"No person shall be . . . deprived of his life, liberty or property, without due process of law".

(6) The only exception is in the case of certain proceedings mentioned in Sec. 340 (2) of the Cr. P. C.

(7) *Hale v. Henkel*, (1906) 201 U.S. 43

(66).

(8) See also Art. 114, Weimar; 107, Czech; 5 (1) Jugoslav; 74 (1), Daqzig, Constitutions.

The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the 'due process clauses'. Under the above clauses the American Judiciary claims to declare law as bad, if it is not in accord with 'due process', even though the legislation may be within the *competence* of the Legislature concerned. The Constitution, however, does not define 'due process of law', and the Courts, taking advantage of that, have given it such a liberal interpretation according to the facts of each case, as to enable itself to invalidate laws which may be supposed to offend against the 'spirit of the Constitution'. Thus, the Supreme Court itself has failed to define it with scientific precision in any case.<sup>9-10</sup>

In *Hovey v. Elliot*,<sup>11</sup> the Supreme Court approved of Daniel Webster's argument in the *Dartmouth case*,<sup>12</sup> that 'due process'—"is the process of law which *hears* before it condemns, which proceeds upon enquiry, and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of the *general rules* which govern society." In a later case,<sup>13</sup> the Court said—"By due process of law is meant one which, following the forms of law, is appropriate to the case and *just to the parties to be affected*. It must be pursued in the *ordinary modes* prescribed by law, it must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties, it must give them an *opportunity to be heard* respecting the justness of the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those *general rules* established in our system of *jurisprudence* for the security of private rights".<sup>13</sup> In the result, "Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land".<sup>14</sup>

Under this power, thus, the American Judiciary claims to nullify any legislation, which may be otherwise valid, on the ground that there is something which seems to be *arbitrary* to the Bench of Judges which try the particular case in relation to which the statute comes to Court. Thus, the Court has invalidated—

(a) A statute which did not secure *reasonable time and opportunity* to secure a counsel for the preparation of defence in a criminal case.<sup>15</sup> (b) A statute, as a result of which such an irreparable injury might result, pending judicial review, as would render *illusory* the remedies afforded.<sup>16</sup> (c) A statute which has the *practical effect* of denying access to the Courts,<sup>17</sup> e.g., a law which *indirectly* imposes such conditions as would bring about a denial of relief upon resort to judicial process.<sup>18</sup> (d) A statute by which an offence is so indefinitely or vaguely defined or described, that a man of common intelligence is unable to determine whether or not he is committing the offence.<sup>19</sup> 'Due process' requires that there should be an 'ascertainable standard of guilt'.<sup>20</sup>

In short, 'due process' as regards *criminal trial* means that "no person could be punished except for a violation of *definite* and validly enacted laws of the land, and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights".<sup>21</sup>

(9-10) See my article on 'The Indian Constitution' in (1949) F.L.J. at p. 161.

(10-11) (1897) 167 U.S. 409.

(12) The *Dartmouth College Case*, (1819), 4 Wh. 518.

(13) *Hagar v. Reclamation Dist.*, (1884) 111 U.S. 701.

(14) Webster, in the *Dartmouth College Case*.

(15) *Powell v. Alabama*, (1932) 287 U.S. 45.

(16) *Natural Gas Pipeline Co. v. Slattery*,

302 U.S. 300.

(17) *Ex parte Young*, (1908) 209 U.S. 123.

(18) *Missouri P. R. Co. v. Tucker*, 230 U.S. 340.

(19) *Lauzetta v. New Jersey*, (1939) 306 U.S. 451.

(20) *U.S. v. Cohen Grocery*, (1921) 255 U.S. 81.

(21) *Feldman v. United States*, (1943) 322 U.S. 487 (502).

"The deduction is that life, liberty and property are placed under the protection of known and established principles which cannot be dispensed with either generally or specially; either by Courts or executive officers, or by legislators themselves. Different principles are applicable in different cases, and require different forms and proceedings; in some they must be judicial; in others the government may interfere directly, and *ex parte*; but due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs. When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted".<sup>22</sup>

'Due process' in short, enables the American Judiciary to examine the validity of laws, not only from the point of view of the Legislature's competence but also from the broader angle of the inherent goodness of law.<sup>23</sup>

*England.*—In the Magna Carta (which King John was forced to sign, in 1215), it was demanded that—"No man shall be taken or imprisoned, disseised ■ outlawed, or exiled, or in any way destroyed, save by the lawful judgment of his peers or by the *law of the land*". This demand was reiterated in the Petition of Right, 1628, and since then the observance of this principle has established what is known ■ the Rule of Law in England. The phrase 'due process of law' was used in a statute of the 14th century (28 Edw. III, 3) and the framers of the American Constitution appears to have borrowed the phrase from there. But in the English Constitution, the expression 'law of the land' has ■ different meaning than the 'due process of law' of the American Constitution. In England, 'law' means the law as declared by Parliament. It does not mean any fundamental law limiting the powers of Parliament itself. The 'law of the land' in the above Charters thus simply means the absence of any arbitrary power by the *Executive*, that no man can be punished except after being tried for a definite offence (*i.e.*, violation of ■ 'law') and in the *ordinary legal manner*. As explained by the Privy Council<sup>24</sup>.

"In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before ■ Court of Justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the Executive".

But as against the legislative competence of *Parliament*, there is ■ limit under the English constitutional system. Thus, "The concessions of Magna Carta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favour of the Commons by limiting the power of Parliament . . . the omnipotence of Parliament was absolute, even against common right and reason."<sup>25</sup>

As May observes—

"The Constitution has assigned ■ limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be *unjust* and contrary to the principles of sound government: But Parliament is not controlled ■ its discretion and when it errs, its errors ■ be corrected by itself."<sup>26</sup>

So, Leslie Stephen put it—

"If a legislature decided that all blue-eyed babies should be murdered, the preservation of all blue-eyed babies would be illegal".

(22) Story, Constitution, 4th Ed., Arts. 1943-6.

(23) See my Article 'The Indian Constitution through American eyes' in (1949) F. L.J. 147 (161-166).

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(24) *Eshugbayi v. Government of Nigeria*, A.I.R. 1931 P.C. 248 (252).

(25) *Hurtado v. California*, (1884) 110 U.S. 576.

(1) May, Parliamentary Practice.



In short, in England, it is not open to the Courts to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to the Courts' notions of justice or 'due process'.

For the most authoritative pronouncement on this question in recent years, we must refer to Lord Wright's observation in *Liversidge v. Anderson*<sup>1-a</sup>—

"All the Courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute."

*U.S.S.R.*—Art. 12 of the Constitution of Soviet Russia, 1936, says:

"The citizens of the U.S.S.R. are ensured inviolability of the person. No one may be subjected to arrest except by decision of a court or with the sanction of a procurator."

*Eire.*—Art. 40 (4) of the Constitution of 1937 says<sup>1-b</sup>

"No citizen shall be deprived of his personal liberty save in accordance with law."

*Japan.*—Art. XXXI of the Japanese Constitution of 1946 says:

"No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

*Burma.*—Art. 16 of the Constitution of 1948 provides—

"No citizen shall be deprived of his personal liberty, nor his dwelling entered, nor his property confiscated, save in accordance with law."

#### INDIA

**Source of Art. 21.**—This Article has been framed in the language of Art. XXXI of the Constitution of Japan (see above).

**Object of Art. 21.**—This Article is not intended to be a constitutional limitation upon the powers of the *Legislature* otherwise conferred by the Constitution. Its object is simply to serve as a restraint upon the *Executive* so that it may not proceed against the life or personal liberty of the individual save under the authority of some law and in conformity with the procedure laid therein [which is in conformity with Art. 22].

**Personal Liberty.**—'Liberty' is a very comprehensive term and let alone it would include not merely freedom to move about unrestricted but such liberty of conduct, choice and action as the law gives and protects.<sup>2</sup> But by qualifying the word liberty by the word 'personal', the import of the word liberty in Art. 21 is narrowed down to the meaning given in English law to the expression 'liberty of the person' or 'personal freedom', i.e., the right not to be punished, imprisoned or coerced except according to the procedure established by law.<sup>3</sup> Art. 21 is the only article in this Constitution safeguarding 'personal liberty'. Art. 19 (1) (d), guaranteeing freedom of movement, has a different context [see p. 94, ante].<sup>4</sup> Further, that clause guarantees a substantive right without prescribing any procedure at all.

**'Established by law.'**—By the use of these words, the Indian Constitution accepts the English principle of supremacy of the law, in preference to the American doctrine of judicial review of legislation,<sup>5</sup> (see pp. 45, 112, ante). Liberty, according to this view, as we have seen<sup>6</sup> is a "liberty confined and controlled by law". 'Law' in this expression means state-made law and not the general principles of natural justice.<sup>7</sup>

(1-a) (1942) A.C. 206 (260).

(1-b) Cf. Art. 6 of the Constitution of the Irish Free State, 1922.

(2) *Allegeyer v. Louisiana*, (1897) 165 U.S. 578.

(3) Keith, *Constitutional Law*, p. 434.

(3-a) In re *Gopalan* [Statesman, Calcutta, 20-5-50, p. 1].

(4) See my article on "The Indian Constitution through American eyes", (1949) F.L.J. (Jour.). [The views expressed in that article have since been affirmed by the Supreme Court Judgment in *Gopalan*, In re].

(5) *Liversidge v. Anderson*, (1942) A.C. 206 (260).

"The only right given by Art. 21 is that no person shall be deprived of his life or liberty except according to 'procedure established by law'. By adopting that phrase, the Constitution gave the Legislature the final word to determine law. . . . Our protection against legislative tyranny, if any, lies, in the ultimate analysis, in a free and intelligent public opinion which must eventually assert itself. . . . It is not for the Court to question the wisdom and policy of the 'Constitution' which the people have given unto themselves. It is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that we find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its security or the protection of private rights."<sup>5-a</sup>

So, once it is found that an Act is within the competence of the Legislature in question, our Courts would be powerless to question the propriety of the legislation or in any way to modify its effect on the ground that it seeks to 'unduly' restrict personal liberty.<sup>6</sup> Thus, if a Legislature enacts a law directing that certain persons shall be detained without trial, for reasons connected with the maintenance of public order (Entry 3 of List III), and the law does not violate any of the provisions of Art. 22, the Courts shall have no power to declare that law as bad under any principles of jurisprudence.<sup>5-a</sup>

The only difference from the situation in England is that ours being a federal system, the powers of the Union and State Legislatures are limited by the respective Legislative Lists, and it is within the competence of the Courts to declare whether any Act is within the legislative powers of the Legislature concerned. So, unlike in England, our Courts shall have the power, notwithstanding the expression 'established by law',—

(a) To declare unconstitutional a law which exceeds the legislative competence of the Legislature concerned.<sup>7</sup>

(b) To declare unconstitutional a law which is only a *colourable*<sup>8</sup> exercise of some legislative power of the Legislature,—being to that extent a 'fraud on the Constitution'.<sup>9</sup>

Thus, when a Legislature professes to take away personal liberty on the ground that preventive detention is necessary for the maintenance of 'public order' [Entry 3, List III], the acts which are sought to be prevented by such law must have a 'real and proximate',—not far-fetched or problematical connection with the maintenance of public order.<sup>9-a</sup> The recital in the Preamble of the Act is not conclusive to establish this connection; it is for the Courts to say whether the prevention of that particular activity has got a real and proximate connection with the maintenance of public order.<sup>9-a</sup>

"Whilst a statement in the preamble of a statute may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on the question of *vires*, where the Legislature concerned has powers to legislate on certain specified matters only. The Court must still see, in such cases, whether the subject-matter of the impugned legislation is really within those powers."<sup>9-a</sup>

But once it is held that the Legislature has not transgressed the powers assigned to it, it is not for the Court to criticise the wisdom and policy of the Legislature.<sup>6</sup> The Court has got to decide on a consideration of the *true nature* and character of a legislation whether it is *really* on the subject to which it pur-

(5-a) In re *Gopalan* [Statesman, Calcutta, 20-5-50, p. 1].

(6) Cf. *Lakhinarayan v. Prov. of Bihar*, (1949) S.C.J. 32 (43).

(7) Cf. *Megh Raj v. Alla Rakha*, (1942) 46 C.W.N. 61 (F.R.).

(8) *A. G. of Br. Columbia v. A. G. of Canada*, A.I.R. 1937 P.C. 91; *Board of*

*Trustees v. Investment Orders*, (1940) A.C. 513; *A. G. of Alberta v. A. G. of Canada*, A.I.R. 1939 P.C. 53.

(9) As to 'Colourable' exercise of a legislative power, see under Part XI, Ch. I, *post*.

(9-a) *Rex v. Basudeva*, (1950) S.C.J. 47 (50).

ports to relate. Once that point is decided in favour of the legislative authority and it is found that the legislation is within its legislative powers, there is nothing arbitrary in it, so far as a Court of law is concerned.<sup>10</sup>

"It is the proper function of a Court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, Courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not."<sup>11</sup>

**Construction of Penal Statutes.**—Though the strict rule that penal statutes ought to be *strictly* construed has been to a great extent relaxed in modern times owing to the predominance of the rule that all statutes should be construed fairly so as to effectuate the intention of the Legislature<sup>12</sup> (*see* p. 5, *ante*), there is still a strong desire on the part of the Courts to protect the life and liberty of a citizen by the application of the old doctrine at least in normal times, though in times of emergency different considerations would prevail.

(A) *In normal times*: In normal times the Court would still act on the presumption against interference with the liberty of the subject.<sup>13</sup> The corollaries following from this presumption are—

(i) Where a criminal offence is created, it should be created in clear language. If the language is ambiguous, it ought to be construed in such a way as to restrict the ambit of the offence which the section creates.<sup>14</sup> When a clause or expression in a penal statute is capable of being interpreted either in favour of or against the accused, the former interpretation ought to prevail and the benefit of the ambiguity ought to be given to the accused.<sup>15</sup> Should the statute be equally susceptible of two meanings, one leading to an invasion of the liberty of the subject, and the other not, the latter should be preferred on the ground of the presumed intention of the Legislature not to interfere with it.<sup>16</sup>

(ii) Where there are two possible interpretations one of which would mitigate the penalty and the other aggravate it, the former should prevail.<sup>17</sup>

(iii) The Court will not supply even an obvious omission if to do so would render an accused person liable to conviction.<sup>18</sup> "Where an enactment may entail penal consequences no violence must be done to its language in order to bring people within it but care must be taken that no one is brought within it who is not within its express language."<sup>19-23</sup>

(iv) When the Legislature has given power to the Executive to take any action it thinks fit but limits the right to take action only for a *definite purpose*, it will be the duty of the Court to scrutinise whether the power has been exercised for that definite purpose and to construe the restriction on liberty as narrowly as possible and limit it within the words used by the Legislature.<sup>24-26</sup> The dissenting judgment of Lord Shaw in *R. v. Halliday*<sup>1</sup> explain the classical principles relating to this point:

"The appellant has been interned, without a trial, because he is of hostile origin or associations. Parliament *never said in words* one of those things. If Parliament had really meant to sanction internment without trial for the cause assigned it could have said so

(10) *Lakhinarayan v. Prov. of Bihar*, (1950) S.C.J. 32 (43).

(11) *Union Colliery Co. v. Bryden*, (1899) A.C. 580 (585).

(12) Maxwell, *Interpretation of Statutes*, 9th Ed., pp. 267, 289.

(13) *R. v. Halliday*, (1917) A.C. 260 (291); *Marshall v. Blackpool Corpn.*, (1932) 1 K.B. 688; *Druce v. Beaumont Trust*, (1935) 2 K.B. 257.

(14) *Elderton v. Totalisator Co.*, (1945) 2 All.E.R. 624 (C.A.).

(15) *D'Silva v. Emp.*, A.I.R. 1947 Bom, 310 (F.B.).

(16) *R. v. Halliday*, (1917) 1 A.C. 260.

(17) *Hildesheimer v. Faulkner*, (1901) 2 Ch. 552.

(18) *Crawford v. Spooner*, (1847) 6 Moo. P.C. 1; Maxwell, 8th Ed. 239.

(19-23) *London County Council v. Aylesbury Co.*, (1898) 1 Q.B. 106; *R. v. Chapman*, (1931) 2 K.B. 606.

(24) *Ramesh v. Prov. of Bombay*, (1950) 5 D.L.R. 12 (14) Bombay.

(25) *Eshugbayi v. Govt. of Nigeria*, (1931) A.C. 662.

(1) (1917) A.C. 260.



without the slightest difficulty, and not left a point which is so fundamental to be reached by inference. . . ."

(v) Any provision of a law encroaching upon liberty of the subject, which seeks to oust the jurisdiction of the Courts will be strictly construed.<sup>2</sup> Ouster of jurisdiction of the Courts would not be inferred in the absence of *express* words to that effect in the statute.<sup>3</sup>

(vi) Strict compliance with the formalities laid down by the statute will be required by the Courts.<sup>4</sup>

(B) *In emergencies*.—The individual cannot, however, have any liberty safeguarded by the State when the existence of the State itself is in danger, *e.g.*, by a war. In the case of *Liversidge v. Anderson*,<sup>5</sup> the bedrock of modern emergency decisions, the House of Lords observed—

"The fact that the nation is at war is no justification for any relaxation of the vigilance of the Courts in seeing that the law is duly observed, especially in matters so fundamental as the liberty of the subject. However, in a *time of emergency*, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the Courts would be slow to attribute to a *peacetime measure*. The purpose of the regulation is to ensure *public safety*, and it is right to interpret emergency legislation as to promote, rather than defeat, its efficacy for the *defence* of the realm. This is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time."

Hence, their Lordships held that to such a regulation there was no scope for application of any presumption that the liberty of the subject must not depend on the unchallengable opinion of the Secretary of State, and that the regulation was to be construed "without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention."<sup>6</sup> In an earlier case,<sup>7</sup> Greer, J., had said:

"Under circumstances such as these the notion that there is any effective presumption that Parliament did not intend to interfere with the liberty or property of the subject becomes so thin as to be described as the *shade of a shadow*, and disappears altogether when we find in the statute express words which show that the Legislature expressly authorised particular regulation which would of necessity restrict the liberty of the subject and his freedom to enjoy his normal rights over his real and personal property."

Similarly, in upholding the validity of Regulations made under the Defence of the Realm Act, 1914, authorising the Home Secretary to intern persons without trial 'for securing public safety and the defence of the realm', the majority of the House of Lords observed—<sup>8</sup>

"It is beyond dispute that Parliament has the power to authorise the making of such a regulation. The only question is whether in a true construction of the Act it has done so. . . . It may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised. . . . It was urged that if the Legislature had intended to interfere with personal liberty it would have provided, as on previous occasions of national danger, for suspension of the rights of the subject as to a writ of habeas corpus. The

(2) *Chester v. Bateson*, (1920) 1 K.B. 829.

(3) *Poul v. Wheat Commrs.*, (1937) A.C. 139 (153-5).

(4) *Jamal v. Emp.*, A.I.R. 1948 All. 225; *Durgadas v. Rex*, A.I.R. 1949 All. 1 (150) (F.B.).

(5) (1941) 3 All E.R. 338 (366) H.L.

(6) *Liversidge v. Anderson*, (1942) A.C. 206 (219).

(7) *Hudson Bay v. Maclay*, (1920) 36 T.L.R. 469 (475).

(8) *R. v. Halliday*, (1917) A.C. 260.

answer is simple. The Legislature has selected another way of achieving the purpose. . . . ."

Lord Maugham, in *Liversidge v. Anderson*,<sup>9</sup> put it more explicitly—

"The suggested rule (that legislation encroaching upon the liberty of the subject should be construed in favour of the subject) has ■ *relevance* in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved."

"However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in war or escape from national plunder or enslavement."<sup>10</sup>

'*Procedure established by law*'.—Our Constitution does not guarantee the right to any particular procedure for the deprivation of life or personal liberty besides those contained in Art. 22. The Legislature is left free to lay down any procedure, within the ambits of the legislative power conferred by Entry 2 of List III ('criminal procedure'), subject, of course, to the limitations included in Arts. 20 and 22. The Courts shall have no power to invalidate a legislation on the ground that the procedure provided therein is arbitrary. Thus, ■ specially constituted tribunal may be conferred by the Legislature with powers to affect personal liberty<sup>11</sup> notwithstanding the existence of ordinary Courts.<sup>11-a</sup>

There is, under our Constitution, no guarantee of any right to trial in the ordinary Courts of law or the right to access to the ordinary Courts, as exists in the following Constitutions: Switzerland, 1874 (Art. 58); Japan, 1946 (Art. 32); Chinese Republic, 1946 (Art. 8, para. 1); German Reich, 1919 (Art. 105); Danzig, 1922 (Art. 62). In the U.S.A., though there is no specific prohibition against the creation of extraordinary tribunals, the right of the individual is safeguarded by the guarantee of the right to jury trial [Art. III, Sec. 2 (3); Art. VI] and the interpretation of due process as including 'an indefeasible right of access to the Ordinary Court.'<sup>12</sup> Nor is there, under our Constitution any direction upon the Legislature as to the circumstances under which it may create special Courts, as is contained in Art. 38 (3) 1 of the Constitution of *Eire* 1937, which says:

"Special Courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order."

So, the Legislatures, under our Constitution shall be free not only to create special Criminal Courts for the trial of particular offences, but also to empower the executive to decide what offences or classes of offences shall be triable by the special Courts created by the Legislature.<sup>13</sup>

Of course, our Constitution confers upon the Supreme Court the right to grant special leave to appeal from the judgment or order of any tribunal, excepting ■ military tribunal (Art. 136). That is, however, a different matter.

*Control of the Executive*.—Though the Courts would be powerless under our Constitution, to nullify a legislative act affecting life or liberty of the indivi-

(9) *Liversidge v. Anderson*, (1942) A.C. 206 (218); *R. v. Halliday*, (1917) A.C. 260 (270).

(10) *Liversidge v. Anderson*, (1942) A.C. 206 (257), per Lord Macmillan, quoting *R. v. Halliday*, (1917) A.C. 260, per Lord Atkinson.

(11) Cf. *Liversidge v. Anderson*, (1942) A.C. 206, per Lord Wright.

(11-a) Thus, by the Special Criminal Courts (Jurisdiction) Act (XVIII of 1950), Parliament has empowered any special Cri-

iminal Court, constituted under the Bombay Public Security Measures Act, 1947, West Bengal Special Courts Ordinance, 1949, and similar Act, to try offences with respect to any of the matters enumerated in List of Sch. VII of this Constitution, if such Court is otherwise competent to try such offence under the law constituting it.

(12) *Ex parte Young*, (1908) 209 U.S. 123.

(13) *Emp. v. Benoari Lal*, A.I.R. 1945 P.C. 48 (52, 54).

dual on grounds of policy as in the United States (*see p. 113 ante*), it will be the duty of our Courts and within their competence (as in England) to guard that "no member of the Executive can interfere with the liberty or property . . . except ■ the condition that he can support the *legality of his action*",<sup>14</sup> that is to say, to see that the action of the Executive is in conformity with 'the procedure established by law' and to nullify such action ■ is not ■ conformity with that procedure. So, it is the duty of the Court to see—

(i) That the Executive exercises its powers within the four corners of the statute which seeks to deprive the individual of his liberty, so that it may be said that the order complained against is one 'under the statute' by virtue of which the power is sought to be exercised,<sup>15</sup> and is not an abuse of the powers granted by the Legislature.<sup>16</sup> For example, there is ■ abuse of the power of preventive detention where, after a long drawn-out proceeding for conviction is over, recourse is had to detention for acts done by the detenu in the *remote past*.<sup>17</sup>

(ii) That the power has been exercised or the order made by ■ officer or authority who has been duly empowered by or under the statute.<sup>18</sup>

(iii) That every formality<sup>19</sup> required by the legislation is complied with before the subject is deprived of his liberty, as well as the conditions subsequent, if any.<sup>20</sup> But when the condition precedent for the exercise of the power is the judgment or opinion of the person upon whom the power is conferred, the Court cannot interfere with that judgment or opinion unless the person or authority exercises the power in bad faith or for ■ collateral purpose.<sup>21</sup>

(iv) That the statutory power has been exercised *honestly*,<sup>22</sup> and not 'in fraud of the statute',<sup>23</sup> or *mala fide*; or, in other words, that the power conferred by the statute has not been utilised for some indirect purpose not connected with the objects of the statute or the mischief it seeks to remedy, *e.g.*, for purposes for which the ordinary criminal law is sufficient.<sup>23-a</sup>

The jurisdiction of the Courts to question the validity of the Executive order on any of the above grounds cannot be barred by the statute itself.<sup>22-23</sup> [See further, under Art. 32 (2)].

At the same time, in exercising this power of scrutiny, the Court cannot trespass upon the province which the Legislature has marked out as belonging to the Executive. Nor can it take upon itself the duty of considering questions of policy which are essentially for the executive and not for a judicial tribunal.<sup>24</sup>

*Onus of proving want of good faith.*—When the condition precedent required by the statute is *objective*, the existence or not of the objective condition or facts and circumstances ■ be tested by the Courts, *vis.*, whether the circumstances which called for the issue of the order existed in fact.<sup>25</sup> But where the condition

(14) *Eshugbayi v. Govt. of Nigeria*, (1928) A.C. 459.

(15) *K. Emp. v. Sibnath*, (1945) 8 F.L.J. 222 (P.C.).

(16) *Liversidge v. Anderson*, (1942) A.C. 206 (261).

(17) *Emp. v. Gajanan*, A.I.R. 1945 Bom. 533; *Mani v. Dt. Magistrate*, A.I.R. 1950 Mad. 162 (174).

(18) In re *Banwarilal*, (1944) 48 C.W.N. 766 (779); *Narayanaswami v. Inspector of Police*, A.I.R. 1949 Mad. 307 (F.B.).

(19) *Enraght's Case*, (1881) 6 Q.B.D. 376.

(20) In ■ *Rajadhar*, A.I.R. 1948 Bom. 334 (F.B.); *Murat v. Prov. of Bihar*, A.I.R. 1948 Pat. 135 (F.B.); *Mani v. Dt.*

*Magistrate*, A.I.R. 1950 Mad. 162 (164).

(21) In re *Banwarilal*, (1944) 48 C.W.N. 766 (782).

(22) *R. v. Halliday*, (1917) A.C. 260; *Liversidge v. Anderson*, (1942) A.C. 206; *K. Emp. v. Sibnath*, (1945) ■ F.L.J. 222 (P.C.).

(23) *Basanta v. K. Emp.*, (1944) F.L.J. 203; *Emp. v. Vimlabai*, A.I.R. 1946 P.C. 123.

(23-a) In re *Ashutosh Lahiri*, Mukherjea, J. [Statesman, Calcutta, 20-5-50, ■ 7].

(24) In re *Rajadhar*, A.I.R. 1948 Bom. 334 (F.B.).

(25) *Liversidge v. Anderson*, (1942) A.C. 206.



is *subjective*, viz., the state of the mind of the authority issuing the order, "he is alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called on to disclose to anyone but himself that these circumstances constituted a reasonable cause and belief",<sup>1</sup> in other words, the existence of the circumstances which called for the order cannot be questioned by the Courts in this latter (subjective) case, and the only question left to the Court is whether the authority exercised the power in good faith.

Where the authority is empowered to make an order upon a *subjective* condition, i.e., a particular state of his mind, e.g., 'on being satisfied' or 'having reasonable grounds for believing' that certain facts exist,—once an order asserting that state of mind and belief has been proved in a valid form,<sup>1</sup> by production of a duly authenticated order the onus is on the person challenging the *bona fides* of the order to disprove the existence of that state of mind. The onus is obviously more difficult than that of disproving an objective fact. Mere evidence of the applicant that he does not know that there are any reasons for the authority's belief, or denial that there are or can be any reasons for it, is not a sufficient discharge of the onus so as to call on the authority to explain and justify the assertion of his order.<sup>2</sup> "The mere fact that the detenu challenges the *factum* or the *bona fides* of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot . . . make it incumbent on the Government to adduce evidence in support of the order."<sup>3</sup>

In the normal case, the recital of the existence of the subjective condition in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate.<sup>4</sup> Nevertheless the detenu would succeed in proving want of *bona fides* if he can show that his case had never been placed before the authority so that he never had any opportunity of exercising his mind with respect to it,<sup>5</sup> as to whether the detention of the person is or is not justified under the Act under which the authority purports to act;<sup>6</sup> e.g. Where the authority *merely* acts on the report of the police<sup>7-8</sup>; or refers to particulars which are so incorrect as to disclose that the authority did not apply his mind at all.<sup>9</sup> The detenu may also succeed if, of course, he proves personal malice or spite of the authority issuing the order.<sup>7</sup> Similarly, want of good faith would be established where the detenu proves that the order of preventive detention has been made for an *ulterior* object, such as to punish him for past acts than to prevent him from doing similar acts again.<sup>9</sup> Where the facts specified have no *prima facie* connection with the *ground* mentioned in the order of detention, it would at once appear that the authority did not apply his mind at all.<sup>10</sup> Even where the authority has applied his mind but has acted upon considerations wholly irrelevant to and outside the scope of the law under which he purports to act, the result is the same.<sup>11</sup>

Different considerations would prevail where the person making the arrest is a *Police-officer*. If a Police-officer is empowered by a law to arrest a person without warrant on reasonable suspicion that such person has acted in a manner

(1) *Liversidge v. Anderson*, (1942) A.C. 206 (224).

(2) *R. v. Secy. of State*, (1942) 1 K.B. 87; *Ex parte Greene*, (1942) A.C. 284.

(3) *Basanta v. King-Emp.*, A.I.R. 1945 F.C. 18.

(4) *Emp. v. Sibnath*, A.I.R. 1945 P.C. 156.

(5) *Emp. v. Sibnath*, (1943) 49 C.W.N. 1 (12) F.R.

(6) *In re Bhaurao Karbhari*, (1950) 5

D.L.R. 22 (Bom.).

(7) *Narayanaswami v. Inspector of Police*, (1948) 11 F.L.J. 43 (62) (Mad.).

(8) *In re Shoilen Dey*, A.I.R. 1949 Bom. 75.

(9) *Kamalakanta v. Emp.*, A.I.R. 1944 Pat. 354.

(10) *Municipal Corpn. v. I. T. Commr.*, A.I.R. 1949 Bom. 37 (39).

(11) *Mani v. Dt. Magistrate*, A.I.R. 1950 Mad. 162 (174).

prejudicial to the public safety, the Court is entitled to enquire whether his suspicion was *reasonable* or not in the circumstances.<sup>12</sup> The arrest would not be valid even if the Police-officer acted *bona fide*,<sup>12</sup> but not reasonably.

*Analogous Provision.*—Art. 21 is to be read subject to Art. 22. As to applicability to military personnel, see under Art. 33.

**22.** (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the ground for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Protection against arrest and detention in certain cases.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien ;  
or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7) ;  
or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(12) *K. Emp. v. Vemlabai*. A.I.R. 1946 P.C. 123.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ;

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

#### OTHER CONSTITUTIONS<sup>13</sup>

*U.S.A.*—The 6th Amendment to the Constitution provides—

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."

By speedy trial is meant trial with such a reasonable speed as is consistent with due course of justice.<sup>14</sup>

'Assistance of counsel for defence' means that the accused must be afforded an opportunity of securing a counsel of his own choice and to give him instructions; and if he is unable to employ counsel in a capital case, it is the duty of the Court to employ a counsel and give him like opportunity to take instructions.<sup>15</sup>

*Japan.*—Art. XXXIV of the Japanese Constitution, 1946, says—

"No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel."

*China.*—Art. 8 of the Constitution of the Chinese Republic, 1946, provided—

"Except arrest in cases of *flagrante delicto* which shall be otherwise provided by law, no arrest and detention may be effected unless through a judicial or a police organ in accordance with legal procedure. No trial and punishment may be effected unless by a law court in accordance with legal procedure. Arrest, detention, trial and punishment, effected not in accordance with legal procedure, may be resisted.

When a person is arrested and detained on suspicion of having committed a crime, the organ effecting the arrest and detention shall inform in writing the person himself and his designated relatives and friends of the cause of his arrest and detention, and shall, within 24 hours at the latest, hand him over to a competent court for trial. He himself or some other person may also petition the said competent court to demand from the organ responsible for the arrest the surrender, within 24 hours, of his person to the court for trial.

The court shall not reject the petition referred to in the preceding paragraph, and also may not order the organ responsible for the arrest and detention to make an investigation and

(13) See also Art. 114 of the Weimar; Art. 5 of the Yugoslav; Art. 74 of the Danzig Constitutions.

(14) *Beavers v. Haubert*, (1905) 198 U.

S. 77 (87).

(15) *Powell v. Alabama*, (1932) 287 U.S. 45.



report first. The organ responsible for the arrest and detention shall not refuse to execute or delay in executing the writ of the court for surrender of the person for trial.

When a person is illegally arrested and detained by any organ, he himself or some other person may petition the court for an investigation, and the court shall not reject the petition and shall, within 24 hours, make the investigation from the organ responsible for the arrest and detention and deal with the case in accordance with law."

### INDIA

*Scope of Art. 22: Safeguards against preventive detention.*—This Art. provides a limitation upon the power of the Legislature, under Art. 21, to make any law to deprivation of personal liberty. Any such law must not contravene the conditions or limits imposed by the present Art. 22. The proper mode of construction as between Arts. 21 and 22 is that—

"to the extent the procedure is prescribed by Art. 22, the same is to be observed: otherwise Art. 21 will apply. If the Legislature prescribes a procedure by a validly enacted law and such procedure in the case of Preventive Detention does not come in conflict with the express provisions of Part 3 or Art. 22 (4) to (7) the Preventive Detention Act must be held valid notwithstanding that the court may not fully approve of the procedure prescribed under such Act."<sup>15-a</sup>

*Analysis of Art. 22.*—This Art. has two parts: One part deals with, persons arrested under the ordinary law of crimes and another deals with persons detained under the law of 'preventive detention'.

(A) Persons arrested under the *ordinary law*: Cls. (1)-(2) provide certain constitutional *limitations* upon the power of the Union and State Legislatures to make any law of procedure (under Entry 2 of List III, read with Art. 21) for depriving a person of his personal liberty. These are: (i) The arrested person must, as soon as may be after arrest, be informed of the grounds of his arrest. (ii) He must be produced before a Magistrate, within 24 hours of his arrest (excluding the time necessary for the journey from the place of arrest to the Court of the magistrate) and then an order of the magistrate confirming the arrest must be obtained. (iii) The arrested person must be given the opportunity to consult a legal practitioner and to defend himself.

(B) Persons detained under a *law of preventive detention*: Cls. (4)-(6) provide certain limitations upon the Union and State Legislatures to make any law providing for 'preventive detention', i.e., detention without trial, under Entries 9 of List I and 3 of List III, Sch. VII,—to prevent 'arbitrary arrests' by the Executive under cover of such laws. These limitations are: (i) Government is ordinarily entitled to detain a person in custody only for 3 months. But Parliament is entitled to make a general law laying down in what classes of cases, the detention may exceed three months. (ii) Apart from such law of Parliament [Cl. (7) (a)], Government may detain a person beyond 3 months, without trial, only if it obtains the report of an Advisory Board that there is sufficient cause for such detention [Cl. (4) (a)]. The procedure of the Advisory Board will be laid down by Parliament by law [Cl. (7) (c)]. (iii) The authority making the detention shall, as soon as may be, communicate to the detenu the grounds of his detention and offer him the earliest opportunity to make representation against such order of detention. But the authority will not be bound to disclose facts which may be considered by the authority to be against the public interest to disclose.

Persons detained under a law of preventive detention shall not be entitled to the protection of Cls. (1)-(2).

(15-a) In *Gopalan* [Statesman, Calcutta, 20-5-50, p. 1].

## CLAUSE (1)

CL. (1): THE RIGHT TO BE INFORMED OF GROUNDS OF ARREST.—While Cl. (2) sets a maximum time-limit for production of the arrested person before a Magistrate, Cl. (1) does not fix any time-limit for the obligation of the arresting authority to communicate to the arrested person the grounds for such arrest. The words 'as soon as may be' means as nearly as is reasonable in the circumstances of the particular case.<sup>16</sup> So, no definite period of time can be laid down as reasonable in all cases. But it will be possible for the Court, in a proceeding for *habeas corpus*, to pronounce whether the arresting authority has communicated the grounds as soon as reasonable in the circumstances, and, if it finds that a reasonable time has already passed and the arrested person has not yet been informed of the grounds of his arrest, the Court would order his immediate release.<sup>18</sup> The reason is that the two conditions of arrest embodied in this clause are constitutional conditions subsequent to arrest, and there is no reason to construe these conditions as other than mandatory,<sup>17</sup> being valuable fundamental rights of the individual. So, even though the arrest had been initially valid, the failure to supply the grounds within a reasonable time may render further detention unconstitutional or illegal.<sup>18-19</sup>

"It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps all of which are regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue".<sup>20</sup>

It is to be noted that while the object of furnishing the grounds in the case of preventive detention [under Cl. (5)] is to allow the detenu to make a representation against his detention at the earliest opportunity, the object of such information under cases other than of preventive detention (present Cl.) is to allow the arrested person the earliest opportunity to move the Court for *habeas corpus*.

*Nature of disclosure required.*—It is to be noted under Cl. (6), the authority making the order of preventive detention under Cl. (5) has a discretion not to disclose facts which he may consider to be against the public interest to disclose, while this discretion is not given to the authority ordering the arrest in cases coming under Cl. (1). No fact can therefore be withheld by the Government in cases of ordinary arrest. Subject to this difference, the following conditions must be observed in furnishing the grounds, whether under Cl. (1) or under Cl. (5) of this Art.:

(a) The grounds furnished must be clear, precise and accurate. Grounds which are vague and indefinite and give no particulars are no compliance with the constitutional requirement.<sup>21</sup> But if there are some definite and precise grounds, the mere fact that the other grounds communicated are vague, cannot vitiate the detention.<sup>21</sup>

(b) The ground disclosed must be within the ambit of the law under which the arrest or detention is professed to be made.<sup>22</sup> Further, the law itself must be within the legislative competence of the Legislature concerned. If a detaining authority gives several grounds for detaining a man, without distinguishing between them, and some of the reasons are held to be bad (*e.g.*, *ultra vires*), the whole order is vitiated, because it can never be certain to what extent the bad reasons

(16) *Murat v. Province of Bihar*, A.I.R. 1948 Pat. 135 (139) (F.B.); *Durgadas v. Rex*, A.I.R. 1949 All. 148 (150) (F.B.).

(17) *Durgadas v. Rex*, A.I.R. 1949 All. 148 (150) (F.B.).

(18) *Murat v. Province of Bihar*, A.I.R. 1948 Pat. 135 (F.B.).

(19) *Mani v. Dt. Magistrate*, A.I.R.

1950 Mad. 162 (168).

(20) *Euragh's case*, (1881) 6 Q. B. D. 876.

(21) Cf. *In re Rajadhar*, A.I.R. 1948 Bom. 334 (F.B.); *In re Krishnaji*, A.I.R. 1948 Bom. 360.

(22) *Durgadas v. Rex*, A.I.R. 1949 All. 148 (153) (F.B.).

operated on the authority or whether the detention order would have been made at all if only one or two good reasons had been before them.<sup>23</sup>

*'Right to consult and to be defended by a legal practitioner of his choice.'*—In the *existing law* of India, there is already a provision to the effect in Sec. 340 (1) of the Code of Criminal Procedure, and that provision has been interpreted to include a right to have access to legal advice even when the accused is in police custody;<sup>24</sup> and the word 'accused' has been interpreted to include any person over whom a Criminal Court exercises jurisdiction.<sup>25</sup> The present clause of the Constitution simply *guarantees* that right against the Legislature and makes it clear that the right arises as soon as a person is arrested.<sup>1</sup>

In the *United States*, the right has been interpreted to include the right of free legal advice for an accused who is poor, in a capital case (see *ante*). In *England*, there is provision for free defence and legal advice for a 'poor person' under the Poor Prisoners' Defence Act,<sup>2</sup> 1930, which has been made more liberal by the recent Legal Aid and Advice Act,<sup>3</sup> 1949, by extending legal assistance to any person having an income of less than £420 per annum. Our constitutional guarantee does not ensure *free* legal advice in any criminal proceeding, but it may be expected that legislation on the lines of the English Act should be undertaken at an early date, for without free advice these would be a virtual denial of equal justice to the poor man [*vide* Art. 14].

#### CLAUSE (2)

SCOPE OF CL. (2): RIGHT TO BE PRODUCED IN COURT OF MAGISTRATE.—This Clause should be read with reference to the *existing law* in Secs. 61 and 81 of the Code of Criminal Procedure. It guarantees a similar right against legislative encroachment, but while it is an improvement upon the existing law in *some* respects, it is regressive in another respect. Thus, this Clause improves upon the provisions of the Cr. P. Code (which shall become void to the extent of repugnancy), on the following point: It makes no distinction between arrests under warrant and without warrant. The maximum time limit laid down by the Clause will apply to both classes of arrests.

When the accused is produced before a Magistrate, he shall have the power to detain the accused for any further period. This maintains the provision in Sec. 167 of the Cr. P. Code. But the Constitution does not, like that section, set any, time limit to each order of detention.

On the other hand, the constitutional guarantee altogether excludes those who are arrested under a law of preventive detention. There is no such exception under Sec. 61 of the Cr. P. Code itself.

#### CLAUSE (3)

SCOPE OF CL. (3): ENEMY ALIENS AND DETENUS.—This Clause constitutes an exception to Cls. (1)-(2). The result is that enemy aliens as well as persons detained under the law of preventive detention have neither the right to consult nor to be defended by any legal practitioner. In the case of detenus, there is a right of representation to the authority [Cl. (5)], and also provision for exami-

(23) *Keshav Talpade v. Emperor*, A.I.R. 1943 F.C. 1.

(24) *R. v. Llewelyn*, (1926) 50 Bom. 741; *R. v. Sundar Singh*, (1930) 12 Lah. 16.

(25) *R. v. Mona Puna*, (1892) 16 Bom. 661.

(1) There is no right to be defended in

connection with an order of preventive detention under Cl. (3) (b); *vide* S. 10 (3) of the Preventive Detention Act, 1950.

(2) Keith, *Constitutional Law*, p. 319; Stephen's *Commentaries*, Vol. I, p. 214.

(3) (1949) D.L.R. 28, 32 (Jour.); 53 C.W.N. xxx; 54 C.W.N. xxxvii.



nation by the Advisory Board. But in neither case shall the detenu have any right of appearance by any lawyer or to cross-examine witnesses. The decision even by the Advisory Board shall be on *ex parte* materials.<sup>4-5</sup>

*Enemy Aliens.*—As to who are enemy aliens, see under Entry 17, List I of Sch. VII, *post*. An enemy alien is not entitled to the protection of Cls. (1)-(2) of Art. 22. This is in accord with the English law, under which an enemy alien may be detained, without a right of *habeas corpus*, under the royal prerogative as well as under statute.<sup>6</sup> But under *our* Constitution, even enemy aliens may, subject to legislation by Parliament, be entitled to the protection of Cls. (4)-(6) of Art. 22, in case they are arrested under a law of 'preventive detention'.

*Preventive detention.*—'Preventive detention' means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof,<sup>7</sup> but may, still be sufficient to justify his detention, for any of the reasons specified in Entry 9 of List I and Entry 3 of List III of Sch. VII (Defence, foreign affairs, security of India or of a State, maintenance of public order or of supplies and services essential to the community). While the object of *punitive* detention is to punish a person for what he *has done*, the object of preventive detention is to prevent him *from doing something*<sup>8</sup> which comes within the above entries. While punitive detention comes after the illegal act is actually committed, preventive detention has reference to the *apprehension* of wrong-doing.<sup>9</sup> The object of preventive detention is to prevent the individual not merely from acting in a particular way, but from achieving a particular object.<sup>10</sup>

The Court has got to decide on a consideration of the true nature and character of the legislation whether it is *really* on the subject of preventive detention or not.<sup>9</sup> Thus, since 'prevention' etymologically refers to future action, there cannot be a preventive detention of a person simply for his having been a member of an association (in the past), which has been of late declared unlawful.<sup>11</sup> But once the legislation is held to be really on the subject of preventive detention and within the powers assigned to the Legislature in question, the Courts have nothing to do with the reasonableness or unreasonableness of the legislation. If a particular piece of legislation be within the ambit of the Legislature's authority, there can be nothing *arbitrary* in it, so far as a Court of law is concerned.<sup>11-a</sup>

Of course, the authority vested with the power of enforcing the legislation may commit an abuse of such power, in which case the act of that authority would be illegal, but that would not invalidate the *legislation* itself. To decide whether a piece of legislation is *ultra vires* the only question to be considered is whether it is within the ambit of the legal powers of that Legislature. The illegality of

(4) See in this connection A.I.R. 1949 92 (Jour.).

(5) It may be noted that even under Reg. 18-B under the Emergency Power (Defence) Act, 1939, which was a wartime measure, the detenu was given a right of calling witnesses and to engage a solicitor.

(6) *Ex parte* Forman, (1917) 87 L.J.K.B. 43; Chalmers & Hood Phillips, p. 434; Keith, Constitutional Law, p. 430.

(7) *Liversidge v. Anderson*, (1942) A.C. 206 (218).

(8) *Gulab v. Dt. Magistrate*, A.I.R. 1950 All. 11 (35).

(9) *Lakhinarayan v. Prov. of Bihar*, (1950) S.C.J. 32 (43).

(10) In *re Gopalan*, per Kania, C.J. [Hindusthan Standard, 20-5-50, p. 5].

(11) *Emperor v. Gajanan*, A.I.R. 1945 Bom. 533; *Nek Md. v. Province of Bihar*, A.I.R. 1949 Pat. 1 (13) (F.B.).

(11-a) The views expressed in *Murat v. Prov. of Bihar*, A.I.R. 1948 Pat. 135 (139), (F.B.) as regards arbitrary detention have been disapproved by the Federal Court in *Lakhinarayan v. Prov. of Bihar*, (1950) S.C.J. 32 (43).

the exercise of legislative power has nothing to do with the validity of the legislation itself.<sup>12</sup>

*Grounds for preventive detention.*—It has already been explained (see pp. 116-7, *ante*), that preventive detention for reasons connected with War has come to stay in England since World War I. The traditional theory of 'personal liberty' ■ Dickey understood it, has thus undergone a revolutionary change. According to him, personal liberty meant that "(i) Physical restraint of ■ individual may be justified only ■ the ground that he has been *accused* of some *offence* and must be brought before the Court to stand his *trial*, or (ii) that he has been *convicted* of some offence and must suffer punishment for it." But since the decisions in *R. v. Halliday*<sup>13</sup> and *Liversidge v. Anderson*<sup>14</sup> (see pp. 116-7, *ante*) it is now settled that Parliament may empower the Executive to make regulations for the detention without trial of persons whose detention appears to be expedient "in the interests of the *public safety* or the defence of the realm".

"At a time when it is the undoubted law of the land that ■ citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's ■ it may well be ■ matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention."<sup>15</sup>

The present Clause is founded ■ the following observations made by Lord Maugham in *Liversidge v. Anderson*:<sup>16</sup>

"It is beyond dispute that he can decline to disclose information on which he has acted ■ the ground that to do so would be contrary to the public interest. . . . There must ■ a large number of cases in which the information ■ which the Secretary of State is likely to act will be of ■ very confidential nature."

But never so far has the English Parliament authorised detention without trial except in times of war or beyond duration of such exigency.<sup>16</sup> It is to be noted that while the Emergency Powers Act, 1920, empowers the Executive to take extraordinary action, in time of *peace*, to ■ the essentials of life to the community, and even provides for summary trial of offences against the regulations ■ made, the Act specifically prohibits the alteration of the rules of *criminal procedure* and there is, accordingly, no provision for preventive detention in the interests of public order, general safety or essentials of life, apart from ■ war emergency. But under the *Constitution of India*, the Legislature has been empowered to provide for preventive detention even in times of peace. Entry 9 of List I, of course, relates to reasons connected with war or the external security of India; but Entry 3 of List III authorises the Union and State Legislatures to provide for preventive detention, to maintain internal security, public order and the essentials of life, apart from any condition of war. This is undoubtedly an extraordinary departure from the English ideal of personal liberty.

*Legislative Power.*—Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India, is included in Entry in List I of Sch. VII; while preventive detention for other reasons, *viz.*, security of ■ State, public order, supplies and services essential to the community is ■ concurrent subject, under Entry 3 of List III. But Cl. (7) of the present Art. confers exclusive power on Parliament to legislate, as regards preventive detention for any reason, on the three matters referred to in sub-cl. (a) to (c) of Cl. (7). Parliament has already enacted the Preventive Detention Act (IV), 1950, under the above powers.<sup>16-a</sup>

(12) *Sushil v. Government of Bengal*, 206.  
(1949) 53 C.W.N. 545 (547), approved in  
*Lakhinarayan v. Province of Bengal*, (1950)  
■ C.J. 32 (43).

(13) *R. v. Halliday*, (1917) A.C. ■.

(14) *Liversidge v. Anderson*, (1942) A.C.

(15) *Liversidge v. Anderson*, (1942) A.  
C. 206 (257).

(16) Cf. 53 C.W.N. cxxxiii.

(16-a) See A.I.R. 1950 Acts (3).

## CLAUSE (4)

CL. 4, SUB-CL. (A): SCOPE OF ADVISORY BOARD.—The only function of the Advisory Board<sup>16-b</sup> is to report to the Government that a detenu is liable to be detained for ■ period exceeding 3 months, subject to the maximum laid down by Parliament under Cl. (7) (b). Action in pursuance of such report will enable the Government to detain the person beyond three months, provided the detention be valid on its merits. The report of the Advisory Board does not make the detention valid if it is *ultra vires* the Constitution. Hence, *habeas corpus* would still lie against the initial order of detention notwithstanding report of the Advisory Board,<sup>17</sup> confirming it.

If, however, the Advisory Board reports against the order of detention, any further detention would be illegal [for the opinion of the Advisory Board is not confidential, though the other portions of its report are, under Sec. 10 (3) of the Preventive Detention Act, 1950], and the detenu may obtain a release by *habeas corpus*, if Government does not release him forthwith.

*Successive orders, exceeding constitutional limit.*—If the authority making the detention, instead of referring the case to the Advisory Board, seeks to extend the detention beyond the maximum limit of three months, by making successive orders on the *same* ground or substantially the *same* grounds, there would be a colourable exercise of his power and a fraud upon the Constitution.<sup>18</sup>

Again, even though the constitutional time limit is not exceeded, where the Court has declared the detention, of a person to be without justification, upon the merits, ■ fresh order of detention made in order to circumvent that decision would be *male fide*<sup>18-a</sup>; if, however, the decision proceeded simply on the ground that the law under which the order had been made was invalid, or the order was irregular in form, a fresh order of detention in ■ valid form or under fresh legislation would not be necessarily *male fide*.<sup>19</sup>

Sub-Cl. (b).—See under Cl. (7) below.

## CLAUSE (5)

CL. (5): RIGHT TO BE INFORMED OF GROUNDS.—See under Cl. (1), above.

The obligation of the authority to furnish information under this Clause differs from that under Cl. (1) in this that under the present Clause, read with Cl. (6), the authority is not bound to disclose facts which he considers to be prejudicial

(16-b) Ss. 8-9 of the Preventive Detention Act, 1950, makes the following provisions as regards constitution of Advisory Boards and reference to them:—

"8. (1) The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards for the purposes of this Act. (2) Every such Board shall consist of two persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, and such persons shall be appointed by the Central Government or the State Government, as the case may be.

9. In every case where a detention order has been made under sub-cl. (iii) of Cl. (a), or Cl. (b), of sub-Sec. (1) of Sec. 3, the Government making the order, or if the order has been made by an officer specified in sub-Sec. (2) of Sec. 3,

the State Government to which such officer is subordinate shall, within six weeks from the date of detention under the order, place before an Advisory Board constituted by it under Sec. 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report made by such officer under sub-Sec. (3) of Sec. 3."

(17) Cf. *Lal Bahadur v. Province of Bihar*, (1950) 5 D.L.R. 8 (Pat.).

(18) Cf. *Zamir v. Emperor*, A. I. R. 1948 All. 285; *Yusuf v. Rex*, A.I.R. 1950 All. 69 (76).

(18-a) *Prahlad v. Prov. of Orissa*, A.I. R. 1950 Orissa 107 (F.B.).

(19) *Bhupendra v. Government of West Bengal*, A.I.R. 1949 Cal. 633 (636) (F.B.).



to the public interest to disclose. So, the authority has absolute discretion as to what facts are to be disclosed or not. But 'facts' must be distinguished from 'grounds'.

While there is ■ discretion as to disclosure of 'facts', Cl. (5) requires ■ disclosure of *all* the grounds, without any reservation. Since the words 'grounds' and 'facts' are used in opposition to each other, they should be taken to refer to different things. 'Grounds' would seem to refer to the *conclusions* or reasons leading to the order, while 'facts' mean the *data* upon which those conclusions are based. The authority need not disclose all the facts, but the communication must give the detenu the reasons or conclusions which impelled the authority to take action against him. Although the facts may not be exhaustive, the grounds stated and the particulars supplied must be sufficiently precise, so as to make it possible for the detenu to make representation which is the object of supplying the information under the present Clause.<sup>20</sup>

Of course, in Cl. (5) of the present Art. of our Constitution, there is no reference to 'particulars' as there was in Reg. 18-B (5) of the Defence (General) Regulations, 1939, of England or in some of the Provincial Security Acts of India, enacted prior to the Constitution. Hence, the question arises, whether the constitutional requirement would be complied with simply by reproducing the clauses of the statute under which the detention order is made, without giving any particulars at all. In *Liversidge's* case,<sup>21</sup> no doubt the clauses of the Regulation were reproduced by way of communicating the grounds of detention, but that was followed by 6 paragraphs, giving details, to support the grounds. Though our Constitution does not lay down any obligation to give 'particulars' or details and leaves it to the discretion of the authority to disclose or withhold facts, it cannot be held that a mere recital of the clauses of the statute without giving any particulars or details would suffice, for without any particulars, it is not possible to make a representation which is the very object of communicating the grounds.<sup>21-a</sup> The detenu is not entitled to know the *evidence*, nor the source of the *information*, but he must be furnished with the grounds for his detention and sufficient details to enable him to make out a case, if he can, for the consideration of the detaining authority.<sup>22</sup> Thus, the mere statement that the detenu had been carrying on 'subversive propaganda' conveys no precise information to the detenu so as to enable him to make ■ proper representation.<sup>23</sup> Similarly, an allegation of 'secret or underground activity', without particulars as to the nature of such activities is vague, for secret activity does not necessarily mean that it is an activity subversive of public order.<sup>20</sup> The giving of such vague information is not a valid compliance with the mandatory constitutional requirement. Hence, the detenu is entitled to be released ■ the ground of the information being defective<sup>24-25</sup> or wrong,<sup>1</sup> even if his detention has since been confirmed by the Advisory Board,<sup>2-3</sup> and even if the detention order itself was not bad.<sup>4</sup> Of course, the detention is not rendered invalid by any *mistake* in the communication which *does not prejudice* the detenu,<sup>5</sup> e.g., where he has been served with ■ true copy of the actual order.<sup>5</sup> The grounds and the particulars should not be

(20) Cf. *Nek Md. v. Emperor*, A.I.R. 1949 Pat. 1.

(21) *Liversidge v. Anderson*, (1942) A.C. 206 (241).

(21-a) This view finds support from the Supreme Court judgment, *In re Gopalan* [Statesman, Calcutta, 20-5-50, p. 1].

(22) *Durgadas v. Rex*, A.I.R. 1949 All. 148 (151) (F.B.).

(23) *In re Krishnaji*, A.I.R. 1948 Bom. 360.

(24-25) *Lal Bahadur v. Province of Bihar*, (1950) 5 D.L.R. 8 (Pat.).

(1) *Ex parte Budd*, (1941) 2 All.E.R. 749.

(2-3) *Mani v. Dt. Magistrate*, A. I. R. 1950 Mad. 162 (170).

(4) *Inder Prakash v. Emperor*, A.I.R. 1949 Pat. 37 (42); *Durgadas v. Rex*, A.I.R. 1949 All. 148 (153) (F.B.).

(5) *Ex parte Greene*, (1942) 1 K.B. 87.

furnished in instalments, but at one time soon after the order of detention is made.<sup>6</sup> The detenu has no obligation to gather the grounds or to supplement them from extraneous documents,<sup>7</sup> nor to ask for further particulars,<sup>8</sup> or to complain of the grounds being indefinite or insufficient.<sup>9</sup>

On the other hand, the information to be supplied in the case of preventive detention cannot be as full and detailed as the 'charge' in the case of a criminal trial. For, in a criminal trial, the accused is being prosecuted for what he has *already done*, and since the prosecution is charging him with that offence, the prosecution should be in a position to give detailed information about the alleged offence. In the case of preventive detention, on the other hand, the accused is not detained for what he has done but for the detenu's future intentions, and hence, it is not possible to give such detailed information as in a charge-sheet.<sup>10</sup> Thus, where the grounds furnished to the detenu stated that he threatened public peace and tranquillity in a certain district by urging violent methods specially among the labour classes and that his speeches at public meetings and demonstrations were prejudicial to the maintenance of public order in that district, *held*, the grounds communicated were sufficient to enable the detenu to make a representation.<sup>11</sup>

'As soon as may be'.—See under Cl. (1), at p. 123, *ante*.

*Earliest opportunity of making representation.*—The authority shall not only inform the detenu of the grounds of his detention, but also afford him, the earliest opportunity of making a representation against the order. It follows that at the time of communicating the information, the authority must also inform the detenu that he has the right to make representation. The object of this right of representation is to give the detenu an opportunity to remove any misapprehension on the part of the detaining authority, so that he himself may be induced to release the detenu, without recourse to any judicial process, on being satisfied that the information received by him is incorrect and that there is no sufficient ground for preventive detention of the person making such representation.<sup>12-15</sup> The urgency of the right of representation implies that the order upon the representation (accepting or rejecting it) must also be passed within a reasonable time.<sup>13</sup>

*To whom the representation is to be made.*—S. 7 (1) of the Preventive Detention Act, 1950, provides that where the order of detention has been made by the Government of India, the representation is to be made to that Government, and, where the order has been made by the State Government or by any officer subordinate thereto, to the State Government.

#### CLAUSE (6).

CL. (6): DISCRETION OF THE AUTHORITY.—This clause controls Cl. (5), and gives the authority making an order of preventive detention a discretion not to disclose facts (while informing the grounds) which he considers to be against the public interest to disclose [see under Cl. (5), *ante*].

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|---|---|
| (6) <i>Ghulam Hasain v. Rex</i> , A.I.R. 1949 Oudh 20 (27).     | 148 (152) (F.B.).   |
| (7) <i>In re Krishnaji</i> , A.I.R. 1948 Bom. 360.              | (11) <i>Benoy v. Government of Assam</i> , A.I.R. 1950 Assam 49.  |
| (8) <i>Inder Prakash v. Emperor</i> , A. I. R. 1948 Pat. 37.    | (12) Cf. <i>Inder Prakash v. Emperor</i> , A.I. R. 1949 All. 37 (41); <i>Durgadas v. Rex</i> , A.I.R. 1949 All. 148 (F.B.). |
| (9) <i>Durgadas v. Rex</i> , A.I.R. 1949 All. 148 (153) (F.B.). | (13) <i>Ghulam Hosain v. Rex</i> , A.I.R. 1949 Oudh 20; <i>Mani v. Dt. Magistrate</i> , A. I. R. 1950 Mad. 162 (170).       |
| (10) <i>Durgadas v. Rex</i> , A.I.R. 1949 All.                  |   |

The question is whether the Court can interfere on the ground that the facts supplied are insufficient to enable the detenu to make a representation. In some cases<sup>14</sup> prior to the Constitution, it was held that where the authority gives no facts at all, or gives insufficient facts, the Court can interfere on the ground that the discretion of the authority has been exercised capriciously. It seems, however, that the Constitution has precluded such a view by separating 'facts' from 'grounds' in two separate Cls. (5) and (6).<sup>15</sup> While it is obligatory upon the authority to disclose all the 'grounds', it has been given an absolute discretion to withhold facts which it would be against the public interest to disclose, according to the opinion of such authority. It is submitted that the word 'considers' has no such implication of reasonableness as is implied in such words as 'satisfied'.<sup>16</sup> It is rather analogous to the expression 'in his opinion'.<sup>17</sup> In short, under the Constitution, the Court has no power to impose its opinion as to whether it is against the public interest or not to disclose any particular fact or facts.<sup>17</sup> Once the authority refuses to disclose any fact or facts in the 'public interest,' the Court shall have no power to declare the detention to be invalid on the ground that the information supplied is vague or insufficient.

The present clause appears to be founded on the following observations made by Lord Maugham in *Liversidge v. Anderson*:<sup>18</sup>

"It is beyond dispute that he can decline to disclose information on which he has acted on the ground that to do so would be contrary to the public interest. . . . There must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature."

But as I have already pointed out, even in that case,<sup>18</sup> 'particulars' were supplied by as many as 6 paragraphs (see p. 128, *ante*). So, it is possible to supply particulars even without disclosing confidential facts.

#### CLAUSE (7).

SCOPE OF CL. (7): LEGISLATION BY PARLIAMENT.—This clause gives exclusive power to Parliament to legislate on the three matters included in sub-cl. (a) to (c), as regards all cases of preventive detention whether it has been made under orders of the Government of India or of a State Government. Parliament has enacted the Preventive Detention Act, 1950.<sup>19</sup> in pursuance of the clause. The relevant provisions of that Act, which is a temporary Act (to remain in force till April 1, 1951), will appear from below.

Sub-cl. (a).—S. 12 (1) of the Preventive Detention Act, 1950 provides that in cases of preventive detention on the following grounds, a person may be detained for a period longer than 3 months but not exceeding one year from the date of his detention, without obtaining the opinion of an Advisory Board: (a) defence of India; (b) relations of India with foreign powers; (c) security of India or State; (d) maintenance of public order. There is, however, provision for a review of the order, under S. 12 (2) of the Act, within

(14) *Nek Md. v. Province of Bihar*, A.I.R. 1949 Pat. 1 (11) (F.B.); *Durgadas v. Rex*, A.I.R. 1949 All. (152) (F.B.).

(15) Cf. *Lakhinarayan v. Prov. of Bihar*, (1950) S.C.J. 32 (42).

(16) Cf. *Liversidge v. Anderson*, (1942) A.C. 206 (271-2).

(17) Cf. *In re Jayantilal*, A.I.R. 1949 Bom. 319 (319; 320).

(18) *Liversidge v. Anderson*, (1942) A.C. 206.

(19) All the provisions of this Act, save S. 14, have been held to be valid by the Supreme Court, *In re Gopalan* [Statesman, Calcutta, 20-5-50, p. 1]. S. 14 of the Act has, how-

ever, been held to be 'severable' from the rest of the Act [Cf. Art. 13 (2), *ante*.] S. 14 of the Act, in short, prevented the detenu from disclosing the grounds of detention to the Court and also prevented the latter from calling upon any officer to disclose those grounds.. The Court was thus prevented from considering whether the requirements of Art. 22 (5) of the Constitution had been complied with. It also took away, in effect, the right to move the Court under Art. 32 (1) and 'rendered the entire proceedings in the Court ineffective and illusory.' Hence, S. 14 of the Act was *ultra vires*.



6 months of the order, in consultation with a person who has been or is qualified to be appointed as ■ High Court Judge.

*Sub-cl. (b).*—A maximum period under the present sub-clause was laid down by the Preventive Detention (Extension of Duration) Order, 1950, but that Order has been repealed by the Preventive Detention Act, 1950. The Act of 1950, however, does not prescribe any maximum period for all classes. It only provides that in cases coming under Sec. 12 (1) of the Act, Government shall be entitled to detain up to one year without obtaining the opinion of the Advisory Board. In other cases, opinion of the Advisory Board shall have to be taken for any detention exceeding the 3 month period laid down by Cl. (4) of Art. 22 of the Constitution. If, however, the Advisory Board reports in favour of detention, "Government may confirm the detention order and continue the detention of the person concerned *for such period as it thinks fit.*" (Sec. 11). So, with the opinion of the Advisory Board, Government shall be competent to detain any person for *any length of time.*

*Sub-cl. (c).*—The procedure to be followed by an Advisory Board is prescribed by Sec. 10 of the Preventive Detention Act, 1950. This in short is: (a) The Board shall consider the representation of the detenu, and the materials placed before it by the Government, and the Board shall be competent to call for further information either from the Government or the detenu; (b) The Board must submit its report to the Government concerned within 10 weeks from the date of detention; (c) The detenu shall have no right to appear in person or through a legal representative, before the Board; (d) The proceedings and the report of the Board shall be confidential, excepting only its opinion in favour of or against the detention, which shall be specified in a separate part.

### *Right against Exploitation*

**23.** (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Prohibition of traffic in human beings and forced labour.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

### OTHER CONSTITUTIONS

*U.S.A.*—The Thirteenth Amendment (1865) to the Constitution of the United States says—

"Neither slavery nor involuntary servitude, except as ■ punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Under the above provision, Congress has prohibited (1867) 'peonage' or the voluntary or involuntary service or labour of any person in liquidation of any debt or obligation.<sup>20</sup> 'Involuntary servitude' has been interpreted to include any kind of "control by which the personal service of one man is disposed of or served for another's benefit".<sup>21</sup> But the involuntary servitude that is forbidden is such as

(20) *Clyatt v. U.S.*, (1905) 197 U.S. 207.

(21) *Bailey v. Alabama*, (1911) 219 U.S. 219.

would not be tolerated by the free principles of the common law, and would not include the following: (i) Regulations of service in the domestic relations.<sup>20-21</sup> (ii) A statute requiring seamen to carry out the terms of their agreement, inasmuch as their employment demands special regulations.<sup>22-23</sup> (iii) Duties of citizenship, such as compulsory military service;<sup>24</sup> compulsory work on the public highways;<sup>25</sup> compulsory jury service.<sup>25</sup> (iv) Forced labour as a punishment for crime.<sup>1</sup>

*Japan.*—Art. XVIII of the Japanese Constitution, 1946, provides—

“No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.”

*Burma.*—Art. 19 of the Burmese Constitution, 1948, provides—

“(i) Traffic in human beings, and (ii) forced labour in any form and involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall be prohibited.

*Explanation.*—Nothing in this section shall prevent the State from imposing compulsory service for public purposes without any discrimination on grounds of birth race, religion or class.”

This article is substantially the same as Art. 23 of the Constitution of India excepting that it makes clear that forced labour and involuntary servitude may be imposed as punishment for a criminal offence.

## INDIA

**SCOPE OF CL. (1).**—This clause prohibits not only forced labour, but also ‘traffic in human beings’, which is evidently a very wide expression. It would include not only the prohibition of slavery but also the traffic in women for immoral or other purposes. It applies equally to citizens and aliens.

**‘Begar’.**—It means involuntary work without payment. Under the Zemin-dary system, tenants, particularly of the lower classes, are sometimes compelled to render free service to their landlord:<sup>2</sup>

**‘Similar forms of forced labour’.**—The words ‘similar forms’ indicate that the forced labour which is prohibited must be similar to ‘begar’. Hence forced labour as a punishment for a criminal offence is not prohibited.

**‘Punishable in accordance with law.’**—See Art. 35 (ii), *post*.

**Existing Law.**—The Bihar Harijans (Removal of Civil Disabilities) Act, 1949 makes it an offence to compel a Harijan to labour against his will or without wages or adequate wages.

**SCOPE OF CL. (2).**—This clause, is an exception to the bar imposed by Cl. (1), on the ground of ‘public purposes.’ Under this clause the State will be free to require compulsory service for public purposes. The latter part of the clause enjoins that while imposing compulsory service for public purposes, the State cannot exempt anybody simply on the ground of race, religion, caste or class, and, consequently, no citizen shall be entitled to avoid such service on any of these grounds.

(20-21) *Clyatt v. U. S.*, (1905) 197 U. S. 328.

(22-23) *Robertson v. Baldwin*, (1897) 165 U. S. 275.

(24) *Selective Draft Law Cases*, (1918) 245 U.S. 366 (390).

(25) *Buller v. Perry*, (1916) 240 U.S.

(1) *U.S. v. Reynolds*, (1914) 235 U.S. 133.

(2) Cf. Constitutional Proposals of the Sapru Committee, pp. 222, 234; See also Constitution Assembly Debates, Vol. VII, p. 80.

Hence, conscription for national defence cannot be avoided on grounds of religion.<sup>3-4</sup>

*'Public purposes'*.—This would include compulsory military service or conscription, for there can be no higher public purpose than the defence of the State itself. "Just government . . . includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."<sup>5</sup>

The expression 'public purposes' is wide enough to cover conscription also for social services, *e.g.*, for removal of illiteracy amongst the masses. It includes any purpose in which the general interest of the community, as approved to the particular interest of individuals is directly and vitally concerned.<sup>6</sup>

It is to be noted that while there is provision [Art. 31 (2)] for payment of compensation for compulsory acquisition of property, there is no question of compensation for compulsory service for public purposes, the reason being that it will be imposed amongst all classes.

#### COMPULSORY MILITARY SERVICE OF CONSCRIPTION.

*England*.—At Common law, the Crown possesses the prerogative to demand personal service within the realm in case of sudden invasion or formidable insurrection.<sup>7</sup> In modern times however, the power of conscription is conferred by statute. Thus, during World War II, a host of legislation was passed to authorise the Executive to conscribe men for military service within the United Kingdom as well as abroad.<sup>8</sup>

*U.S.A.*—The power to impose compulsory service has been held to belong, to Congress under its power 'to raise and support armies' [Art. I, Sec. 8 (12)].<sup>9</sup>

*India*.—Under our Constitution, too, it will be a legislative power of Parliament, under Entry I of List I, to raise forces by conscription if necessary for defence or prosecution of war.

**24.** No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Prohibition of employment of children in factories, etc.

#### OTHER CONSTITUTIONS.

*U.S.A.*—There is no constitutional prohibition against employment of children in any industries. But the authority of Congress to regulate the employment of children in industries engaged in *inter-State* commerce has been upheld by the Supreme Court.<sup>10</sup> Thus, the Fair Labour Standards Act of 1938, which has been upheld as valid,<sup>10</sup> excludes from *inter-State* commerce commodities in the production of which children under certain specified ages had worked. But there

(3) *Murdock v. Pennsylvania*, (1943) 319 U.S. 105; *In re Summers*, (1945) 325 U.S. 561.

(4) *Krygger v. Williams*, (1912) 15 C. L.R. 366.

(5) *Selective Draft Law Cases*, (1918) 245 U.S. 366 (390).

(6) *Framjee v. Secy. of State*, (1914) 39 Bom. 279 (P.C.).

(7) *Wade & Phillips*, Constitutional Law,

p. 129.

(8) *E.g.*, The National Service (Armed Forces) Act, 1939; the Armed Forces (Conditions of Service) Act, 1939; the National Service Act, 1941; the National Service (Foreign Countries) Act, 1942.

(9) *Selective Draft Law Cases*, (1918) 245 U.S. 366.

(10) *U.S. v. Darby Lumber Co.*, (1941) 312 U.S. 100.



is nothing to regulate the employment of children in inter-State or non-commercial industries.

## INDIA

*Scope of Art. 24: Prohibition of child labour.*—Our Constitution goes in advance of that of the U.S.A. by laying down a constitutional prohibition against employment of children (i.e., below 14 years) in (a) factories, (b) mines as well as, (c) any other hazardous employment. The expression 'any other hazardous employment' has to be construed by the rule of *ejusdem generis*. Employments connected with transport would come within this expression. So, a child, in India, has a fundamental right not to be employed in such hazardous works and anything which may require such employment would be void.

*Existing law.*—The Employment of Children Act (XXVI) of 1938 prohibits employment of children below 15 years in any occupation connected with the transport of passengers, goods or mails by railway or in any port.

The Indian Factories (Amendment) Act, 1940, prevents the employment of children in unhealthy and dangerous conditions.

*Analogous Provisions.*—See Art. 39 (e); Entry 24 of List III, Sch. VII.

*Right to Freedom of Religion*

**25.** (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

*Explanation I.*—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

*Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

OTHER CONSTITUTIONS<sup>11</sup>

*U.S.A.*—The First Amendment to the Constitution (1791) says—

"Congress shall make no law respecting ■ establishment of religions or prohibiting the free exercise thereof."

(11) See also Arts. ■ (1), ■ (1) of the the Czech; 12 of Jugoslav; 96 of Danzig, Swiss; 135 of Weimar; 121, 122 and 125 of Constitutions.

This clause, in short, means that there are no restraints upon the free exercise of religion according to the dictates of conscience, or upon the free expression of religious opinions, save those imposed under the Police power.<sup>12</sup> "No man in religious matters is to be discriminated against by the law, or subjected to the censorship of the State or of any public authority; and the State is not to inquire into or take notice of religious belief or expression so long as the citizen performs his duty to the State and to his fellows, and is guilty of no breach of public morals or public decorum."<sup>12</sup>

The 'free exercise of religion' has been interpreted to involve three concepts: (a) Freedom of religious belief; (b) Freedom of practice; (c) Freedom of propagation of religious views.

(a) *Freedom of religious belief*.—This means the right to 'worship God according to the dictates of one's conscience.'<sup>13</sup> "Man's relations to his God was made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views".<sup>14</sup> Hence, in the United States, no man can be punished for 'heresy', and none can be put to the proof of his religious doctrines or beliefs.<sup>14</sup> The First Amendment, on the other hand, "forestalls compulsion by law of the acceptance of any creed or practice of any form of worship."<sup>15-17</sup>

(b) *Freedom of practice*.—Though the above article offers the right of 'free exercise' of the chosen form of religion, unrestricted by any qualification, Courts have interpreted the clause to be subject to some limitations which are necessary in the interests of the society itself. Thus, it has been held that while the freedom of religious *belief* is absolute, the right to *act* in the exercise of a man's religious belief cannot override the interests of the peace, good orders or morals of the society and that it is competent to the legislature to suppress such religious practices which are dangerous to public morals, safety, health or good order.<sup>18</sup> "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation".<sup>18</sup>

(i) Thus, polygamy or bigamy may be prohibited by legislation notwithstanding the fact that it is in accordance with the creed of a religious body.<sup>18-19</sup> (ii) Similarly, an individual would not be allowed to advance a claim to supernatural powers to conquer disease, poverty, misery or the like, nor to use the Postal services for the purpose of procuring money under such a claim.<sup>20-21</sup> Proof of the truth of such a claim is not permitted in a trial for such use of the mails.<sup>14</sup> On the other hand, the State may enforce health regulations such as vaccination, isolation of contagious diseases and the like even against persons who believe only in faith cure.<sup>22-25</sup> (iv) Again the State may legislate for the protection of minor children, founded upon its position as *parents patriae*, even though such legislation runs *contra* to a particular parent's religious beliefs.<sup>22-25</sup> Thus, the right to practise religion freely does not include liberty to expose the child to ill-health or death.<sup>22-25</sup>

"Congress was deprived of all legislative power over mere *opinion*, but was left free to reach actions which were in violation of *social duties* or subversive of *good order*. . . Laws are made for the government of actions, and while they cannot interfere with mere

(12) Cooley, Constitutional Limitations, 8th Ed., Ch. XIII; Cooley, Constitutional Law, p. 260.

(13) *Downes v. Bidwell*, (1901) 182 U.S. 244.

(14) *U.S. v. Ballard*, (1944) 322 U.S. 78.

(15-17) *Cantwell v. Connecticut*, (1939) 310 U.S. 296 (303).

(18) *Davies v. Beason*, (1890) 133 U.S. 333.

(19) *Reynolds v. United States*, (1878) 98 U.S. 145.

(20-21) *New v. U.S.*, (1917) 245 Fed. 710.

(22-25) *People v. Pearson*, (1903) 176 N. Y. 201.

religious belief and opinions, they may with *practices*. Suppose that one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? . . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."<sup>1-2</sup>

But when State action impinges upon religious freedom, it must be shown to be necessary for the protection of the community against some 'clear and present danger'.<sup>3</sup>

(c) *Freedom of propagation of religious views*.—The freedom to act in the exercise of one's religious belief includes the freedom to propagate that belief. ■ such propagation does not transgress the limits imposed by the law for the preservation of public order, safety and morals, the State cannot wholly deny the right to preach religious views, by imposing a tax or otherwise.<sup>4</sup> Regulation of religious propaganda on the streets or in public meetings thus comes under the ordinary law relating to public meetings, etc., and no discrimination is made in the case of religious purposes. Neither a State nor ■ municipality can completely ban the distribution of religious literature on the street or public places or to subject it to a permit or payment of a licence tax.<sup>5</sup> The right is not available in respect of *private* property without the assent of the owner,<sup>6</sup> but it extends to *public* places even though they may be privately owned.<sup>7</sup>

*Australia*.—S. 116 of the Australian Constitution Act says—

"The Commonwealth shall not make any law for establishing religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

*Eire*.—Art. 44 (2) of the Constitution of 1937, says—

"1. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

2. The State guarantees not to endow any religion.

3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."

*U.S.S.R.*—Art. 124 of the Soviet Constitution, 1936, says—

"Freedom of religious worship and freedom of *anti-religious* propaganda is recognized for all citizens."

*Fourth French Republic*.—Cl. (10) of the Declaration of Rights of 1789, which is adopted by the Preamble of the Constitution of 1946, says—

"No one ought to be disturbed on account of his opinions, even religions, provided their manifestation does not derange the public order established by law."

*Japan*.—Art. XX of the Constitution of 1946, says—

"Freedom of religion is guaranteed to all. . . . No person shall be compelled to take part in any religious act, celebration, rite or practice".

*Ceylon*.—S. 29 (2) of the Ceylon (Constitution) Order in Council, 1946, provides—

"No such law (*i.e.*, law made by Parliament) shall (a) prohibit or restrict the free exercise of any religion; or (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made

(1-2) *Reynolds v. United States*, (1878) 98 U.S. 145.

(3) *Schenck v. United States*, (1919) 249 U.S. 47.

(4) *Murdock v. Pennsylvania*, (1943) 319 U.S. 105.

(5) *Lovell v. Griffin*, 303 U.S. 444.

(6) *Martin v. Struthers*, (1943) 319 U.S. 141.

(7) *Marsh v. Alabama*, (1945) 326 U.S. 501.



liable; or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions. . . ."

*Burma.*—Art. 20 of the Burmese Constitution, 1948, provides—

"All persons are equally entitled to freedom of conscience and the right freely to profess and practise religion subject to public order, morality or health and to the other provisions of this Chapter.

*Explanation 1.*—The above right shall not include any economic, financial, political or other secular activities that may be associated with religious practice.

*Explanation 2.*—The freedom guaranteed in this section shall not debar the State from enacting laws for the purpose of social welfare and reform."

On the other hand, Cls. (3) and (4) of Art. 21 say—

"(3) The State shall not impose any disabilities or make any discrimination on the ground of religious faith or belief. (4) The abuse of religion for political purposes is forbidden; and any act which is intended or is likely to promote feelings of hatred, enmity or discord between racial or religious communities or sects is contrary to this Constitution and may be made punishable by law."

## INDIA

### CLAUSE (1):

*Object of Cl. (1).*—The wording of this clause has been largely taken from the judicial interpretation of freedom of religion in the *United States*, as explained above. The meaning of the words freedom of 'conscience', 'profession', 'practice' and 'propagation' of religion will be clear from the American cases discussed above. The above freedoms are subject to a twofold restriction—(a) Public order, morality and health. (b) Restrictions imposed under Cl. (2).

*"Freedom of conscience".*—The freedom of conscience of the individual follows from the ideal of the secular State envisaged by the framers of the Indian Constitution. A secular State is based on the idea that the State, as a political association, is concerned with the social relations between man and man and not with the relation between man and God which is a matter for the individual conscience. A secular State therefore means a State which has no religion of its own and which refrains from discrimination on grounds of religion. No particular religion would receive any special patronage from such a State,<sup>8</sup> nor could anybody be compelled to accept or abandon any creed or belief.

In this respect, the Constitution of India is more secular than the Constitutions of Eire and Burma and perhaps even that of the U.S.A. Thus, Art. 44 (1) 2 of the Constitution of *Eire* says—

"The State recognises the *special position* of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the great majority of the citizens."

Similarly, Art. 21 (1) of the Constitution of *Burma* declares—

"The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union."

Similarly in interpreting the prohibition against 'establishment of religion' in the First Amendment to the Constitution of the United States, *Cooley* observes—

"By establishment of religion is meant the setting up or recognition of a State Church, or at least the conferring upon one Church of special favours and advantages which are denied to others.<sup>9</sup> It was never intended by the Constitution that the government should be

(8) Cf. *Murdock v. Pennsylvania*, (1943) 319 U.S. 105.

(9) This is the condition prevailing in

England, where the Church of England is an 'established' Church. Though there is in England freedom of worship as in other

prohibited from *recognizing* religion, or that religious worship should never be provided for in cases where ■ proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion was always *recognized* in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly."<sup>10</sup>

'*To profess and practise*'.—Freedom of conscience would be meaningless unless it were supplemented by the freedom of unhampered expression of spiritual conviction in word and action. Matters of conscience come in contact with the State only when they become articulate. While freedom of 'profession' means the right of the believer to state his creed in public, freedom of practice means his right to give its expression in forms of private and public worship. Both imply ■ right to active intervention in the public sphere. Hence, these freedoms are guaranteed by our Constitution 'subject to public order and morality', as by the Constitution of Eire.<sup>11</sup> None would be allowed to disturb the public peace or to offend against public decency in the name of religious liberty.

'*To propagate*'.—As has been held in the United States (p. 136, *ante*), the Constitution of India acknowledges that the freedom to act in the exercise of one's religious belief includes the freedom to propagate that belief, without let or hindrance from any other individual or the State, except that it must not transgress the limits imposed by the State for the preservation of public order, safety and morals. As Pandit Lakshmikanta Maitra observed,<sup>12</sup> the very foundation of society in India being religion, India would lose all her spiritual values and heritage unless the right to practise and propagate religion was not recognised as a fundamental right. The right to propagate is not given to any particular religion or community alone. It is given to all, subject to the right and duty of the State to see that these rights are not exercised in a manner that would upset the order, morality and health of the country. 'Propagation', again, does not mean 'conversion' but the conveyance of one's own beliefs to another by exposition or persuasion, without any element of coercion.<sup>13</sup> It may be noted that the right to hold religious discourses, associations and propaganda, would also follow from the freedoms guaranteed in Art. 19 (1) (a) and (c).

'*Subject to public order, morality, health*'.—As has been held in the United States (p. 135, *ante*), freedom of religious belief and to act in the exercise of such belief cannot override the interests of the peace, order or morals of the society, and to that extent, the freedom of religion is subject to the control of

countries, there are still some political disabilities attached to Roman Catholics and other non-conformists. Thus, Roman Catholics and those who marry Roman Catholics are excluded from the Throne (Act of Settlement, 1701). But, above all, the Church of England (*i.e.*, the Protestant Church) has been, by the Acts of Supremacy and Uniformity, "by law established", *i.e.*, built into the fabric of the English Constitution. "The process of establishment means that the State has accepted the (Protestant) Church as ■ religious body ■ its opinion truly teaching the Christian faith and given to it a certain legal position and to its decrees. . . . certain legal sanctions (*Marshall v. Graham*, (1907) 2 K.B. 112 (126)). Its entire organisation is sanctioned by law which establishes it and recognises its property and other rights to the exclusion of any other system (*Free Church*

*of Scotland v. Overtoun*, (1904) A.C. 515 (726)). It has deliberative and judicial powers and its Acts and decrees are given legal sanction. The members of the Church have special privileges such as relating to marriage. Again, a clergyman, belonging to the established Church cannot be called upon to serve in any temporal office, in war or on a jury (*see Keith, Constitutional Law*, Part VII, Ch. I; Chalmers & Hood Phillips; Wade & Phillips).

(10) Cooley, *Constitutional Law*, pp. 259-260.

(11) Cf. Kohn's *Constitution of the Irish Free State*, 1932, p. 164.

(12) Constituent Assembly Debates, Vol. VII, p. 832.

(13) Cf. Constituent Assembly Debates, Vol. VII, pp. 833, 837.

the State.<sup>14</sup> "Whilst legislation for the establishment of a religion is forbidden and its free exercise permitted, it does not follow that everything which may be so called can be tolerated.<sup>15</sup> Crime is not the less odious because sanctioned by what any particular sect may designate as religion."<sup>14</sup>

Thus, freedom of religion would not allow a man to commit human sacrifice, even though human sacrifice is sanctioned by some religious creeds (e.g., some of the Tantras).

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment of the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. . . . It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."<sup>14</sup>

[As to the meaning of 'public order and morality', see under Art. 19, *ante* and Entry 1 of List II, Sch. VII.]

*Existing Law.*—Sec. 34 of the Police Act (V of 1861), prohibits the slaughter of cattle or indecent exposure of one's person on any road, thoroughfare or other public place. These acts cannot be justified on the plea of practice of religious rites.

'Other provisions of this Part'.—Thus, in the exercise of the freedom of religious practice, a person would not be allowed to commit an act which is punishable as 'untouchability' under Art. 17 or to take part in a traffic in human beings [Art. 23 (1)], e.g., in the system of devadasis.<sup>16</sup> Nor can a citizen avoid 'service for public purposes' on ground of religion [Art. 23 (2)].<sup>17</sup>

Similarly, freedom of religion would not extend to political doctrines associated with particular creeds, which cannot be said to be essence of religion. Thus, a man cannot be allowed, in the exercise of his freedom of religious practice and profession, to carry on an anti-war propaganda, subversive to the effective prosecution of war when the nation is engaged in a War;<sup>18-25</sup> nor would it, as already stated, enable a man to avoid compulsory military training for purposes of defence [see under Art. 23 (2), *ante*].

#### CLAUSE (2):

*Scope of Cl. (2).*—The freedoms guaranteed by Cl. (1) are subject to the exceptions provided by sub-cl. (a) and (b) of Cl. (2).

*Sub-Cl. (a): Secular activities.*—Sub-cl. (a) is particularly an exception to the freedom of practice. The freedom of practice would extend only to

(14) *Davies v. Beason*, (1890) 133 U.S. 333; *Board of Education v. Barnette*, (1943) 319 U.S. 624 (643).

(15) *Keynolds v. U. S.*, (1879) 98 U.S. 145.

(16) See in this connection, Madras Act V of 1929.

(17) This principle is embodied in Art.

77 of the Constitution of Denmark, Art. 11 of Esthonia, Art. 49 of Switzerland, Art. 12, Jugoslavia—that religious conviction cannot be pleaded in justification of non-fulfilment of civic duties".

(18-25) *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116 (159-160).



those rites and observances which are of the *essence* of religion and would not cover secular activities which go by the name of religion and are no part of true religion. Such matters, for example, are those that come within the scope of the expression 'personal law', *e.g.*, relating to marriage, adoption and the like, as regards which the Hindu and Mahomedan laws are founded on religious scriptures, and yet they do not form the essence of either religion, in the sense of 'one's views of his relations to his Creator'. Hence, matters of personal law are subject to regulation or restriction by the State in the larger interests of society. The legislative power in this respect is conferred by Entry 5 of List III of Sch. VII.

*Political activity.*—Nor can the State allow subversive activities to be carried on in the name of religion and action may be taken against the anti-war activities of religious associations, if the safety of the State is really prejudiced by such activities.<sup>1-8</sup>

*Sub-Cl. (b): 'Social Reform'.*—This clause provides that where there is conflict between religious practice and the need of social reform, religion must yield. As Dr. Ambedkar explained,<sup>9</sup> the conception of religion in this country is so vast as to cover every aspect of life from birth to death. If the State were to accept this conception of religion, the country would come to a standstill in regard to reforms. It may be expected that no sensible State, in the name of social reform, would affect the very *essence* of any religion. The legislation would only touch questionable practices, dogmas and the like which stand in the way of the social progress of the country as a whole, *e.g.*, the system of *devadasis*.

*Opening Hindu religious institutions.*—The latter part of Sub-Cl. (b) empowers the State to override religious injunctions prohibiting certain classes from entering into temples or other religious institutions. The obvious object is to remove a potent cause of disunion and inequality. It is confined to 'public' institutions, *i.e.*, those institutions which have been dedicated to the Hindu public either by grant or user (*see* p. 62, *ante*). It would not extend to family endowments or institutions. 'Hindu' religious institutions include Sikh, Jaina and Buddhist religious institutions [*Expl. II*].

*Existing Law.*—Several Provinces have enacted temple entry laws even before commencement of the Constitution, *e.g.*, the Bombay Harijan Temple Entry Act (XXXV of 1947),<sup>10</sup> which penalties prevention or obstruction of a Harijan from entering into "a place by whatever designation known, which is used as of right by, dedicated to or for the benefit of, the *Hindus in general* other than Harijans as a place of *public religious worship*."<sup>11</sup>

*Legislative power.*—The legislative power as regards religious institutions is conferred by Entry 28 of List III.

*Explanation.*—The right of the Sikhs to carry *kripans* was acknowledged by the Nehru Committee (1928), as well as the Sarpu Committee (1945, para. 363).

*Analogous Provisions.*—As to prohibition of discrimination on ground of religion, *see* Arts. 15, 16, 29 (2). While the present Article deals with the freedoms of conscience, profession, practice and propagation of religion, Arts. 26-28 deal with three other allied freedoms relating to religion.

(1-8) Cf. *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116 (160).

(9) Constituent Assembly Debates Vol. VII, p. 781.

(10) See also C. P. and Berar Temple Entry Authorization Act, 1947; Madras Temple Entry Authorisation Act (V of 1947).

(11) Current Statutes, (1947) Bom. 108.

**26.** Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

Freedom to manage religious affairs.

(a) to establish and maintain institutions for religious and charitable purposes ;

(b) to manage its own affairs in matters of religion ;

(c) to own and acquire moveable and immoveable property ;  
and

(d) to administer such property in accordance with law.

#### OTHER CONSTITUTIONS

*Eire.*—Art. 44 (2) 5-6 of the Constitution of 1937 provide—

“Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, moveable and immoveable, and maintain institutions for religious or charitable purposes.

The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.”

*Ceylon.*—Sec. 29 (2) (d) of the Ceylon Constitution Order in Council, 1946, lays down—

“No such law shall (d) alter the constitution of any religious body except with the consent of the governing authority of that body: Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.”

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*Scope of Art. 26: Freedom to manage religious affairs and institutions.*—This article guarantees to every religious denomination or section, the right to maintain religious and charitable institutions of its own, including the right to own, acquire and administer property for such purposes. It is to be noted that (a) the above right is subject to the limitations of public order, morality and health; (b) that a corresponding right to maintain *educational* institutions of its own is guaranteed to every religious denomination or section by Art. 30 (1).

**27.** No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Freedom to payment of taxes for promotion of any particular religion.

#### OTHER CONSTITUTIONS.

*U.S.A.*—The First Amendment (1791) enjoins that Congress shall make ‘no law respecting establishment of religion’.—By reason of this prohibition, Congress cannot make appropriations in aid of religious bodies, including educational institutions under the management of and engaged in disseminating the religious doctrines of any particular sect. But, the mere fact that a hospital is managed by Roman Catholics is no bar to its incorporation by Congress or provision of money for its management for such provision would not be a ‘law respecting establishment of religion’, provided the institution is carried on—

in accordance with the Constitution.<sup>12</sup> Nor does the above prohibition debar the State from exempting religious bodies from taxation, if the basis of the exemption is public welfare and not the religious character of the institutions concerned.<sup>12</sup>

*Switzerland.*—Art. 40 of the Swiss Constitution, 1874, provides—

"No person may be compelled to pay taxes the proceeds of which are specifically appropriated in payment of the purely religious expenses of any religious community of which he is not a member."

*Japan.*—Art. 22 of the Constitution of 1946 says—

" . . . . No religious organization shall receive any privileges from the State, nor exercise any political authority. . . ."

#### INDIA

*Object of Art. 27: Freedom from payment of taxes for the promotion of any particular religion.*—This article secures that the public funds raised by taxes shall not be utilized for the benefit of any particular religion or religious denomination. Thus, a local authority, which raises taxes from persons of all communities residing within its jurisdiction, would not be entitled to aid or maintain an educational institution which decides to give instruction relating to any particular religion, even though the majority of students receiving education from that institution belong to that religion. In the present article *our Constitution* embodies the principle which has been arrived at in the *U.S.A.* by judicial decision, viz., that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they adopt to teach or practise religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."<sup>13-14</sup>

It is to be noted that what the present article of our Constitution prohibits is taxation for the promotion of any *particular* religion. It would not bar any provision by which religious institutions are benefitted along with secular ones, without any discrimination,<sup>13-14</sup> or by which all religious institutions are benefitted alike.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

**28.** (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

(12) *Bradfield v. Roberts*, (1889) 175 U. S. 291.

(13-14) *Everson v. Board of Education*, (1947) 330 U. S. 1.



## OTHER CONSTITUTIONS

*U.S.S.R.*—Art. 124 of the Soviet Constitution, 1936, says—

“In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. is separated from the State, and the school from the church.”

*Eire.*—Art. 44 (2) 4 of the Constitution of 1937, provides—

“Legislation providing State aid for schools shall not . . . be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction in that school.”

*Japan.*—Art. XX of the Japanese Constitution, 1946, says—

“....The State and its organs shall refrain from religious education or any other religious activity.”

*Burma.*—The Constitution of Burma, 1948, does not debar the State from imparting religious education but prohibits the abuse of religion for political purposes, [S. 21 (4)] and guarantees that no religious instruction shall be ‘compulsorily imposed’ on any minority [S. 22].

## INDIA.

*Scope of Art. 28: Religious instruction in educational institutions.*—This article is confined to educational institutions maintained, aided, or recognised by the State. It does not relate to institutions other than these, which have no connection with the State.

Cl. (1) relates to institutions wholly maintained by State funds. Cl. (2) relates to educational institutions which are simply administered by the State under some endowment or trust. Cl. (3) refers to institutions receiving aid out of State funds, and institutions which are simply recognised by the State.

No institution, maintained by State funds exclusively, shall impart religious instruction of any kind. But institutions which are maintained *partly* by public funds or are recognised by the State shall be free to impart religious instruction, provided they do not *compel* members of other communities to follow or attend such courses without their consent.

The attitude of the Constitution towards religion as expressed by this article, is a compromise between two opposite considerations: (a) On the one hand, there has been much exploitation of society in the name of religion, and the conflict between the exclusive dogmas of the different religions and different Schools within the same religion has been detrimental to the society. Again, owing to the multiplicity of religions, it is not possible for the State itself to impart religious instruction, even if it minded to do so. (b) On the other hand, religion forms the basis of the entire morality and culture of the society in India, and in some form or other religious instruction is necessary, so that the State, though a secular State, cannot ban religious instruction altogether.

The Constitution, therefore, strikes a *via media*. It totally bans religious instruction in State-owned educational institutions, but does not ban it in other denominational institutions. But even as regards those other institutions, it seeks to prevent the fostering of religious dogmas, by Art. 28 (3) and Art. 29 (2).

On the other hand, in institutions which are not maintained either wholly or in part by the State but are merely administered by the State as a trustee under a trust or endowment created for the purpose of imparting religious instruction, there cannot reasonably be any bar to the provision for religious instruction, for the State does not thereby lose its secularity or impartiality.

Cl. (1): ‘*Religious instruction*’.—What this clause bans is the imparting of religious instruction in institutions wholly maintained by the State funds. It does

not ban *moral* instruction which is an essential part of training in citizenship, maintenance of law and order in the State, and growth of social cohesion. In fact, the provision for primary education being a duty of the State [Art. 45], it is all the more essential that the State will impart moral education to the future citizens, in their formative years. At the same time, the task of differentiating morality from religion will not be an easy one, in a country where almost every part of ■ man's life is inextricable blended with religion, according to the scriptures.

*'Wholly'.*—In order to bring an institution within the scope of Cl. (1), it must be wholly maintained out of State funds. If it is not wholly maintained out of State funds, it would come under Cl. (3) relating to aided institutions. 'State' in this context obviously comprises all the authorities mentioned in Art. 12.

Cl. (2) engrafts the only exception to the absolute prohibition of religious education contained in Cl. (1). But this is not really ■ exception to that clause. For, Cl. (1) makes that prohibition as regards institutions maintained "*out of State funds*". The Proviso refers to institutions which are not maintained out of State funds, but are only *administered* by the State as trustees, *e.g.*, the Benares Hindu University.

Thus, if a donor of ■ religious endowment or trust provides that religious instruction shall be given in ■ institution created by or under the endowment, the State, if it happens to be the trustee of such management, would not be debarred from carrying out the terms of the endowment or the trust. Otherwise, it would not have been possible for the State ever to take up the management of such a trust, without committing breach of trust.

*Object of Cl. (3).*—This clause enables any community or religious denomination, who wanted to give religious education to their children, to establish educational institutions for that purpose, and also to seek aid from the State, provided that they should not be in a position to *force* these instructions on any other community. The State is free to offer the aid or not; but a condition necessary for the State aid is that the religious instruction given in such institution shall not be compulsory upon the children belonging to other communities (who may be receiving general education in such institution), unless and until the consent of the pupil (if adult) or of his guardian is obtained.

Another condition of State aid has been indirectly introduced by Cl. (2) of Art. 29. A religious community may maintain educational institutions of its own and give religious instruction there; but if it wants State aid, it cannot prevent citizens of other communities from getting admission into the institution; and when the latter are admitted, the exclusive character of the institution will be gone, for under Art. 28 (3), the pupils of those other communities shall be free not to take the religious instruction given in that institution.

### *Cultural and Educational Rights*

**29.** (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

Protection of interests of minorities.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

## OTHER CONSTITUTIONS

*Burma.*—Art. 22 of the Burmese Constitution, 1948, provides—

“No minority, religious, racial or linguistic, shall be discriminated against in regard to admission into State educational institutions.”

## INDIA

*Object of Cl. (1).*—The object of this clause is to give cultural protection not only to the ‘technical minorities’ or religious communities in the minority, but also to linguistic minorities. The clause makes it clear that if there is a cultural minority, which wanted to preserve its own language and culture, the State would not by law impose upon it any other culture which might be local or otherwise.

*Object of Cl. (2).*—This clause is a counterpart of the equality clauses of Art. 15. There should be no discrimination against any citizen on the ground of religion, etc., in the matter of admission into any educational institution maintained or aided by the State.

‘*Only of religion, race, caste, language*’.—These words show that the educational institutions coming within this clause are not debarred from imposing beneficial conditions or limitations, such as previous training, age, physical fitness, vaccination, dissociation from injurious associations and the like.<sup>15</sup>

**30.** (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

Right of minorities to establish and administer educational institutions.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

## OTHER CONSTITUTIONS

*Eire.*—Art. 42 (3) of the Constitution of 1937 says—

“The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State or to any particular type of school designated by the State”.

Art. 44 (2) 4, again provides—

“Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations.”

## INDIA

*Object of Cl. (1).*—This Clause is a counterpart of the rights guaranteed by Art. 26. While Art. 26 guarantees to a minority the right to maintain religious and charitable institutions, the present clause guarantees the right to establish its own educational institutions. Again, the present Clause is complementary to Art. 29 (1). While Art. 29 (1) gives the minority or any other community to maintain its language or script, the present Clause enables them to run their educational institutions, and thus tries to solve the problem of linguistic minorities.

The present Clause also involves a corresponding right to attend such denominational institutions to the exclusion of State institutions.<sup>16</sup> Hence, in making

(15) Cf. *Cooley, Constitutional Law*, pp. 294-5.

(16) Cf. *Pierce v. Society of Sisters*, (1925) 268 U.S. 510.



primary education compulsory (Art. 45), the State cannot compel that such education must take place only in the schools owned, aided or recognised by the State.

*Object of Cl. (2).*—This is another prohibition against discrimination by the State. In granting aid to educational institutions, the State shall not discriminate against institutions managed by any minority,—religious or linguistic. So, minority institution will be entitled to State aid in the same way as other institutions.

### *Right to Property*

Compulsory acquisition of property.

**31. (1)** No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

#### CLAUSE (1)

#### OTHER CONSTITUTIONS<sup>17</sup>

*U.S.A.*—The Fifth Amendment (1791) says—

“Nor shall any person be deprived of . . . property, without due process of law.”

Sec. 1 of the 14th Amendment (1868) imposes ■ similar prohibition upon the State.

This provision is founded on the theory of individualism and private property and ■■■■■ that what a man acquires as his property, by inheritance, personal effort or other lawful means, shall not be taken away from him *arbitrarily* (the meaning of ‘due process’ has been explained at p. 112, *ante*). We have already seen (p. 98) how the *use* of private property may be controlled by the State under its taxing and police powers, in the interests of public welfare. The present clauses (5th and 14th Amendments) provide how a person may be *deprived* of his property. Shortly speaking, private property may be taken by the State only in the exercise of its powers of taxation, eminent domain, penalty by way of fines, and under the law of escheat.

A person is *deprived* of his property when its *value* is taken in whole or in part.<sup>18</sup> So, this may be done by some act done at a distance from the property in question, *e.g.*, by flooding the land by placing a dam across ■ water-course<sup>19</sup> or by cutting off access to his property by occupying the street in front of it,<sup>20</sup> or by ■ second grant after the grant of an exclusive privilege.<sup>20</sup> There can be no ‘deprivation’ when the law does not recognise any right of property in the thing in question, *e.g.*, an individual has no vested right of property in any rule of law and hence, any change in any rule of law, so long as it does not disturb ‘property rights’ which are recognised by law, is not a deprivation of property.<sup>21</sup>

*England.*—In *Entick v. Carrington*,<sup>22</sup> Lord Camden observed—

“By the laws of England, every invasion of private property, be it ever ■ minute, is ■ trespass. No ■ can set his foot upon my ground without my licence. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him.”

Apart from the right against *trespass* upon his property, every subject has a right against unlawful *deprivation* of his property in his lands and goods. English law, in short, recognizes private property and it can be taken by the state only (a) by consent of the owner, or (b) under authority of Parliament which represents the consent of the nation.<sup>23</sup>

(17) See also Art. 153 of Weimar Germany; Art. 109 of Czechoslovakia; Art. 37 of Yugoslavia; Art. 110 of Danzig; Arts. 9-10 of U.S.S.R., Constitutions.

(18) *Pumpelly v. Green Bay Co.*, (1871) 13 Wall. 166.

(19) *Lackland v. R.R. Co.*, ■ Mo. 180.

(20) *Central Bridge v. Lowell*, ■ Gray, 474.

(21) *Munn v. Illinois*, (1876) 94 U.S. 113.

(22) (1765) 19 St. Tr. 1067.

(23) Stephen's Commentaries, Vol. I,

p. 548.

Parliament interferes with private property in the public interest—

(a) By way of *taxation* for raising the revenue for the State.

(b) By way of acquisition of land and other property for purposes of industry, development, etc., in time of peace; and for defence in time of war. This is technically called the power of '*eminent domain*'.

Parliament's interference with private rights is, however, subject to two *safeguards* in favour of the subject:

(i) The Courts would not infer that Parliament intended to take away private property, unless such intention was expressed by Parliament by plain words, or it follows from the statute by necessary implication.<sup>24</sup>

(ii) There is a further *presumption* that Parliament would not interfere with private property without payment of compensation for the loss.<sup>25</sup> [This second principle is embodied in Cl. (2) of our Art. 31]. "An intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in *unequivocal terms*."<sup>25</sup> Again, any legislation which enables the Executive to take property without compensation must be strictly construed and all conditions laid down by the statute must be strictly complied with in order to give validity to the order.<sup>1</sup>

It is to be noted that during the World Wars, statutes authorising acquisition or requisition of property for defence purposes provided for payment of compensation and it was held that the Crown's prerogative to take possession of property, for the defence of the realm, without compensation, was to that extent, superseded by the legislation.<sup>2</sup>

*Ire.*—Art. 43 of the Constitution of 1937 provides:

"(1) 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

(2) 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this article ought, in civil society, to be regulated by the principles of social justice. 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

*Fourth French Republic.*—The Preamble of the Constitution of the Fourth French Republic (1946) affirms and adopts the Declaration of Rights of 1789. Cl. (17) of that Declaration is—

"Property being a sacred and inviolable right, no one can be deprived of it unless a legally established public necessity demands it, and — condition of just and prior indemnity."

*Japan.*—Art. 29 of the Japanese Constitution, 1946, says—

"The right to own property is inviolable, but property rights shall be defined by law, in conformity with the public welfare."

Art. 30 says—

"The people are liable to taxation as fixed by law."

(24) *Inglewood Pulp Co. v. New Brunswick Commission*, A.I.R. 1928 P.C. 287 (290).

(25) *Central Control Board v. Cannon Brewery*, (1919) A.C. 744 (752). Stephen's Commentaries, 1938, Vol. I, p. 549; *Colonial Sugar Refining Co. v. Melbourne Commrs.*,

(1927) A.C. 343; *Commissioner v. Logan*, (1903) A.C. 355.

(1) *Minister of Health v. Rex*, (1930) 2 K.B. 98 (145).

(2) *Att. Gen. v. De Keyser's Royal Hotel*, (1920) A.C. 508.



*Burma.*—Cls. (1-3) of Art. 23 of the Constitution of 1948 says—

“(1) Subject to the provisions of this section, the State guarantees the right of private initiative in economic sphere. (2) No person shall be permitted to use the right of private property to the detriment of the general public. (3) Private monopolist organizations, such as cartels, syndicates and trusts formed for the purpose of dictating prices or for monopolizing the market or otherwise calculated to injure the interests of the national economy, are forbidden.”

*Government of India Act, 1935.*—Cl. (1) of Sec. 299 of that Act was exactly the same as Cl. (1) of Art. 31 of our Constitution.

## INDIA

*Source of Cl. (1).*—This clause reproduces Sec. 299 (1) of the Government of India Act, 1935.

*Scope of Cl. (1): No expropriation except under law.*—The protection offered by this clause is not confined to citizens but extends to any property situate in India, whether held by a citizen or an alien.

The effects of Cls. (1) and (2) are that any deprivation of a man's property, not sanctioned by law, constitutes a wrong, for which an action will lie in tort, *inter alia*. No action in any form will lie for any deprivation which is authorised by law. But when the law professes to take property 'for public purposes', there is a right to compensation, whatever be its amount. A law which comes within the scope of Cl. (2) but does not provide for payment of consideration, would be void.

Apart from Cl. (2), there is no constitutional right to compensation. But the Courts may apply the English rules of interpretation, subject, of course, to Cl. (5) of the present Article.

*'Property'.*—See under Art. 19 (1) (f), *ante*. Being used generically, the word includes all kinds of property,<sup>3</sup> and all that a person may have dominion over and every possible interest over it.<sup>4</sup>

*'Deprived'.*—See p. 147, *ante*. Obviously, it excludes taking by consent of or by agreement with the owner.<sup>4-a</sup>

*'Save by authority of law'.*—This expression indicates that the Indian Constitution follows the English law on the point, rather than the American 'due process'.

Under the *English* system, the Legislature is competent to take away any rights of property, without any interference of the Courts in that action. The only restriction imposed by judicial interpretation is that the statute taking away vested rights must say so either expressly or by necessary implication.

Under the *American* Constitution, on the other hand, vested rights cannot be taken away by the Legislature except under due process and it is for the Courts to say in each case whether the action of the Legislature has been a 'due process'.<sup>5</sup> "As an exercise of the right of the owners is a severe instance of governmental convenience displacing private ownership, the rule is general that the legislation which permits it must be strictly construed and strictly followed, and that ever precedent, form or ceremony which by law is made a condition to a completed appropriation must be had or observed before the right of the government will be perfected, and the right of the citizen appropriated".<sup>6</sup>

(3) *Corporation of Calcutta v. St. Thomas' School*, (1949) F.L.J. 361 (365).

(4) *Jones v. Skinner*, (1835) 5 L.J. Ch. 87 (90).

(4-a) Cf. *Nelungaloo v. Commonwealth*,

(1948) 75 C.L.R. 495.

(5) Cf. *Bailey v. Anderson*, (1945) 326 U.S. 203.

(6) Cooley, *Constitutional Law*, p. 409.

'*Authority of law*'.—'Law' in this article obviously refers to statute law as is shown by Cls. (3-4). Cl. (1) thus means that private property cannot be taken away by mere executive orders, without legislative sanction.

The usual purposes for which a State may deprive a person of his private property, by law, are—(i) taxation; (ii) eminent domain, (iii) penalty;—as we have already seen. But *our* Constitution does not prevent the Legislature to take away private property for any purpose which comes within any of the Entries of Sch. VII, conferring legislative power upon the Legislature concerned.<sup>7</sup> In the *United States* it has been held that it is unconstitutional for the State to take private property for *private use*, i.e., to divest one citizen to benefit another, whether compensation is made or not.<sup>7a</sup> But our Legislatures, like the English Parliament, would not be subject to any such limitation. The only limitation would be legislative competence.

### CLAUSE (2)

#### OTHER CONSTITUTIONS<sup>8</sup>

*U.S.A.*—The Fifth Amendment to the Constitution of the U.S.A. included—

" . . . Nor shall private property be taken for public use, without just compensation".

Property is '*taken*' when the title to it is transferred to Government or Government takes over or assumes to control its valuable uses, or when, in the case of land, it commits a deliberate and protracted trespass.<sup>9</sup> The infringement of any *right* of property is a '*taking*' even though the owner is not actually deprived of the subject-matter.<sup>10</sup> In other words to constitute '*taking*', it is not necessary that the property acquired should be *appropriated*. Thus, where land was permanently inundated by back water from a public dam, compensation was directed under this provision.<sup>10</sup> But there is no '*taking*' when the injury is merely '*consequential*' or where the injury is due to the operation of natural causes.<sup>11-12</sup>

Though taxation also amounts to taking of private property for public purposes, the taxing power is distinct from that of eminent domain. For when property is taken under the latter power, Government shall make compensation; but no question of direct compensation arises in the case of taxation inasmuch as the persons taxed may be said to be compensated by the general benefits which they receive from the existence and operation of the Government.<sup>13</sup> Again, property is not '*taken*' simply because its *value declines in consequence* of the exercise of some lawful power by government, e.g., lowering the tariff or declaring war. In such cases, there is no obligation to compensate those who suffer such loss.<sup>14</sup> When private property is held *subject* to some public right, the exercise of the public right would not constitute a '*taking*'.<sup>15</sup>

It is not a matter for the Courts but for the Legislature exclusively, to determine whether there is sufficient public benefit to warrant the taking;<sup>16</sup> or

(7) Cf. S. 51 (3) of the Australian Constitution, at p. 151, *post*.

(7-a) *Missouri R. Co. v. Nebraska*, (1896) 164 U.S. 403.

(8) See also Art. 11, Belgium; Art. 80, Denmark, Constitutions.

(9) *U.S. v. Great Falls Mfg. Co.*, (1884) 112 U.S. 645.

(10) *Pumpelly v. Green Bay Co.*, (1871) 13 Wall. 166.

(11-12) *Bedford v. United States*, (1904) 192 U.S. 217.

(13) Willoughby, *Constitutional Law*, II, p. 667.

(14) *Knox v. Lee*, 12 Wall. 457.

(15) *U.S. v. Chandler-Dunbar*, (1913) 229 U.S. 53 (62).

(16) *Eastern Railroad Co. v. Boston*, 15 Am. Rep. 13.

when and in what manner and to what extent the public necessities require the exercise of the power of eminent domain.<sup>17</sup> But the question whether the use is a 'public' one is a justiciable one, and the determination of the Legislature is not conclusive upon the Courts.<sup>18-19</sup>

The expression '*public use*' has been widely interpreted to include purposes relating to the functions of Government. Apart from use by the State or local authorities, there is a public use when the property is put directly to the use of the people of the community as a whole, for purposes relating to public welfare or convenience.<sup>20</sup> Thus, property is taken for public use when it is taken for the construction of public buildings, schools and the like; for establishing public parks, cemeteries, markets, etc., highways, bridges, ferries and canals used as highways, railways, telegraph and other means of communication; for irrigation of arid tracts, drainage of land; fortresses, lighthouses, piers, docks; preservation of places of historical value.<sup>20-21</sup> What is a 'public use' is a justiciable question.<sup>22</sup> But the rule followed by the Court is that when the Legislature has declared a purpose to be public, its judgment will be upheld by the Court unless it is palpably without foundation.<sup>23</sup>

It has been held that the ascertainment of '*just compensation*' is a judicial function and cannot be taken away by statute, nor is the Executive assessment final.<sup>24</sup> It means that the owner should be put in as good a position pecuniarily as he would have been if his property had not been taken.<sup>25</sup> He is, therefore, entitled to the full and perfect equivalent of the property taken, damages inflicted by the taking as well as interest on the value where the payment of it would be necessary to restore the owner to his former position.<sup>1</sup>

*Australia.*—Sec. 51 (31) of the Commonwealth of Australia Constitution Act, 1900, gives the Commonwealth Parliament the power of—

"acquisition of property on just terms from any State or person for any purpose in respect of which Parliament has power to make laws".

The *time, manner, occasion and necessity* for the exercise of the power of acquisition are matters exclusively for the Legislature. The only two justiciable questions are—(i) whether the acquisition is on just terms (but not the measure of justice) and (ii) whether the acquisition is in respect of some purpose as regards which Parliament has the power to make laws.<sup>2</sup> As to 'just terms', it has been held that the Court will not invalidate a law unless the terms provided by it are such that *reasonable* man could not regard them as just; thus, a low rate of interest on compensation is not unjust.<sup>3</sup> But the Legislature cannot, by any device, withdraw from the determination by a Court whether any terms which it has provided are just.<sup>4</sup> If the compensation is not just, the whole Act fails, including the acquisition.<sup>5</sup>

(17) *Fairchild v. St. Paul*, 46 Minn. 540.

(18) *Obinion of the Justices*, (1903) 204 Mass. 607.

(19) *Kohl v. U.S.*, (1875) 91 U.S. 367.

(20) Burdick, *American Constitution*, p. 551; Cooley *Constitutional Law*, p. 410.

(21) *Clark v. Nash*, (1905) 198 U.S. 361; *Cherokee v. Kansas Ry.*, (1890) 135 U.S. 656; *Fallbrook Irrigation v. Bradley*, (1896) 164 U.S. 112; *Shoemaker v. U.S.*, (1893) 147 U.S. 282; *Kohl v. U.S.*, 91 U.S. 367 (372); *U.S. v. Jones*, (1883) 107 U.S. 512.

(22) *Kohl v. U.S.*, (1875) 91 U.S. 367.

(23) *U.S. v. Gettysburg Ry.*, (1896) 160 U.S. 668.

(24) *Seaboard Air Line Co. v. U.S.*, (1923) U.S. 299.

(25) *United States v. Rogers*, 257 Fed. 397 (400).

(1) *United States v. New River Collieries*, (1923) 262 U.S. 341.

(2) Wynes, *Legislative and Executive Powers*, p. 249.

(3) *Grace Bros. v. Commonwealth*, (1946) 72 C.L.R. 269; *Johnston Co. v. Commonwealth*, (1943) 67 C.L.R. 314.

(4) *Australian Marketing Board v. Tonking*, (1942) 66 C.L.R. 77 (106-7). The Court will not readily deny the justice of terms fixed by the Legislature [*Andrews v. Howell*, (1941) 65 C.L.R. 255]. In considering whether the terms are just, the Court



*Eire.*—Art. 44 (2) 6 of the Constitution of 1937 says—

"The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation."

*Japan.*—Art. 29 of the Japanese Constitution, 1946 says—

"Private property may be taken for public use upon just compensation therefor."

*Burma.*—Cls. (4-5) of Art. 23 of the Constitution of 1948 says—

"(4) Private property may be limited or expropriated if the public interest so requires but only in accordance with law which shall prescribe in which cases and to what extent the owner shall be compensated.

(5) Subject to the conditions set out in the last preceding sub-section, individual branches or national economy or single enterprises may be nationalized or acquired by the State by law if the public interest so requires."

*Government of India Act, 1935.*—Cl. (2) of Sec. 299 of the Act of 1935 was—

"Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles ■ which, and the manner in which, it is to be determined."

#### INDIA

*Source of Cl. (2).*—This clause substantially reproduces Sec. 299 (2) of the Government of India Act, 1935, with the addition of *movable* property within the scope of the provision.

*Scope of Cl. (2): No acquisition without compensation.*—The conditions necessary for the application of this clause are—

(a) The subject-matter must be 'property'.

(b) Property must be 'acquired' or 'taken possession of'.

(c) The acquisition or taking must be for 'public purposes'.

(d) The acquisition or taking must be under some *law*. If the property is acquired not under a statute, but under a contract (*cf.* Art. 299, *post*), the owner or possession of the property will get merely the price payable under the contract and no question of compensation under the present clause would arise.<sup>5</sup>

*The doctrine of Eminent Domain.*—It has been already stated that the present clause embodies the principle of what is called 'Eminent Domain', or the acquisition of land for public purposes. The justification for acquisition of private property for public purposes is that the interests of the public are paramount and that in some cases, private interests have to be subordinated to public interests and the necessities of government.<sup>6-7</sup>

may have regard to the interests of the public ■ well as those of the person dispossessed [*Johnston v. Commonwealth*, (1943) 67 C.L.R. 314]. Ordinarily, what the owner is entitled to ■ the value to him of the property taken (*Minister for Army v. Parbury*, (1945) 70 C.L.R. 459). "The value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any

advantage due to the carrying out of the scheme for which the property is compulsorily acquired. (*Fraser v. City of Fraser-ville*, (1917) A.C. 187, *fol.* in *Minister for Home v. Lazarus*, (1919) 26 C.L.R. 159).

(5) *Cf.* *Commonwealth v. Huon Transport*, (1945) 70 C.L.R. 293 (304, 329).

(6) *Ramchandra v. Secretary of State*, (1905) 29 Bom. 480.

(7) *Cooley*, Constitutional Law, ■. 408.

One of the characteristic features of ■ sovereign power is its legal right to deal as it thinks fit, with anything and everything within its territory. This includes the right to take to itself any property within its territory,—eminent domain being thus the proprietary aspect of sovereignty.<sup>8</sup> From this standpoint, it has been held in the *United States*, that the State cannot contract away its right of eminent domain.<sup>9</sup>

The present clause, however, imposes a limitation upon this right of the State to take private property for public use, *viz.*, that it can be taken only on payment of compensation to the individual, for, otherwise it would be ■■■■ spoliation on the part of the State,—contrary to principles of justice and liberty.<sup>10</sup> The Legislature of the State, again, is subject to another condition laid down in Cl. (3).

*'Property'*.—Property in this clause includes the property not only of individuals but also of companies, commercial or industrial undertakings—so as to include any undertaking by way of any trade or business, *e.g.*, occupations connected with the transport of goods, the business of an hotel<sup>11-12</sup>.

The materials of a business as well as its goodwill is 'property'.<sup>11</sup>

Property includes both movable and immovable property<sup>13</sup> tangible and intangible property (see p. 149, *ante*), further, the clause would apply not only in the case of acquisition of the *corpus* of a property, but also of the taking of its *possession* for a temporary period.<sup>14</sup> In other words, the present clause provides for compensation not only for 'acquisition' but also for 'requisition' of property [see under Entry 42 of List III].

Again, 'property' would include interest<sup>14-a</sup> or 'rights in or over property'. the explanation in Sec. 299 (5) of the Government of India Act, 1935, is not reproduced in the Constitution, the same conclusion would follow from juristic interpretation, since property is nothing but a bundle of rights with respect to the property.<sup>15</sup>

*'Acquire'*.—'Acquisition' implies that there must be an actual *transference* of, and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to.<sup>16</sup> To regulate the relations between landlord and tenant and thereby diminish rights hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of the land.<sup>17</sup> Similarly, where an owner of land remains in possession as before, and merely the land revenue payable by him is increased, there is no 'acquisition' of any right in or over the property.<sup>16</sup>

*'Public purposes'*.—In the interpretation of this expression, the interpretation put upon the same expression in the existing law contained in the Land

(8) *Kohl v. U.S.*, (1875) 9 U.S. 367.

(9) *Pennsylvania Hospital v. Philadelphia*, (1917) 245 U.S. 20 (23).

(10) Cf. *Searl v. School Dist.*, (1890) 133 U.S. 553 (562).

(11) *Mackertich v. Gupta*, (1945) 49 C.W.N. 322 (326); also 49 C.W.N. 583 (587).

(12) *Lahore Electric Supply Co. v. Punjab*, (1943) 24 Lah. 617.

(13) Cf. Definitions in S. 4 (25) of the General Clauses Act, 1897; S. 2 (9) of the Indian Registration Act, 1908.

(14) Cf. *Minister of State v. Dalziel*, (1944) 68 C.L.R. 261 (285). In *Australia*,

it has been held that a regulation which makes it 'difficult,' if not impossible, for a wool owner to dispose of his wool except under the direction of the Government and on terms offered by it, amounts to 'requisition' [*John Cooke v. Commonwealth*, (1922) 31 C.L.R. 394; *McClinton v. Commonwealth*, (1948) 75 C.L.R. 1].

(14-a) Cf. *Syme v. Commonwealth*, (1942) 66 C.L.R. 413.

(15) *Inder Sen v. Naubat*, (1885) 7 All. 553 (556) (F.B.).

(16) *Lal Singh v. C. P. and Berar, A.I.R.* 1944 F.C. 61.

(17) *Jagannath v. United Provinces*, (1946) 50 C.W.N. 674 (678) (P.C.).

Acquisition Act (I of 1894) will be useful. In Sec. 40 (1) (b) of that Act, the expression used is 'some work likely to prove *useful* to the public.' Sec. 3 (f), again, says—"public purpose includes 'the provision of village-sites in districts in which the Provincial Government shall have declared by notification . . . that it is customary for the Government to make such provision.'" Sec. 4 (1) says—"Whenever it appears . . . that land is needed . . . for any *public purpose*. . . ." This expression public purpose has been interpreted to include "a purpose, *i.e.*, an object or aim, in which the *general* interest of the community, as opposed to the *particular* interest of individuals, is directly and vitally concerned."<sup>18-19</sup> It is not necessary that the land when taken, should in some way or other be made *available* to the public at large.<sup>18-19</sup>

Thus, acquisition of land for the manufacture of salt—a vital commodity for the life of the community, is an acquisition for a public purpose, even though the manufacture may be made through private enterprise.<sup>20</sup>

As to the jurisdiction of the Courts to determine whether a purpose is 'public' or not, it is submitted that the position under *the Constitution* will be the same as in the *United States* (*see p. 150, ante*) *viz.*, that the Court shall have jurisdiction though it may be slow to differ from the Legislature on this point.<sup>21</sup> Hence, the distinction made under the existing law [Sec. 6 (3), Land Acquisition Act, 1894], between acquisition by the Provincial Government and acquisition by the local authority,<sup>22</sup> will no longer be a good law. The Courts shall have jurisdiction to determine not only whether the purpose of the acquisition is a 'public purpose', but also whether it is within the legislative competence of the Legislature concerned. Again, after acquisition, a diversion of the property to some other purpose will not be permissible.<sup>23</sup>

*Amount of Compensation.*—It has been seen that both the *United States* and *Australian* Constitutions provide for payment of *just* compensation and that it has been held that the determination of the 'just' compensation is a matter for the Courts, and not for the Legislature or Executive.<sup>24-25</sup>

But the present clause of our Constitution as well as Sec. 299 (2) of the Government of India Act, 1935, upon which the present clause is modelled, do not require that the amount of compensation must be judicially found to be fair or just. It only requires that the law which provides for the acquisition must—

- (i) either fix the amount of compensation itself, or
- (ii) specify the principles on which the compensation is to be determined.

In other words, the standard according to which the compensation is to be determined must be a known standard, but it is not justiciable. In short, *our Constitution* gives final authority to our Legislature in the matter of making compensation for acquisition, subject only to the scrutiny of the Courts, in cases of fraud on the Constitution, *e.g.*, where the provision for compensation was merely a cloak for a confiscatory legislation.

The other matters which are within the exclusive competence of the Legislature are—(i) the principles on which the compensation is to be determined and given; (ii) the manner in which this is to be determined and given. The position, thus, is similar to that in Australia (*see p. 151, ante*).

(18-19) *Framjee v. Secretary of State*, (1914) 39 Bom. 279 (P.C.).

(20) *Municipal Corporation v. Sind*, (1947) Kar. 89.

(21) *U. S. v. Gettysburg Ry.*, (1896) 160 U.S. 668.

(22) *Esra v. Secretary of State*, 7 C.W.N. 249, will not be good law under the Consti-

tution.

(23) Cf. *Luchmeswar v. Darbhanga Municipality*, 18 Cal. 99 (P.C.).

(24) *Seaboard Air Line Co. v. U. S.*, (1923) U.S. 299 (*see p. 151, ante*).

(25) *Australian Marketing Board v. Tonking*, (1942) 66 C.L.R. 77.



*'Or specifies the principle'.*—This expression enables the Legislature to make the acquisition by specific legislation for a specific purpose, itself fixing the amount of compensation to be paid; or to make a general legislation conferring general powers on local or other subordinate bodies,—itself providing only the principles according to which compensation is to be determined and given by such subordinate bodies.

*Legislative power.*—Acquisition for the 'purposes of the Union' is a Union subject (Entry 32, List I), while that for the State is a State subject (Entry 36, List II), while the Legislatures shall have concurrent power in matters relating to compensation (Entry 42 of List III).

*Analogous Provisions.*—Property acquired for purposes of the Union shall vest in the Union and property acquired for the purposes of a State shall vest in that State [Art. 298 (2)].

#### CLAUSE (3)

*Legislation by State.*—This clause corresponds to the latter part of Sec. 299 (3) of the Government of India Act, 1935. No law of compulsory acquisition within the scope of Art. 31 (2), passed by a State Legislature shall be valid unless it is reserved for consideration of the President (Arts. 200-1) and is assented to by the President. The present clause thus supplements the 2nd Proviso to Art. 200 (*post*), by requiring a compulsory reservation of such Bills.

#### CLAUSE (4)

*Scope of Cl. (4).*—Cls. (4)-(6) from exceptions to the requirement of compensation embodied in Cl. (2). Cl. (4) relates to Bills of a State Legislature relating to public acquisition which were *pending* at the commencement of the Constitution. If such a Bill has been passed and assented to by the President as required by Cl. (3), the Courts shall have no jurisdiction to question the validity of such law on the ground of contravention of Cl. (2), i.e., on the ground that it does not provide for compensation. But Cl. (4) would not debar the Courts from examining the validity of the law on other grounds, *e.g.*, the legislative competence of the State Legislature, or whether the purpose of the acquisition is a 'public purpose'.

#### CLAUSE (5)

*Scope of Cl. (5).*—This clause provides a number of exceptions to the requirement of compensation embodied in Cl. (2). So, as regards these laws, too, the Courts shall have no power to examine their validity on the ground of absence of provision for compensation. In order that Cl. (5) may apply, two conditions must be satisfied: (a) the law must be one coming within the categories mentioned in sub-cl. (a)-(b); (b) The purpose of the law must be one coming within items (i)-(iii) of sub-cl. (b).

(a) The following laws would come within the scope of Cl. (5): (i) Any existing law, coming within the definition in Art. 366 (10), *post*, other than Acts enacted within 18 months before commencement of the Constitution [which are provided for separately in Cl. (6)]. In view of the definition in Art. 366 (10), laws of the Central Legislature as well as orders, etc., shall also coming within this saving clause. (ii) Any law passed by the State subsequent to the commencement of the Constitution.

(b) In order to come within the protection of Cl. (5), the law in question must have been passed for any of the following purposes—(i) taxation or

penalty (i.e., fiscal and penal statutes); (ii) promotion of public health, prevention of danger to life or property;<sup>1</sup> (iii) enforcement of any agreement relating to evacuee property, with another Government.

### CLAUSE (6)

*Scope of Cl. (6).*—This is another exception to Cl. (2), and provides ouster of jurisdiction of the Courts. While Cl. (4) relates to Bills pending in the State Legislature at the commencement of the Constitution, Cl. (6) relates to Bills *enacted* by the State<sup>1-a</sup> within 18 months before commencement of the Constitution, i.e., to Acts providing public acquisition which was enacted not earlier than 26-7-48. If the President *certifies* such **■** Act within 3 months from the commencement of the Constitution, the Courts shall have no jurisdiction to invalidate that Act on the ground of contravention of Cl. (2) of this article or of Sec. 299 (2) of the Government of India Act, 1935.<sup>1-b</sup>

### Right to Constitutional Remedies

Remedies for enforcement of rights conferred by this Part.

**32.** (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

(1) This exception is a partial adoption of the exception made in the United States, under the doctrine of 'Police powers'. Thus in the *U. S. A.*, it has been held that no obligation to compensate arises when private property is taken in the legitimate exercise of the Police powers. For, the principle of compensation involved in the doctrine of Eminent domain is founded on the principle of *benefit* to the members of the community, while the principle of 'police power' is founded **■** the necessity of *protection* of the community from public evils (*Northern Pacific Ry. v. N. Dakota*, (1915) **■** U. S., 585 (595)).

(1-a) That is, by any of the authorities enumerated in Art. 12. The words 'the State' in cls. (5)-(6) refer to definition in Art. 12 while 'a State' in cls. (3)-(4) refer to a State in Parts A-C of the 1st Sch.

(1-b) By a Notification d. 29-4-50, the President has, under Cl. (6) of Art. 31, certified the following Acts—(a) Bombay Acts 67 of 1948, 61 and **■** of 1949; (b) Assam Vehicles Requisition and Regulation Act, 1948; (c) Reserve Bank (Transfer of Public Ownership) Act (LXII) of 1948; (d) Delhi Hotels (Control of Accommodation) Act (XXIV) of 1949.

## CLAUSE (1)

## OTHER CONSTITUTIONS.

*Burma.*—Cl. (1) of Art. 15 of the Burmese Constitution is identical with Cl. (1) of Art. 32 of the Constitution of India.

## INDIA.

*Scope of Cl. (1): Enforcement of Fundamental Rights.*—A declaration of fundamental rights is meaningless unless there are effective judicial remedies for their enforcement. In *England*, individual rights are safeguarded, even without any declaration that they are fundamental, by means of the 'prerogative writs', which have been called 'the bulwark of English liberty' (*Dicey*). The Constitution of the *U.S.A.* assumed that these common law writs would be available in the United States. Hence, there is no specific provision for the issue of these writs in the Constitution even though there is specific prohibition against the suspension of *habeas corpus* [Art. I, Sec. 9 (2)]. Federal laws have, however, been enacted laying down the conditions and procedure for the issue of these writs, *e.g.*, the Jurisdictional Act, 1925. The writs are issued both by the Supreme Courts and District Courts, but the Supreme Court uses the powers only in its appellate character.<sup>2</sup>

The present article of *our Constitution* provides for the enforcement of the Fundamental Rights by means of these writs or writs of the same nature.

Cl. (1), in particular, *guarantees* the right to move the Supreme Court for such writs. The effect of such guarantee is that the power of the Court to issue the writs cannot be suspended except as provided by Art. 359 read with Cl. (4) of the present article; and also that the power of the Supreme Court to issue these writs cannot be taken away by any legislation. It is curious to note that though the High Courts are also vested with the power to issue these writs for the same purpose, by Art. 226 (1), *post*, the right of the High Courts in this respect is not included in the constitutional guarantee against legislation in Art. 32 (1).

## CLAUSE (2)

## OTHER CONSTITUTIONS

*Burma.*—Cl. (2) of Art. 25 of the Constitution of Burma, 1948, says—

"Without prejudice to the powers that may be vested in this behalf in other Courts, the Supreme Court shall have power to issue directions in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* appropriate to the rights guaranteed in this Chapter."

The above clause thus combines the provisions of Cls. (2) and (3) of the Constitution of India.

## INDIA

*Scope of Cl. (2): The Judicial writs.*—This clause gives a very wide jurisdiction to the Supreme Court for the enforcement of the Fundamental Rights. It not only empowers the Supreme Court to issue the writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* as they are known in England, but also enables the Supreme Court to devise directions, orders or writs analogous to the above, or improving upon the above writs so as to avoid their technical deficiencies, if any, or to adapt them to Indian circumstances. No legislation

(2) *Ex parte Clarke*, (1879) 100 U. S. S. 552.  
399; *Ex parte Hung Hang*, (1883) 111 U.



would be required to support the inventions of directions or writs as may be required for the effective enforcement of the fundamental rights.

*Existing law.*—The old Supreme Courts possessed the power of issuing these writs within the limits of their original jurisdiction, and outside that jurisdiction, only as regards 'European British subjects.' But the Supreme Courts, as pointed out by the Privy Council, did not have the power to issue these prerogative writs upon Mofussil Courts or to persons outside the limits of the Presidency towns who were not subject to their Original Jurisdiction.<sup>3</sup>

(i) As to the jurisdiction of the High Courts to issue the writ of *habeas corpus*, it was settled by the Privy Council<sup>4</sup> that by the High Courts Act, 1861, and the Criminal Procedure Code, the Legislature had taken away the power of the High Courts to issue the prerogative writ of *habeas corpus* in matters contemplated by Sec. 491 of the Criminal Procedure Code.<sup>5</sup> The order under Sec. 491, Cr. P. Code, was wholly statutory<sup>6</sup> and it was limited to the *appellate* jurisdiction of the High Court.

(ii) As regards the writ of *Mandamus* the power to issue the common law writ had been entirely taken away by the Specific Relief Act, 1877, which substituted an order in the nature of *Mandamus*, under Sec. 45 of that Act. Sec. 50 of the Act specifically bars the issue of the writ of *mandamus* in future. But the statutory order under Sec. 45 is limited to requiring anything to be done or forbore, within the local limits of the Ordinary Original Civil Jurisdiction of the High Courts.

(iii) Similarly, the High Courts had no jurisdiction to issue the writ of *Certiorari* to any Mofussil Court or any body of persons exercising quasi-judicial functions over lands situated outside the original jurisdiction of the High Courts and as between parties residing outside that jurisdiction not being European British subjects.<sup>7</sup>

(iv) The Bombay High Court held that it had the power to issue the common law writ of *Prohibition*,<sup>8</sup> on the ground that though Sec. 45 of the Specific Relief Act combined relief in the nature of both *mandamus* and *Prohibition*, Sec. 50 prohibited the issue only of the writ of *mandamus*.

(v) The High Court in its original jurisdiction inherited from the Supreme Court the jurisdiction to issue a writ in the nature of *quo warranto* but this jurisdiction was confined to the limits of the Presidency town.<sup>9</sup>

*The Constitution* seeks to remove these historical difficulties by laying down that the Supreme Court as well as the High Courts shall have full power to issue writs or orders in the nature of the common law writs, irrespective of any statutory remedies.

*Analogous Provisions: Which Courts may issue these writs.*—Under different provisions of our Constitution, the following Courts shall have the jurisdiction to issue the writ or order in the nature of *habeas corpus* and similar other writs mentioned above:

(3) *Ryots of Garabandhu v. Parlakimedi*, (1943) 48 C.W.N. 18 (P.C.).

(4) *Mathen v. Dt. Magistrate of Travancur*, (1939) 43 C.W.N. 981 (P.C.).

(5) *K. Emperor v. Shibnath*, (1945) 50 C.W.N. 25 (P.C.).

(6) *Birbal v. Emperor*, A.I.R. 1948 F.C. ■ (12).

(7) A statutory power to call for records for revision is contained in Ss. 435-439 of the Criminal Procedure Code and in Sec. 115 of the Civil Procedure Code.

(8) *Dinbai v. Noronha*, A.I.R. 1946 Bom. 407.

(9) *Nomani v. Banwarilal*, (1947) 51 C.W.N. 716 (P.C.).

(i) *For the enforcement of the Fundamental Rights.*—The High Court as well as the Supreme Court shall have jurisdiction to issue the writ. But the power of the High Court shall not be in derogation to that of the Supreme Court in this respect [Art. 226 (2)]. In other words, notwithstanding the refusal or granting of an application by the High Court, the Supreme Court shall have the power to direct otherwise, whereupon the order of the High Court shall be superseded. [Arts. 32 and 226.]

Besides the High Court and the Supreme Court, subordinate Courts may also be vested by Parliament with the power to issue the writ for the enforcement of the Fundamental Rights. [Art. 32 (3).]

(ii) *For other purposes.*—The Constitution also provides for the issue of these writs for purposes other than the enforcement of Fundamental Right. Thus, the High Courts shall have jurisdiction to issue the writ or order for any purpose other than the enforcement of Fundamental Rights, and this jurisdiction shall extend throughout the territories in relation to which the High Court has its jurisdiction, Civil, Criminal or otherwise. [Art. 226.] The Supreme Court may also be vested with similar power, by Parliament (Art. 139).

[For the convenience of treatment, we shall discuss under the present Article all the different uses of these writs.]

### HABEAS CORPUS

*Kinds of writs of habeas corpus.*—Under the Common Law of England there were several forms of the writ of *habeas corpus*. Of these the most well-known was, of course, the writ of *habeas corpus ad subjiciendum*, and, popularly, when we talk of *habeas corpus*, we usually mean this writ.

The writ of *habeas corpus ad subjiciendum* is a prerogative writ by which the causes and validity of detention (civil or criminal) of a subject are investigated by the High Court, at the instance of the prisoner or of somebody on his behalf. This is the writ which, according to all constitutional jurists, is the greatest safeguard for personal liberty in England.

At Common law, besides the writ of *habeas corpus ad subjiciendum*, there were other writs of *habeas corpus*, designed to secure the temporary liberty of a person, or to bring him before the Court, for purposes other than testing the validity of his detention. The main point of distinction between the writ of *habeas corpus ad subjiciendum* and these other writs of *habeas corpus* is that the former is a 'prerogative writ', i.e., an extraordinary writ granted by the Sovereign as the fountain of justice on the constitutional ground of inadequacy of ordinary legal remedies. The other writs now under discussion are, on the other hand, in the nature of ministerial or judicial writs.<sup>10</sup>

These other writs of *habeas corpus* are—

I. *Habeas Corpus ad Testificandum.*—The object of this writ is to bring before the Court, for the purpose of giving evidence, any person who is in legal custody, either under a civil or a criminal process.

In India, Sec. 491 (1) (c) of the Criminal Procedure Code is in these terms: "(c) that a prisoner detained in any jail situate within such limits be brought before the Court (i.e. High Court) to be there examined as a witness in any matter pending or to be inquired into in such Court."

It is to be noted in this connection, that in England, even Judges of County Courts have been given similar powers by statute (County Courts Act, 1888).

(10) Halsbury's Laws of England, Hailsham Ed., Vol. IX.

There is no corresponding power of inferior Courts in India, under the existing law.

II. *Habeas Corpus ad Deliberandum and Recipias*.—The object of these writs (delivery and reception) is to remove a prisoner from one custody to another, for the purpose of his trial.

In India, orders in the nature of these writs can be issued under Sec. 491 (1) (e) of the Criminal Procedure Code, which are in the above terms.

III. *Habeas Corpus ad Respondendum*.—The object of this writ is to bring up prisoners, who are detained under civil or criminal process, before a Magistrate or Court for trial or examination on any charge other than that for which he has been imprisoned.

In India, Cl. (d) of Sec. 491 (1) of the Criminal Procedure Code provides for the bringing up of prisoners for trial before a Court Martial or Commissioners for trial or examination of any matter pending before them.

PURPOSES FOR WHICH HABEAS CORPUS HAS BEEN USED IN ENGLAND AND UNDER EXISTING LAW OF INDIA: (a) *In England*.—Leaving aside uses for purposes of historical interest which no longer exist, the modern uses of the writ of *habeas corpus* in England may be summarised as follows:

(a) *Testing the regularity of detention in general*.—This is the widest use of the writ which is available equally in the case of detention by a private person (as in the case of slavery), by the Executive (e.g., under some emergency law or regulation), as well as in the case of an illegal commitment by some military or other authority exercising quasi-judicial powers.

In the case of conviction by a *quasi-judicial tribunal*, however, the Court would interfere by *habeas corpus* only if the act of the tribunal is clearly *without jurisdiction*, e.g., for want of competence of the tribunal, or the offence not being within the scope of the law purported to be administered by the tribunal, and not on ground of mere *technical* defects, even if such defect is patent on the face of the proceeding.<sup>11</sup>

The writ has been issued in England for the present purpose, in the following cases, *inter alia*:

(i) *Under the Extradition Acts*.—A person who has been committed by a Magistrate for extradition in respect of an offence committed in a foreign State, has the right to apply for a writ of *habeas corpus* for the purpose of testing the validity of his commitment. The Court will grant the writ—

(a) if the Magistrate has exercised ■ jurisdiction which he does not possess,<sup>12</sup>

(b) if the accused is being extradited for ■ *political* offence, the decision of the Magistrate on this point being open to review by the High Court.<sup>13</sup> An offence is 'political' only when "there are two parties in the State each striving to impose its own Government on the other". Hence, an explosion caused by

(11) *R. v. Lewis Prison*, (1917) 2 K. Shure, (1926) 1 K.B. 127.

B. 254.

(12) *R. v. Brixton Prison, Ex parte*

(13) *Re Castioni*, (1891) 1 Q.B. 149.

(14) *B. C. 21* (1981)



■ anarchist is not a political offence.<sup>14</sup> The questions (a) whether there is an extraditable offence, and (b) whether there is a valid warrant, are judicial questions.<sup>15</sup> But where the case of the prisoner is that though the surrender is asked for in respect of an extraditable offence, the *real* object of the proceeding is to try him for a political offence, or in other words, the non-political charge is merely a *pretext* to take action against the prisoner for his political activities, the Court would not interfere but would leave the matter to the discretion of the Executive to determine whether a surrender of the prisoner should be made in such circumstances,—the Executive having the power to cancel any warrant which has been issued.<sup>15</sup>

(ii) *Under the Fugitive Offenders Act.*—The Fugitive Offenders Act, 1881, provides for the surrender of criminals when they flee from one part of His Majesty's Dominions to another. When a person is arrested by a Magistrate under this Act, the prisoner has, as under the Extradition Acts, the right to apply for *habeas corpus* to test the validity of his arrest.<sup>16</sup> The writ is available even though the prisoner has in the meantime been released on bail.<sup>16</sup>

(iii) *For Custody of Infants.*—A person who is legally entitled to the custody of a child can regain such custody when wrongfully deprived of it by any person or institution such as ■ orphanage,<sup>17</sup> whether any restraint or force is being used towards the infant or not.<sup>18</sup> Where the child has attained the age of discretion, the Court would, however, consult the wishes to the child before granting *habeas corpus* for restoration of custody to the applicant.<sup>19</sup> When the person charged with unlawfully detaining ■ child has ceased to have custody of the child in fact, the writ would not, ordinarily, be issued.<sup>17</sup> Where, however, the person only pretends ignorance of the place of custody of the child, the writ should be issued to enable the Court to investigate into the facts.<sup>17</sup>

(iv) *Custody of a Person Alleged to be a Lunatic.*—The writ of *habeas corpus* is available to test the legality of detention of a person alleged to have been unlawfully confined as a lunatic.<sup>20</sup> But in this case, a very strong case must be disclosed in order to obtain the writ,<sup>20</sup> upon an affidavit of the alleged lunatic himself, unless where it is shown that he is prevented from making the affidavit.<sup>21</sup> Again, final order on the application is not passed until medical examination of the alleged lunatic.<sup>22</sup>

(v) *In the Matter of Husband and Wife.*—A husband is entitled to regain the custody of his wife, if she is restrained by any person *against her wish*.<sup>23</sup> but not where she is living apart out of her own wish, on account of cruelty or the like, without restraint exercised by any other person.<sup>24</sup> On the other hand, the wife is entitled to ■ writ of *habeas corpus* against her husband himself, if the latter wrongfully restrains her after execution of a deed of separation, or wants to exercise his conjugal rights by force or confinement.<sup>25</sup>

(B) *Under Existing Law of India.*—Relief under 491, Criminal Procedure Code, has been granted in the following cases, *inter alia*:

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- |   |   |
|---|---|
| (14) <i>Re Meunier</i> , (1894) 2 Q.B. 450.         | (C.A.).   |
| (15) <i>In re Arton</i> , (1896) 1 Q.B. 108.        | (20) <i>R. v. Turlington</i> , (1761) 2 Burr.     |
| (16) <i>R. v. Spilsbury</i> , (1898) 2 Q. B. 615.   | 1115.   |
| (17) <i>Barnardo v. Ford</i> , (1892) A. C. 326.    | (21) <i>R. v. Clarke</i> , (1762) 3 Burr. 1362.   |
| (18) <i>Ex parte M'Clellan</i> , (1831) 1 Dowl. 81. | (22) <i>R. v. Wright</i> , (1760) 2 Burr. 1100.   |
| (19) <i>Re Agar-Ellis</i> , (1883) 24 Ch.D. 317     | (23) <i>Re Cochrane</i> , (1840) 8 Dowl. 630.     |
|   | (24) <i>Place v. Searle</i> , (1932) 2 K. B. 497. |
|   | (25) <i>R. v. Jackson</i> , (1891) 1 Q.B. 671.    |

(i) *Under the Extradition Act.*—(a) Where there are formal defects in the warrant.<sup>1</sup> (b) Where the police has arrested a person without either requisition from the State where the offence is said to have been committed or a warrant under S. 10 of the Act.<sup>2</sup> (c) Where the detention is in excess of the period prescribed by S. 10.<sup>3</sup> (d) In order to justify arrest under S. 54 (1), seventhly, of the Criminal Procedure Code by a Police-officer without warrant the Police-officer's suspicion must be 'reasonable' and the Court has power to enquire into the reasonableness.<sup>4</sup>

On the other hand, in the following cases, it has been held that the High Court has no jurisdiction to interfere with extradition proceedings by exercising its power over *habeas corpus*: (a) Questions whether the Political Agent who issued the warrant had satisfied himself as to the existence of a *prima facie* case or whether the offences were committed within the Native State must be raised not by an application under S. 491, Criminal Procedure Code, but before the Magistrate in India where the accused is produced after arrest.<sup>5</sup>

(b) Where the evidence taken by the Magistrate discloses *prima facie* that the prisoner committed an extraditable offence, the High Court would not interfere under S. 491 of the ground that the extradition was being sought for to take action against the prisoner for his political activities.<sup>6</sup>

(ii) *Under the Foreigners Acts.*<sup>7</sup>

(iii) *Under the Bengal Goondas Act, 1923.*<sup>8</sup>

(iv) *Under the Public Safety Acts.*<sup>8-a</sup>

(v) *Under the Guardians and Wards Act.*—*Habeas Corpus* for the custody of a minor was granted on the application of the Deputy Commissioner where authority of the guardian appointed under an instrument came to an end by reason of the Court of Wards assuming charge of the estate.<sup>9</sup>

(b) As to the availability of the remedy under S. 491, Criminal Procedure Code for recovery of custody of a minor by a person claiming to be the lawful guardian, there has been a sharp difference of opinion. The Allahabad High Court<sup>10</sup> has held that remedy being in such cases available under the special Act,—the Guardians and Wards Act,—High Court would refuse its discretionary powers under S. 491.

The Madras<sup>11</sup> High Court, however, holds that the remedy under S. 491 is not to be refused simply because another remedy is open to the applicant. the Oudh High Court<sup>9</sup> has also been of this view.

But it is clear that—(a) If a Court of competent jurisdiction has already declared a person to be the lawful guardian, S. 491 cannot lie because the custody of such guardian cannot be said to be illegal or improper.<sup>12-13</sup> (b) It is

(1) *Israr v. Dt. Magistrate, Basti*, (1940) All. 23; *Bajinath v. Emperor*, (1931) 134 I.C. 594; *Junma v. Emperor*, (1925) 91 I.C. 69.

(2) *Santabir v. Emperor*, (1934) 39 C.W.N. 285.

(3) *Suraj v. Emperor*, A.I.R. 1935 Pat. 419.

(4) *Pramila v. Prentice*, (1932) 36 C.W.N. 669 (673); *Subodh v. Emperor*, (1924) 29 C.W.N. 98.

(5) *Mathen v. Dt. Magistrate, Trivandrum*, (1939) I.A. 222.

(6) *Adhibandu v. Emperor*, A.I.R. 1946 Pat. 196.

(7) *R. v. Jagerdeo*, (1924) 49 Bom. 222; *In re Antonius*, A.I.R. 1950 Bom. 101;

*Shervashidze v. West Bengal*, (1949) 4 D.L.R. 166 (Cal.).

(8) *R. v. Bissesswar*, (1926) 53 Cal. 962.

(8-a) *In re Bhaurao*, A.I.R. 1950 Bom. 126; *In re Lakshminarayana*, A.I.R. 1950 Mad. 266; *Nek Mohammad v. Prov. of Bihar*, (1949) 4 D.L.R. 66 (Pat.).

(9) *Deputy Commissioner v. Muhammad*, A.I.R. 1934 Oudh 392.

(10) *Haidari v. Jawad*, A.I.R. 1934 Oudh 392.

(11) *Subbaswami v. Kamakshi*, (1929) 57 M.L.J. 642; *Venkataramania v. Pappamah*, (1947) 2 M.L.J. 153.

(12-13) *Subbarathnammal v. Seshachalam*, 61 M.L.J. 219.

not proper that questions of status such as conversion, validity of marriage, should be decided in an application under S. 491.<sup>14</sup>

(vi) *Under the Lunacy Act.*—As under the Guardians and Wards Act, so under the Lunacy Act, it has been held on the ground of special Act,—that an application for *habeas corpus* does not lie to set at liberty a person who has been wrongly confined as a lunatic,—the appropriate remedy is to apply under S. 33 of the Lunacy Act.<sup>15</sup>

(vii) *For the custody of a child.*—The English principle of the welfare of the child has been followed,<sup>16</sup> and where the child is capable of forming intelligent opinions, his wishes are to be taken into consideration.<sup>17</sup> But if the minor is in the custody of a person, having no right to have his or her custody, even though it be with the latter's consent, *habeas corpus* will be granted to a person entitled at law to the custody of the child.<sup>17-a</sup>

#### WHEN HABEAS CORPUS IS REFUSED.

(A) *England.*—In England, the writ of *habeas corpus* cannot be issued in following cases—

(i) Against a person who is not within the jurisdiction of the Court at the date of the issue of the writ.<sup>18</sup>

(ii) Against a person who is on board a public armed vessel of a foreign State, demeaning herself in a friendly manner in British waters and not being at war with the Crown. In International law, such vessels are deemed to remain part of the territory of her Sovereign.<sup>19</sup>

(iii) To set at liberty an alien detained in England in the foreign embassy or legation of his country,—on the same ground of extra-territoriality (the remedy in such cases being by means of diplomatic representation).<sup>20</sup>

(iv) In favour of a person who has been arrested under a valid warrant of a foreign State which is executable in England, by some arrangement.<sup>21</sup>

(v) To release an alien enemy, interned by the Crown, whether or not such internment makes him a prisoner of war.<sup>22</sup>

(vi) To release a person committed for contempt by the House of Commons, whether he is a member of the House or a stranger, so long as Parliament is in session.<sup>23</sup> The House of Lords has, however, the power to commit for a fixed term.<sup>23-a</sup>

(vii) To release a party to a suit, when he is in lawful custody, to argue his case in person or to show cause against a rule, unless it is shown that without his personal attendance substantial justice could not be done.<sup>24</sup>

(viii) To release a person convicted in the legal process or imprisoned in execution of a civil process.<sup>25</sup>

(14) *Joy Dayal v. Sohagan*, A.I.R. 1934 Lah. 647.

(15) *Hoshang v. Emperor*, A.I.R. 1936 Sind 156.

(16) *R. v. Saithri*, (1881) 16 Bom. 307; *R. v. Joshy*, (1895) 23 Cal. 290.

(17) *Saraswathi v. Dhanakoti*, (1924) 48 Mad. 299; 47 M.L.J. 614.

(17-a) *Sudar v. Dhan*, A.I.R. 1936 Nag. 99.

(18) *R. v. Pinckney*, (1904) 2 K.B. 84 (C.A.).

(19) *The Sitka* (Pitt Cobbett, Vol. 1, p.

286).

(20) Halsbury.

(21) *Ex parte Nalder*, (1947) 2 All E.R. 611.

(22) *R. v. Bottrill*, (1946) 2 All E.R. 434 (C.A.).

(23) *Case of the Sheriff of Middlesex*, (1840) 11 A. & E. 273.

(23-a) Keith, *Constitutional Law*, p. 75.

(24) *Clark v. Smith*, (1847) 3 C.B. 982; *Weldon v. Neal*, (1885) 15 Q.B.D. 471.

(25) *Ex parte Lees*, (1858) E. B. & E. 828.



(ix) To set at liberty a person committed for treason or felony plainly expressed in the warrant. But in such a case, he may be released on bail, and under statute, he is entitled to bail, if not tried at the next Session, and to be discharged if not tried at the second Session.

(x) Where the effect of it would be review the judgment of a superior Court which could be reviewed on appeal, or to falsify the record of a Court which shows jurisdiction on the face of it.<sup>1</sup>

(xi) Where there is no ground of probable relief shown in the affidavit. For, otherwise, persons lawfully confined might obtain a temporary enlargement by means of the writ.<sup>2</sup>

(xii) Where the illegal detention has ceased before the application for the writ is made.<sup>3</sup>

(B) *India*.—Following English law, relief under S. 491, Criminal Procedure Code has been refused in the following cases:

(a) Where the prisoner is detained in a place outside the jurisdiction of the High Court to which the application is made.<sup>4</sup> The Court has no jurisdiction to issue the writ if the person in whose custody the prisoner was, has removed the prisoner outside the jurisdiction of the Court before the date of issue of the writ, whether deliberately or not.<sup>5</sup>

(b) Where the prisoner has been prosecuted for some offence under the penal law, his appropriate remedy is to apply for bail to the appropriate Court, and not *habeas corpus*.<sup>6</sup>

(c) If at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The Court is thus to see whether on the date on which it makes the order in the proceedings for *habeas corpus*, there is a valid order for detention of the applicant.<sup>7</sup> But a fresh order cannot validate a detention which was initially invalid. The fresh order should be construed as effecting a new case of detention and the detenu should have a fresh right of information and representation under Art. 22 (5).<sup>8</sup>

(d) Under the Acts and Regulations mentioned in sub-section (3) of Sec. 491, Criminal Procedure Code,—viz., Reg. III of 1818, similar Regulations of Madras and Bombay, and the State Prisoners Acts,—for the statutory remedy given by Sec. 491 of the Criminal Procedure Code is wholly governed by the provisions of that section.<sup>9</sup>

(e) Where the remedy of *habeas corpus* is barred by the express provisions of any other statute, e.g., Bengal Criminal Law Amendment Act, 1925.<sup>10</sup>

*When habeas corpus is not barred even by statutory denial*.—It has been held that even where the remedy is barred by statute, as above, or a statute authorises detention, *habeas corpus* would still lie, in the following cases—

(1) Halsbury. This principle has been followed in India, in *R. v. Bonomally*, (1916) I.L.R. 44 Cal. 723 (733) (S.B.).

(2) Blackstone's Commentary, quoted in Halsbury.

(3) Halsbury, Laws of England.

(4) *Sarangapani v. Emperor*, I. L. R. (1945) Nag. 862; A. I. R. 1946 Nag. 20.<sup>11</sup>

(5) *Leo Zepantis v. Emperor*, A. I. R. 1944 Cal. 76; *Sarangapani v. Emperor*, A. I. R. 1946 Nag. 20.

(6) *Emperor v. Moolchand*, (1948) All.

288 (291).

(7) *Basanta v. Emperor*, (1945) F.L.J. 40.

(8) Cf. *In re Jayantilal*, A. I. R. 1949 Bom. 319 (324) (F.B.).

(9) *Birpal Singh v. Emperor*, A. I. R. 1946 F.C. 2 (12).

(10) *Girindra v. Birendra*, (1927) I.L.R. 54 Cal. 727. All these statutory bars will be void under the Constitution, by reason of contravention of Art. 32, (1).

(i) In cases of *mala fide* application of the statute, or cases of 'fraud on the statute'<sup>11</sup>. In such a case, it cannot be said that the order in question is an order under that Act.<sup>12</sup>

(ii) Similarly, the remedy would not be barred if the order is *prima facie* invalid, not being duly authenticated<sup>13</sup> or not being made by an officer duly empowered to make the order,<sup>14</sup> or on the ground of non-compliance with some *condition precedent* for the exercise of the power conferred by the statute;<sup>15</sup> e.g., when the authority issuing the order has not at all applied his mind to the matter as required by the statute or rules framed thereunder.<sup>16</sup> Thus, where the authority merely fills up a cyclostyled form, he neither exercises any executive discretion nor makes a quasi-judicial consideration of the facts pertinent to the case, and the order made is no order under the statute at all;<sup>16</sup> or where the facts specified in the order have no connection with the ground of detention mentioned therein.<sup>17</sup>

(iii) Where there is a *mistake of identity*,<sup>18</sup> that is to say, the person actually detained is not the person intended to be detained by the order, or the detenu is a person to whom the statute or Regulation could not possibly apply at all,<sup>18</sup> the detention is obviously illegal. [See pp. 119-120, *ante*].

WHAT CONSTITUTES WANT OF 'GOOD FAITH'.—'Good faith' in the present context has been interpreted to mean 'malice in law',<sup>11</sup> i.e., inflicting a wrong or injury upon another person in contravention of the law, even though it may be without any malicious intention.<sup>19-20</sup> Good faith is obviously wanting where there is a 'fraud on the statute,' i.e., a misuse of the statute for a collateral purpose or a purpose other than that for which it was intended,—or in other words, a 'colourable use' of the statute.<sup>11</sup>

The following are some instances where it has been held that there was a *mala fide* use of statutory powers, to effect an unlawful detention of a person by the Executive, in India:

(i) Where the reason given for the detention is outside the scope and ambit of the Act conferring the power.<sup>21</sup>

(ii) Where the order of detention is in *excess* of the powers conferred by the statute.<sup>22</sup>

(iii) Where the order of detention is made in the *colourable* exercise of the powers conferred by the statute, e.g.,—

(a) Where on the face of the Magistrate's order of detention under the Detention Ordinance of 1944 (for security of the State or efficient prosecution of the war), it appeared that the Magistrate was considering whether he should use the Criminal Tribes Act against the applicant, and then detained him under the Ordinance, it was evident that it was not a proper order 'under the Ordinance'.<sup>22</sup>

(11) *Vinilabai's case*, I.L.R. (1945) Nag.

6. (12) *King-Emperor v. Sibnath*, (1945) 8 F.L.J. 222 (P.C.).

(13) *Ex parte Greene*, (1942) 1 K. B. 87.

(14) *Basanta v. Emperor*, (1945) F.L.J. 40.

(15) *King Emperor v. Shibnath*, (1943) 6 F.L.J. 151; (1945) 8 F.L.J. 222 (P.C.).

(16) *Emperor v. Keshav*, (1945) 8 F.L.J. 108.

(17) *Municipal Corporation v. I. T. Commissioner*, A.I.R. 1949 Bom. 37 (39).

(18) *Birpal v. King-Emperor*, (1946) 9 F.L.J. 1 (F.C.); Cf. *Eshugbayi v. Government of Nigeria*, A.I.R. 1931 P. C. 248.

(19-20) *Shearer v. Shields*, (1914) A.C. 808.

(21) *Emperor v. Rajadhar*, (1947) 2 D. L.R. 556 Bom. (F.B.); *Emperor v. Keshav*, 46 Bom.L.R. 22.

(22) *Bajirao v. Emperor*, A.I.R. 1946 Bom. 32.

(170) (b) Where the detention was made simply with the object of making a secret investigation into a crime, in contravention of the provisions of the Criminal Procedure Code.<sup>23</sup>

(c) Where the primary purpose of the order of detention is only to circumvent the orders of bail issued by the Court or to effect an illegal extension of the period of imprisonment served out by the prisoner.<sup>24</sup>

(iv) When a man is arrested and brought up before a Court on some definite and specific charge, it is wrong to make an order of detention (under some security measure) against him before he has been tried on the charge and his guilt or innocence finally determined.<sup>25</sup>

(v) Where the authorities refuse the detenu adequate facilities for placing his case before the Court, that may be taken to be an additional ground for suspecting the good faith of the authorities.<sup>1,2</sup> [See Art. 22 (1), ante].

#### WHO MAY APPLY.

(A) In *England*, an application for *habeas corpus* may be presented not only by the prisoner himself, but also by any other person on his behalf,<sup>3</sup> such as a relation or a friend; only that in such latter cases, it must be stated in the affidavit why it is not possible for the prisoner to make the application himself.<sup>4</sup>

In the case of a child<sup>5</sup> or a lunatic,<sup>6</sup> however, it has been held that a person who is not entitled to the custody of the child or lunatic or to represent him, is not entitled to move the Court in *habeas corpus*. But even in the latter case, the Court seems to have proceeded on the question whether it is possible for the person who is entitled, to present the application. Thus, in an Irish case, the Court entertained an application for *habeas corpus* of a child, from the secretary of the father, who was a prisoner of war on the Continent.<sup>7</sup>

(B) In *India*, under the existing law, the English practice has been followed in allowing relations<sup>8</sup> and friends<sup>9</sup> of the prisoner to make the application.

But in ■ Simla case,<sup>10</sup> it was observed that some rules should be framed restricting the right to move the applications to relations and friends, so that persons having no knowledge could not create unnecessary embarrassment to the authorities and waste of judicial time. It is submitted, however, that the word 'friend' is itself a vague term and may include even persons having political or other affinity. In *England*, the right to move the applications has been *unrestricted* in cases where it is not possible for the applicant to make the application personally. The real question is whether the detenu is in such a position. In any case where the detenu is in such a position, it would be defeating the very object of *habeas corpus* if the right is restricted to any particular person or persons. Vexatious applications may be discouraged by awarding costs.<sup>10-a</sup>

(23) *Vinlabai v. Emperor*, I.L.R. (1945) Nag. 6.

(24) *In re Srinivasan*, A.I.R. 1949 Mad. 761; *Mani v. District Magistrate*, A.I.R. 1950 Mad. 162 (176).

(25) *Kamalakant v. Emperor*, A.I.R. 1945 Pat. 354.

(1-2) *Surajprasad v. Yeshwanta*, A.I.R. 1944 Nag. 221.

(3) *Ashby v. White*, (1704) 14 St. Tr. 695; *In re Agar-Ellis*, (1883) 24 Ch. D. 317.

(4) *Hottentot Venus Case*, (1810) 13 East. 195.

(5) In ■ *Harper*, (1895) 2 I.R. 571.

(6) *Ex parte Child*, (1854) 15 C.B. 238.

(7) *In re Kindersley*, (1944) I.R. 111.

(8) *Vinlabai v. Emperor*, I.L.R. (1945) Nag. 6; *Jyoti Basu v. Province of West Bengal*, (1948) 53 C.W.N. 9; *Usha Bakhale v. Commissioner of Police*, (1947) 4 D.L.R. 38.

(9) *Amir Singh v. Crown*, (1948) 4 D.L.R. 53.

(10) *In re Hardial Singh*, (1948) 4 D.L.R. 9 (13).

(10-a) Costs may be awarded under O. XXXV, r. 5 of the Supreme Court Rules; see at p. 169, post.



It is gratifying to note that the Supreme Court has ruled<sup>11</sup> (see p. 169, *post*) that where the person detained is, owing to the restraint, unable to make the affidavit, the application shall, be accompanied by an affidavit by some other person.<sup>12</sup>

#### THE RIGHT TO SUCCESSIVE APPLICATIONS

On this matter, there is a divergence between the English law and the existing law in India, and even as to the latter, there has been a divergence of opinion between different High Courts. The principles relating to it should therefore be properly analysed in order to determine what should be the position under the Constitution of India.

(A) *Under the English System.*—According to English Common Law, each Judge of the High Court of Justice has jurisdiction to entertain an application for *habeas corpus*; even though some other Judge has refused a similar application on the merits. In other words, the person detained has the right to apply successively to every Court competent to issue a writ of *habeas corpus* and to have the opinion of each tribunal on the merits, unfettered by the decision of any other tribunal of co-ordinate jurisdiction, until he has exhausted all the Judges.<sup>12</sup> It is not infrequent that an applicant who has been refused the writ on one or two applications is successful to have it from a third Judge, on the very same grounds.<sup>13</sup>

If one asks why this apparently conflicting and anomalous practice is cherished by the Common law, we may simply refer to the observation of Lord Herschell in *Cox v. Hakes*.<sup>14</sup> "... the law of this country is very jealous of any infringement of personal liberty."

While discussing the constitutional position under the Constitution of India, we should always remember the above observation.

(B) *Under the Existing Law of India.*—Sec. 491 (1) of the Criminal Procedure Code empowers,—

"Any High Court" to issue the orders or directions contemplated by the section; and sub-S. (2) says: "The High Court may, from time to time, frame rules to regulate the procedure in cases under this section."

But by the Letters Patent relating to the different High Courts, it has been provided that any powers directed to be performed by the High Court, may be performed either by a single Judge or by a Division Court, as may be properly appointed or constituted under the Government of India Act, 1935.<sup>15</sup>

Many of these High Courts have framed rules directing that the power under S. 491 of the Criminal Procedure Code, shall be exercised by two Judges of the Division Bench, exercising Appellate Criminal jurisdiction, and it has been held that in view of such rule, where it exists, an order under S. 491 by a single Judge would be without jurisdiction.<sup>16</sup>

On the other hand, under the rules of the Lahore High Court, a Single Judge nominated to exercise criminal jurisdiction is empowered to issue orders under S. 491, and at any moment, there may be a number of Judges sitting in

(11) *Vide* S.C.J. (1950) Supplement, p. 70.

(12) *Ex parte Partington*, 14 L.J. Ex. 122; *In re Carroll*, (1941) 1 K.B. 104.

(13) *Ex parte Partington*, 14 L.J. Ex. 122; *Pshugbayi v. Nigerian Government*, C-28, A.C. 459 (P.C.).

(14) *Cox v. Hakes*, (1890) 15 A.C. 506.

(15) *Cf.* section 223 of the Government

of India Act, 1935; section 108 of the Government of India Act, 1915; Clause 36 of the Letters Patent of the Calcutta, Bombay and Madras High Courts.

(16) *District Magistrate v. Mammen*, A.I.R. 1939 Mad. 120; affirmed by *Mathew v. District Magistrate*, (1939) 1 M.L.J. 406; L.I.R. 1939 Mad. 741.

Single Bench exercising such jurisdiction.<sup>17</sup> Similar seems to be the position in the Allahabad High Court.<sup>18</sup>

This difference is not, however, material for the question under discussion, for even where the jurisdiction is vested only in a Division Bench, the question of maintainability of successive applications may arise if the applicant seeks to have his case determined by successive Division Benches.<sup>19</sup> Of course, there is little doubt that when the detention becomes invalid by reason of some fact or event taking place subsequent to the refusal of an application under S. 491, the applicant shall be entitled to bring a fresh application, for, in that case, the second application cannot be said to be brought on the same grounds as the first one.<sup>20</sup> But the question under discussion is whether the applicant under Sec. 491, Criminal Procedure Code has the right to bring successive applications on the same grounds, notwithstanding refusal of the earlier application or applications, as in England. On this point, until the recent decision of the Full Bench of the East Punjab High Court,<sup>21</sup> we had a unanimous opinion in the negative from the Allahabad, Patna, Nagpur, Bombay and Lahore High Courts,<sup>22</sup> though on different grounds.<sup>23</sup>

It is submitted that the Simla view<sup>22</sup> should be followed (though in the minority); under the Constitution of India, if it be intended that the individual should be as free in India as in England.<sup>23</sup>

#### APPEAL

(A) In England.—(i) No appeal lies from an order of discharge of the prisoner upon a writ of *habeas corpus*.<sup>24</sup> Nor does an appeal lie from a valid order for the issue of the writ, determining the illegality of the detention of the prisoner, though not ordering immediate discharge.<sup>25</sup> Of course, motion lies to quash a writ wrongly issued.<sup>1</sup> Again where a discharge has been directed owing to some technical defect in the writ,<sup>2</sup> it does not bar a subsequent detention under a valid order, e.g., where a discharge had been ordered on the ground that the pre-requisite of a lawful detention under the Defence Regulations had not been complied with, the prisoner could be lawfully detained under a subsequent valid order.<sup>3</sup> An exception to the rule that no appeal lies from an order granting a writ is, however, made in the case where the writ is issued in the matter of custody of an infant.<sup>4</sup>

(ii) As regards appeal from an order refusing a writ, a distinction has been made according to the nature of the matter, whether it is 'criminal' or not. The matter is criminal, if the direct outcome of it may be the trial of the applicant

(17) *Ramji v. Crown*, (1948) 4 D.L.R. (S.B.).

27 (Simla) (F.B.).

(18) *Haidari v. Jowad*, A.I.R. 1934 All. D.L.R. 27 (Simla) F.B.

(19) *Haridas v. Province of C. P. and Berar*, (1948) 3 D.L.R. 81 (Nag.).

(20) *R. v. Satish*, (1948) 4 D.L.R. 46 (All.) (F.B.); *Dilbagh v. Emperor*, A.I.R. 1944 Lah. 343; *Emperor v. Ramji*, (1947) 50 Bom.L.R. 188 (F.B.).

(21) *Haidari v. Jowad*, A.I.R. 1934 All. 271; *R. v. Satish*, (1948) 4 D.L.R. 46 (All.) (F.B.); *Raghunandhan v. Province of Bihar*, (1948) 4 D.L.R. 42 (Pat.); *Haridas v. Province of C. P. and Berar*, (1948) 3 D.L.R. 81 (Nag.); *Emperor v. Ramji*, (1947) 2 D.L.R. 569 (Bom.) (F.B.).

(22) *Kishori v. The Crown*, (1945) 26 Lah. 573; *Malhari v. Emp.*, A.I.R. 1948 Bom. 326.

(23) See the arguments for and against successive applications summarised in my article on 'Some Aspects of Habeas Corpus' in (1949) F.L.J. at p. 86 (Jour.).

(24) *Cox v. Hakes*, (1890) 15 A.C. 506 (514).

(25) *Home Secretary v. O'Brien*, (1923) A.C. 603.

(1) *Re Justices of Supreme Court*, (1829) Knapp's Rep. 1; *In the matter of Crawford*, (1849) 13 Q.B. 613.

(2) *R. v. Richards*, (1844) 5 Q.B. 926.

(3) *Ex Parte Budd*, (1942) 2 K.B. 14.

(4) *Barnardo v. McHugh*, (1891) A.C. 388; *Barnardo v. Ford*, (1892) A.C. 326.

and his possible punishment for an alleged offence by a Court of competent jurisdiction.<sup>5</sup>

(a) If the matter is criminal, no appeal lies from the order refusing the writ of *habeas corpus*<sup>5</sup> e.g., (i) Where a Netherlands subject was liable to be charged with an offence under the military law of his country.<sup>5</sup> (ii) Where the deportation of an Indian had been ordered under the Fugitive Offenders Act, 1881.<sup>6</sup>

Of course, though there is no appeal, there is the right to move from Court to Court until all the Judges competent to issue the writ are exhausted (see p. 168, *ante*).

(b) Where there is no actual criminal charge, appeal lies from an order refusing a writ, e.g.—(i) Where a native Chief had been detained under an Ordinance.<sup>7</sup> (ii) In the matter of custody of a child.<sup>8</sup> (iii) Where some Irishmen had been deported under the Restoration of Order in Ireland Act, 1920, passed to suppress civil war in Ireland.<sup>9</sup>

(B) *Under the Existing Law in India*.—(i) Since the Privy Council decisions in the cases of *Sibnath Banerjee*<sup>10</sup> and *Vinlabai*,<sup>11</sup> it was settled beyond doubt that an appeal lay to the Federal Court under Sec. 205 and to the Privy Council under Sec. 208 of the Government of India Act, 1935, from an order under Sec. 491 of the Criminal Procedure Code, whether it was one granting or refusing the writ or an order of discharge, provided the case involves a substantial question as to the interpretation of the Government of India Act, 1935. (Even where no constitutional question is involved, the Privy Council granted special leave under its prerogative power, read with Sec. 208 (b) of the Government of India Act, 1935.<sup>11</sup>)

(ii) Where no constitutional question is involved, and there is no question of the application of Sec. 205 or 208 of the Government of India Act, 1935, the question whether there is any right of appeal from an order of the High Court (whether allowing or refusing *habeas corpus*), depends upon the further question whether the order under Sec. 491 is an 'order of a Criminal Court,' by reason of Sec. 404 of the Criminal Procedure Code which says: "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

Sec. 205 of the Government of India Act not being applicable unless there is a constitutional question involved, it follows that there is no appeal from an order under Sec. 491, where there is no constitutional question, if we regard the order under Sec. 491 as the order of a Criminal Court, and even the Federal Court (Enlargement of Jurisdiction) Act I of 1948, did not alter the position, for that Act merely extended the jurisdiction of the Federal Court in civil cases.<sup>12</sup> In *Sibnath's case*,<sup>10</sup> the Privy Council definitely assumed that the order under Sec. 491, Criminal Procedure Code was an order to which Sec. 404 of that Code was applicable and held that Secs. 205 and 208 of the Government of India Act formed exceptions to Sec. 404 of the Criminal Procedure Code as contemplated by that section itself.

(5) *Amand v. Home Secretary*, (1943) A.C. 147 (156).

(6) *Ex parte Savarkar*, (1910) 2 K.B. 1056.

(7) *R. v. Crewe*, (1910) 2 K.B. 576.

(8) *Barnardo v. McHugh*, (1891) A.C. 388.

(9) *Ex parte O'Brien*, (1923) 2 K.B.

361.

(10) *K. E. v. Sibnath*, (1945) 72 I.A. 241 (P.C.).

(11) *K. E. v. Vinlabai*, (1946) 73 I.A. 144.

(12) *Venkatachala v. Sivasankara*, (1948) 2 M.L.J. 76.



(c) *Under the Constitution*.—1. If the case involves a constitutional question, there will lie an appeal to the Supreme Court, upon a certificate of the High Court to that effect, under Art. 132 (1) of the Constitution.

2. Even where there is no constitutional question involved, appeal would lie under Art. 134 (1) (c), upon the certificate of the High Court.

3. Under Art. 136, the Supreme Court shall have jurisdiction to grant special leave, in its discretion, to appeal from: "any final order in any cause or matter."

It will be seen that the language is wide enough to admit appeals in criminal proceedings while the Federal Court had no criminal jurisdiction. So, whether a proceeding for *habeas corpus* be regarded as civil or criminal in nature, under the new Constitution, an appeal will lie to the Supreme Court by its special leave in fit cases, even though there is no question of interpretation of the Constitution involved.

*Supreme Court Procedure in habeas corpus*.—The Supreme Court has made the following rules under Art. 32 of the Constitution, laying down the procedure in *habeas corpus*<sup>13-14</sup>—

"1. An application for a writ of *Habeas Corpus* shall be filed in the Registry and shall be accompanied by an affidavit of the person restrained, stating that it is made at his instance and setting out the nature and circumstances of the restraint:

Provided that where the person restrained is unable owing to the restraint to make the affidavit, the application shall be accompanied by an affidavit to the like effect made by some other person, which shall state the reason why the person restrained is unable to make the affidavit himself.

2. The application shall be heard by a Division Court, except in vacation, when it may be heard by a Single Judge.

3. If the Court is of opinion that a *prima facie* case for granting the application is made out, a rule *nisi* shall be issued calling upon the person or persons against whom the order is sought, to appear on a day to be named therein to show cause why such order should not be made and at the same time to produce in Court the body of the person or persons alleged to be illegally or improperly detained then and there to be dealt with according to law.

4. On the return day of such rule or on any day to which the hearing thereof may be adjourned, if no cause is shown or if cause is shown and disallowed, the Court shall pass an order that the person or persons improperly detained shall be set at liberty. If cause is allowed, the rule shall be discharged. The order for release made by the Court, or the Judge, shall be a sufficient warrant to any gaoler, public official, or other person for the release of the person under restraint.

5. In disposing of any such rule, the Court may in its discretion make such order for costs as it may consider just."

Forms 27-30 of the Fifth Schedule of these Rules relate to *habeas corpus*.

*Costs in a proceeding for Habeas Corpus*.—In England, prior to the Supreme Court of Judicature Act, 1925, the Court could award costs to a successful applicant for *habeas corpus*, in a case of civil detention<sup>15</sup> but not of criminal detention. But now, the Court may award costs to the successful applicant both in civil and criminal cases.<sup>16</sup> There is no doubt that the Court may award costs against an unsuccessful appellant against an order of discharge.<sup>17</sup> Costs may be awarded also against an unsuccessful applicant.<sup>18</sup> A writ of *habeas corpus* is not allowed to issue without an affidavit either from the person in whose name the application is made or from the person really responsible for costs, so that the other party

(13-14) Order XXXV of the Supreme Court Rules, 1950, vide S.C.J. (1950) Supp. p. 20.

(15) *Dale's Case*, (1881) 6 Q.B.D. 376 (C.A.).

(16) *R. v. Woodhouse*, (1906) 2 K.B. 501.

(17) *Ex parte Lees*, (1941) 1 K.B. 72.

(18) *Re Carter*, (1893) 95 L.T.Jo. 37.

may know on whom to rely for payment of costs.<sup>18-a</sup> But costs cannot be awarded to some one who is not a party to the proceeding.<sup>18-a</sup>

In India, there is no provision for costs in Sec. 491, Criminal Procedure Code, which exclusively deals with the remedy under the existing law. So, it has been held<sup>19</sup> that costs being a creature of statute or statutory rules, no costs can be awarded to either party in a proceeding under Sec. 491.

Under the Constitution, the remedy of *habeas corpus* being no longer confined within the bounds of Sec. 491, Cr. P. Code, there is no bar to awarding costs in a proceeding for *habeas corpus* as in England.

The Supreme Court has already made a rule to this effect<sup>20</sup> [see rule 5, quoted at p. 171]. It may be expected that the High Courts will make similar rules.

### MANDAMUS

*Mandamus, nature of.*—‘Mandamus’ literally means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed.<sup>21</sup>

“The writ of mandamus is a high prerogative writ of a most extensive remedial nature, and is, in form, a command issuing from the High Court of justice, directing any person, corporation,<sup>22</sup> or inferior Court requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right; and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual”<sup>23</sup>.

*Principles governing issue of Mandamus.*—Mandamus, as understood in England, is not a writ of right and is not issued as a matter of course. The issue of the writ is a matter for discretion of the Court, and it will not be granted if the Court is satisfied that there is an alternative remedy which is sufficient and convenient.<sup>24</sup> Hence, where there is an alternative remedy, but that remedy is less convenient, beneficial and effective than mandamus, mandamus may issue.<sup>25-1</sup> On the other hand, “instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, the Court will apply it in every case to which, by any reasonable construction, it may be applicable.”<sup>2</sup> So the writ may, in proper cases, be issued even in cases where the right in respect of which it is applied for appears to be doubtful, in order that the right may be tried upon the return.<sup>3</sup> But Mandamus will not lie where a statute prescribes a specific remedy, e.g., appeal to a minister<sup>4-5</sup> or some other specific and adequate remedy is available.<sup>6-7</sup>

(18-a) *Re Carter*, (1893) 95 L.T.Jo. 37.

(19) *Ramammal v. Vijayaraghavalu*, A.I.R. 1933 Mad. 102; *Basanta v. Emperor*, A.I.R. 1945 Patna 44 (F.B.); see contra *Yusuf v. Bhagwandas*, A.I.R. 1948 Bom. 417; *Haidari v. Jawad*, A.I.R. 1934 All. 606.

(20) *Vide* S.C.J., (1950). Supplement, p. 20.

(21) Stephen's Commentaries, 20th Ed., Vol. I, p. 591.

(22) As to local authorities, see Keith, Constitutional Law, p. 285.

(23) *King v. Archbishop of Canterbury*, (1812) 15 East. 117 (136); Halsbury, Halsbury Ed., Vol. IX, para. 1269.

(24) *Stepney Borough Council v. Walker & Sons*, (1934) A.C. 365.

(25) Halsbury, Halsbury Ed., Vol. IX, para. 1269.

(1) *Tan Bug v. Collector*, A.I.R. 1946 Bom. 216.

(2) *Rochester Corpn. v. R.*, (1858) E.B. & E. 1024 (1030).

(3) *R. v. All Saints*, (1876) 1 A.C. 611.

(4) *Pasmore v. Urban Dt. Council*, (1868) A.C. 387.

(5) *Penkatachalam v. Commr. of I.-T.*, A.I.R. 1935 Mad. 379.

(6) *King v. Bank of England*, (1780) 2 Dong. 514; *Queen v. Registrar*, (1888) 21 Q.B.D. 131 (136); *R. v. Charity Commis-*

*sioners*, (1897) 1 O.B. 407; *R. v. Bedwelty Urban Council*, (1934) 1 K.B. 333.

(7) *Commissioner of Income-tax v. Chettyar*, A.I.R. 1934 Rang. 132.

On the other hand, the issue of the writ being *discretionary*, it may be refused on equitable grounds, such as delay or conduct of the parties,<sup>8</sup> or where it would enable trustees to avoid duties which a Court of equity must enforce against them.<sup>9</sup> For the same reason, the precise order asked for should be carefully defined.<sup>10</sup>

#### *Conditions precedent to issue of Mandamus*

In order to obtain a writ of mandamus the applicant must satisfy the following conditions:

(a) The applicant must show that he has a *legal right* to the performance of a *legal duty* by the party against whom the mandamus is sought.<sup>11</sup>

(b) The right must be a 'public right' and the duty sought to be enforced must be of a *public nature*.<sup>12</sup> The writ of mandamus is not issued to settle private disputes or to enforce private rights.<sup>13</sup>

(c) The legal right to compel the performance of the public duty must be shown to reside in the applicant himself.<sup>14</sup> It will not do to show merely that the applicant has an *interest* in the performance of the duty.<sup>15</sup> The right may, however, be enjoyed in common with others.<sup>16</sup>

(d) The application must be made in good faith and not for an *indirect purpose*,<sup>17</sup> or on behalf of a third party.<sup>18</sup>

(e) The application must be preceded by a distinct *demand* for performance of the duty, in order to give the party an opportunity to consider whether he should comply or not,<sup>19</sup> and such demand must be shown to have been met by a refusal either by words or conduct, so that the Court may be satisfied that the party complained of is determined not to do what is demanded.<sup>19</sup>

#### *Against whom Mandamus does not lie.*

(i) As no Court can compel the Sovereign to perform any duty, in England, no writ of mandamus will lie to the Crown.<sup>20-21</sup> Where it is sought to establish a right against the Crown, the appropriate remedy is a petition of right. Where, however, Government officials have been constituted *agents* for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards such subjects, a writ of mandamus will lie for the enforcement of such duties,<sup>22</sup> e.g., against the Board of Education.<sup>23</sup> Before mandamus can issue to a public servant it must, therefore, be shown that a duty towards the applicant has been imposed upon the public servant by *statute* so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown,<sup>24</sup> his principal.<sup>24-a</sup>

(8) *R. v. All Saints*, (1876) 1 A.C. 611 (622).

(9) *R. v. Garland*, (1870) 5 Q.B. 269 (272).

(10) *Commissioner v. Abdul*, A.I.R. 1931 P.C. 132 (136).

(11) *Ex parte Napier*, (1852) 18 Q.B. 692 (695); *R. v. Barnstaple Justices*, (1937) 54 T.L.R. 36.

(12) *R. v. Bank of England*, (1819) 2 B. & Ald. 620.

(13) *R. v. Clear*, (1825) 4 B. & C. 899.

(14) *R. v. Lewisham Union*, (1897) 1 Q.B. 498.

(15) *R. v. London Assessment Committee*, (1907) 2 K.B. 764 (C.A.).

(16) *A. G. v. Vestry of Bermondsey*, 23 Ch.D. 60.

(17) *R. v. Peterborough Corp.*, (1875) 44 L.J. (Q.B.) 85.

(18) *R. v. Liverpool Ry. Co.*, (1852) 21 Q.B. 284.

(19) *R. v. Brecknock Canal Co.*, (1835)

3 A. & E. 217.

(20-21) In the U.S.A., similarly, it has been held that mandamus lies against public officials to compel performance of a duty which is made imperative by law, but not so as to compel the President or public officials to perform political or discretionary duties, enjoined by the Constitution (*Marbury v. Madison*, (1803) 1 Cr. 137) *Kendall v. U.S.*, (1838) 12 Pet. 524 (609); see Burdick, *Law of the American Constitution*, pp. 125-7).

(22) Halsbury's *Laws of Eng.*, Hailsham Ed., Vol. IX, para. 1293 [Cf. S. 45 (g), Specific Relief Act of India; *Commissioner of Income-tax v. Bombay Trust Corporation*, A.I.R. 1936 P.C. 269].

(23) *Board of Education v. Rice*, (1911) A.C. 179.

(24) *Queen v. Lords Commissioners*, (1872) 7 Q.B. 387.

(24-a) In India, there is no doctrine of immunity of the Crown or of officers, under



(ii) Mandamus will not be granted against an *inferior or ministerial* officer, who is bound to obey the orders of a competent authority, to compel him to do something which is part of his duty in that capacity.<sup>25</sup> When the Court finds that the ministerial officer has already received an order from his superior,—for disobeying which he will be liable to indictment, the Court would not proceed by mandamus but would leave the party to the ordinary remedies. But where the superior has issued no orders, the Court may issue a mandamus.<sup>1</sup> Again, where the affidavits show that the ministerial officer was only put forward as a *nominal* party by others, who are the persons interested in preventing issue of the writ, the Court would issue the writ.<sup>2</sup>

(iii) Where an obligation is cast upon the principal and not upon the servant, it cannot be enforced against the servant so long as he is merely acting as servant. Thus, if a mandamus were applied for against the secretary of a railway company to do something, it would not be granted, merely because the railway company (his master) had an obligation to perform the duty, and it makes no difference that the master, or the principal cannot be sued at all. There is the familiar case of the surveyor of highways who is the servant of the inhabitants of the parish; the inhabitants of the parish cannot be sued, because they are not a body corporate, but the surveyor of the highways is not to be responsible for the non-performance of their duties, or the negligence of their servants.<sup>3</sup>

(iv) Mandamus will not issue against persons who are not holders of 'public' office.<sup>4</sup>

### Uses of Mandamus

In England, the writ of mandamus has been used for the following purposes:

(a) *Restoration, admission and election to office.*—A writ of mandamus lies to compel the *restoration* to a public office or franchise of which the holder has been wrongfully dispossessed,<sup>5</sup> e.g., to municipal offices and positions,<sup>6</sup> to academical degrees.<sup>6</sup> The writ is also available for *admission* to a public office or franchise of a person who has been duly elected thereto, but has never been in possession,<sup>6</sup> e.g., a municipal alderman or a director or registrar of a corporation, who has been duly elected.<sup>6</sup> But the writ will not lie if the office be merely temporary or which depends upon the will of a fluctuating body, e.g., the secretaryship of a society.<sup>7</sup> Similarly, mandamus will lie to command an election to an office of a public nature, e.g., a municipal election.<sup>8</sup> But it is not granted to compel the election of an indefinite body.<sup>9</sup> A mandamus to restore, admit or elect to an office will not be granted unless the office is vacant. It will, however, be issued where there has been an election which is void or merely colourable,<sup>10</sup> or where a person is merely holding over without due election.<sup>10</sup> Where a person is in possession of right, remedy lies by way of *quo warranto* to oust him.<sup>11</sup>

the Constitution. But there is the immunity of the Executive heads of the Union and the States [Art. 361, *post*].

(25) *R. v. Bristow*, (1795) 5 T.R. 549.

(1) *R. v. Payn*, (1837) 6 A. & E. 392 (400).

(2) *Ex parte Bottom*, (1849) 13 Jur. 680.

(3) *Queen v. Lords Commissioners*, (1872) 7 Q.B. 387 (398).

(4) *Khelsidas v. Pratapmal*, A.I.R. 1946 Cal. 197 (206).

(5) *R. v. Bloor*, (1760) 2 Burr. 1043.

(6) Halsbury, Vol. IX.

(7) *Evans v. Hearts of Oak Society*, (1866) 12 Jur. (N.S.) 163.

(8) In *Barnes Corporation*, (1933) 1 K.B. 668.

(9) *R. v. Fowey Corporation*, (1824) 2 B. & C. 584.

(10) Halsbury, Vol. IX.

(11) *R. v. Chester Corporation*, (1855) 25 Q.B. 61.

(b) *Delivery up, Production and Inspection of documents.*—A mandamus will lie commanding the delivery up of public books and papers, e.g., on the removal of the officer having custody of the books.<sup>12</sup> It will also lie to compel the production and to permit the inspection of public books or documents, provided that the party applying has a direct and tangible interest in the documents and shows reasonable grounds for requiring inspection.<sup>12</sup> For the same reason, no mandamus may be had to have a general inspection of all papers in the possession of any party.<sup>12</sup>

(c) *Compelling public officials to carry out their duties.*—The writ of mandamus will lie to compel a public official or body to perform his official duty whether imposed by statute or otherwise.

Thus, Mandamus has been used for the following purposes:

(a) to direct the Registrar of Companies to incorporate a new company where the Registrar has under the law no discretion to refuse such registration,<sup>14</sup> or to require a clerk to justices to register a club on receipt of proper fees.<sup>15</sup> (b) to compel income-tax authorities to repay overpaid sums,<sup>16</sup> or to compel a Local Government Board to award compensation for loss of office in accordance with a statute.<sup>17</sup>

(i) So long as public functionaries strictly confine themselves within the exercise of those duties which are confided to them by law, the Court will not interfere. The Court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, the Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.<sup>18</sup>

(ii) Mandamus will not be available to compel an authority to exercise a discretion in a particular way; but if it is under a duty to exercise a discretion, it can be compelled by mandamus to exercise it in one way or another, and if, by the omission of one of the requirements of natural justice, it has failed in the eye of law to exercise a discretion, it can be forced to exercise it properly. The same will be true if it has exercised its discretion *mala fide* or for a purpose other than that for which it was entrusted with the discretion.<sup>19</sup>

(d) *Enforcement of statutory rights and duties.*—A writ of mandamus will be granted to compel the performance of a duty laid down by a statute, as distinguished from a merely discretionary or permissive authority.<sup>20-21</sup> It must be shown that the statute commands the performance of the duty. In the case of a statutory duty, however, mandamus will issue even though the person against whom the duty is imposed be a private party. Thus, the writ will issue to an official of a society to compel him to perform the terms of the statute by which the society is controlled.<sup>22</sup>

(12) Halsbury, Hailsham Ed., Vol. IX.

(13) *R. v. Merchant Tailor's Co.*, (1831) 1 B. & Ad. 115.

(14) *R. v. Registrar of Companies*, (1914) 3 K.B. 1161.

(15) *Ashton v. Wainright*, (1936) 52 T.L.R. 372.

(16) *R. v. Income-tax of Commissioners*, (1888) 21 Q.B.D. 313.

(17) *R. v. Local Government Board*, (1885) 15 Q.B.D. 70 (C.A.).

(18) *Frewin v. Lewis*, (1838) 4 My. & Cr. 249.

(19) Stephen's Commentaries, 20th Ed., Vol. I, p. 592.

(20) *R. v. G.W.Ry. Co.*, (1893) 69 L.T. (C.A.); Halsbury, Hailsham Ed., Vol. IX, p. 768.

(21) *R. v. Marshland Commrs.*, (1920) 1 K.B. 155 (165).

(22) *R. v. Pharmaceutical Society*, (1854) 2 W.R. 220.

(e) *Against inferior Courts and quasi-judicial tribunals.*—The writ of mandamus will issue to tribunals exercising an *inferior* jurisdiction, commanding them to adjudicate according to their powers in matters which are judicial in their character,<sup>22-a</sup> subject to the following limitations:

(i) A mandamus goes to *set a tribunal in motion* but not to prescribe the *way* in which it shall do any particular act, unless it is quite plain that what it has to do is purely ministerial, and not judicial.<sup>23</sup> In other words, a mandamus may be issued to command a tribunal to hear and decide a particular matter, but no direction would be given as to the *manner* in which it is to decide.<sup>24</sup> Thus, an administrative tribunal may be compelled to hear and determine an appeal.<sup>25</sup>

(ii) Nor would mandamus be issued directing a tribunal to *review* its decision, where the tribunal has exercised its jurisdiction, even though its decision be *erroneous* and there is no other way of having the duty performed.<sup>26</sup>

(iii) Nor will mandamus issue where a tribunal has dismissed a matter on hearing a preliminary objection,<sup>1</sup> or on the ground that he has disbelieved certain evidence,<sup>2</sup> or refused to receive some evidence as incompetent,<sup>3</sup> or refused adjournment,<sup>4</sup> and on similar grounds relating to matters within the *discretion* of the tribunal.

*Whether mandamus will lie against Governments of Union and State.*—See under Art. 361, *post*.

#### PROHIBITION

*Prohibition, nature of.*—Prohibition is a judicial writ, issuing out of a superior Court and directed to an inferior Court, preventing the inferior Court from usurping jurisdiction with which it is not legally vested, or in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction.<sup>5</sup> In general, Prohibition differs from Mandamus only on the following points:

(a) Prohibition commands *inactivity* instead of activity.

(b) While the issue of Mandamus is discretionary, with certain exceptions, the issue of the writ of Prohibition is *of right* (though *not of course*) and the superior Court cannot refuse to enforce public order in the administration of the law by the denial of this writ.<sup>6</sup> So, in the matter of Prohibition, the superior Court will not be fettered by the fact that an alternative remedy (*e.g.*, appeal<sup>7</sup>) exists to correct the abuse or excess of jurisdiction for which the writ is sought.<sup>8</sup> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act *judicially*, act in *excess* of their legal authority, they are subject to the controlling jurisdiction exercised by the writs of prohibition and certiorari.<sup>9</sup>

(c) While Mandamus is available against any public authority, including administrative and local bodies,—Prohibition will issue only against *judicial* authorities, including within that term quasi-judicial and administrative tribunals, *e.g.*, Income-tax Commissioners;<sup>10</sup> Assessment Committee;<sup>11</sup> Electricity Commission;

(22-a) Halsbury Hailsham Ed., Vol. IX.

(23) *Rex v. Justices of Kingston*, (1902) 86 L.T. 590.

(24) *Ex parte Cook*, (1860) 29 Q.B. 68.

(25) *King v. Housing Tribunal*, (1920) 3 K.B. 334.

(1) *R. v. Kesteven Justices*, (1844) 3 Q.B. 810.

(2) *R. v. Bowman*, (1898) 1 Q.B. 663.

(3) *Ex parte Gill*, (1885) 53 L.T. 728.

(4) *Ex parte Becke*, (1832) 2 B. & A. 704.

(5) *In re Clifford and O'Sullivan*, (1921) 2 A.C. 570.

(6) Halsbury. Hailsham Ed., Vol. IX, pp. 819, 822.

(7) *R. v. North*, (1927) 1 K.B. 491.

(8) *R. v. Electricity Commissioners*, (1924) 1 K.B. 171 (205).

(9) *Kensington Income-tax Commissioner v. Aramaya*, (1916) 1 A.C. 215.

(10) *Ex parte Hadley*, (1929) 2 K.B. 397.



ners;<sup>11</sup> Municipality;<sup>12</sup> arbitrators.<sup>13</sup> Prohibition is not available against purely executive acts which may be controlled by Mandamus.<sup>14</sup>

*Limits to the writ of Prohibitions.*—(i) It will not issue to restrain the exercise of legislative functions.<sup>15</sup>

(ii) Prohibition will issue only to ■ public authority. It will not issue to ■ mere private tribunal exercising consensual jurisdiction such as a club or ■ trade union.<sup>16</sup>

(iii) It will not be readily issued if there is a right of appeal from the inferior Court which has not been used.<sup>17</sup>

(iv) Where proceedings in the inferior tribunal are partly within and partly without jurisdiction, prohibition will lie against doing what is in excess of jurisdiction.<sup>18</sup>

(v) There must remain something to which prohibition can apply, some act which the authority if not prohibited, may do in excess of its jurisdiction, including any act, not merely ministerial, which may be done by it in carrying into effect any quasi-judicial order which it has wrongly made.<sup>19</sup> An application for prohibition is never too late so long as there is something left for it to operate upon.<sup>20</sup>

### CERTIORARI.

*Certiorari, nature of.*—The writ of *certiorari* is issued for removing the records of proceedings from an inferior tribunal or quasi-judicial authority<sup>21</sup> to the High Court 'for the purpose of determining the legality of the proceedings or for giving fuller or more satisfactory effect to them than could be done by the Court below';<sup>21-a</sup> to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction;<sup>22</sup> to quash ■ decision that goes beyond jurisdiction;<sup>22</sup> to ensure observance of the rules of natural justice.<sup>23</sup>

Broadly speaking, there is no difference in principle between the writ of *certiorari* and that of *Prohibition* except that the latter may be invoked at an earlier stage<sup>24</sup>—the object of both being to control judicial or quasi-judicial bodies.

But though closely akin to each other, there are points of *difference* between *Prohibition* and *Certiorari*:

(i) While *certiorari* lies to quash a proceeding after trial, prohibition would not be issued after trial except in ■ clear case, apparent on the face of the proceedings, that the Court or tribunal was acting without jurisdiction.<sup>25-1</sup> The

(11) *R. v. Electricity Commissioners*, (1924) 1 K.B. 171.

(12) *Administrator v. Majid*, A.I.R. 1941 Lah. 81 F.B.

(13) *R. v. Powell*, (1925) 1 K.B. 641.

(14) *Dinbai v. Noronha*, A.I.R. 1946 Bom. 407 (412).

(15) *R. v. Legislative Committee of the Church Assembly*, (1927) 1 K.B. 491.

(16) *Stephen's Commentaries*, 20th Ed., Vol. I, p. 594.

(17) *Queen Anne's Bounty v. Pitt-Rivers*, (1936) 2 K.B. 416.

(18) *Halsbury, Hailsham, Ed.*, Vol. IX, para. 1398.

(19) *E. & T. Agencies v. S. I. Trust*, A.I.R. 1937 P.C. 265.

(20) *In re London Building Society*, (1893) 63 Q.B. 113.

(21) *R. v. Minister of Health*, (1927) 1 K.B. 765; *Board of Education v. Rice*, (1911) A.C. 179; *Local Government v. Arlidge*, (1915) A.C. 120.

(21-a) *Short & Mellor's Crown Practice*, 2nd Ed., p. 14.

(22) *R. v. London County Council*, (1931) 2 K.B. 215 (233).

(23) *R. v. Hendon*, (1933) 2 K.B. 696.

(24) *R. v. Electricity Commissioners*, (1924) 1 K.B. 171 (204).

(25) *R. v. Edmundsbury*, (1946) 2 A.E.R. 604 (607) K.B.

(1) *Ricketts v. Bodenham*, (1836) 4 Ad. & El. 433 (441).

object of prohibition is prevention, while *certiorari* may serve the dual purpose of prevention or cure. "Where a final decision has been made by the inferior Court, prohibition is obviously useless, but *certiorari* is available to enable the High Court to quash the decision. Thus, prohibition is the appropriate remedy to prevent the Minister of Health from proceeding to confirm an *ultra vires* housing scheme,<sup>2</sup> and *certiorari* when an *ultra vires* scheme has already been approved by the Minister".<sup>3</sup>

(iii) On the other hand, *certiorari* may be issued for removing proceedings to the High Court for *better* justice (in view of the difficult matter involved), even though the inferior tribunal has jurisdiction,—but where the inferior tribunal has jurisdiction prohibition cannot obviously lie.<sup>4</sup>

(iv) *Certiorari* may be had in either civil or criminal proceedings.

(v) Entirely different considerations apply to *Mandamus* from those which apply to *certiorari*. When it has been shown that a tribunal has declined to consider matters which they ought not to have considered, or have not decided the case according to law, *mandamus* would be granted commanding the tribunal. But *certiorari* will lie to quash or remove proceedings on the grounds of want or excess of jurisdiction or of the order being bad on its face, but not on the ground that the tribunal (having jurisdiction) has not taken into consideration matters which it ought to have taken into consideration.<sup>5</sup>

#### *Principles governing issue of Certiorari.*

(i) A writ of *certiorari* does not require any personal right or interest to support a claim for such writ. The only distinction is that in the case of a man who is personally aggrieved he can ask for the writ almost *ex debito justitiæ* and that in the case of a man who has not suffered any injury, the Court has a *discretion* to grant or refuse the application according to the circumstances of a case.<sup>6</sup> Thus, it will be refused if there has been undue delay in bringing the application;<sup>7</sup> or if the applicant comes with a suppression of material facts.<sup>8</sup>

(ii) *Certiorari to remove* the proceedings to the High Court *for trial* is granted only if—(a) in the opinion of a Judge of the High Court, the action is fit to be tried in the High Court, or it may be desirable that it should be so tried on account of difficult point of law involved;<sup>9</sup> or (b) where there is reason to suppose that a fair trial could not be secured in the Court below, or (c) complete justice cannot be obtained in the lower Court.<sup>10</sup>

But—(a) *Certiorari to remove* proceedings will not be granted where the superior Court itself has no jurisdiction to determine the matter, *e.g.*, where the jurisdiction of the High Court is barred by statute,<sup>11</sup> or the matter is not otherwise capable of being determined by the superior Court.<sup>12</sup> (b) Just as *mandamus* will not be issued to compel an authority to exercise its *discretion* in a particular way, so *certiorari* will not issue for the purpose of exercising ■■ appellate jurisdiction, to correct a merely *erroneous* decision, unless ■■ appellate jurisdiction

(2) *R. v. Minister of Health*, (1929) 1 K.B. 619.

(3) *Ex parte Yaffe*, (1931) A.C. 494.

(4) *Longbottom v. Longbottom*, (1852) ■ Exch. 203.

(5) *R. v. Rent Tribunal*, (1947) 1 A.E. R. 448 (449).

(6) *Rex v. Williams*, (1914) 1 K.B. 608.

(7) *R. v. Stafford Justices*, (1940) 2 K. B. 33.

(8) *R. v. I. T. Commissioners*, (1917) 1 K.B. 486.

(9) *Potter v. G. W. Colliery*, (1894) 10 T.L.R. 380 (C.A.).

(10) *Stephenson v. Houlditch*, (1704) 2 Vern. 491.

(11) *R. v. Edmundsbury*, (1947) 2 A.E. R. 170 (180) C.A.

(12) Halsbury, Hailsham Ed., Vol. IX, p. 854.

has also been conferred upon the High Court. But when the want of jurisdiction is based upon the breach of a fundamental principle of justice, *certiorari* would not be refused simply because there is a right of appeal.<sup>13-14</sup> (c) *Certiorari* will not be granted where, if the writ were subsequently quashed, the inferior Court could not be ordered to resume the proceedings, *e.g.*, where the proceedings in an inferior Court have become null and void by the operation of some statute, or otherwise.<sup>15</sup>

(iii) *Certiorari to quash criminal proceedings.*—*Certiorari* does not quash an acquittal even though want of jurisdiction is apparent on the face of the proceedings, on the ground that a man should not be put in peril twice for the same offence.<sup>16</sup> Where however the order of acquittal is the result of appeal (quashing conviction), *certiorari* lies to quash that appellate order.<sup>17</sup> *Certiorari* would go to quash a conviction, which is found to have been obtained by *fraud* and *perjury*.<sup>18</sup> It lies to correct all irregularities in the proceedings of inferior Courts which are vitiated by fraud.<sup>19</sup> Where the inferior Court violates some principle of natural justice, *e.g.*, by interviewing some witness in the absence of the accused (whether with any improper motive or not) contrary to the principle that 'justice must not only be done, but must manifestly be seen to be done,' *certiorari* will lie to quash the conviction, and even the Court which made such conviction may be made to pay the costs of the application for *certiorari*.<sup>20</sup>

*Conditions precedent to issue of the writs of certiorari or prohibition.*—The conditions necessary for the issue of either of these writs are—

(a) There should be a tribunal or officer, (i) having legal authority,<sup>21</sup> (ii) to determine questions affecting rights of subjects, and (iii) having a duty to act judicially<sup>22</sup> (including within that term all quasi-judicial bodies, domestic tribunals, etc., as to which, see below). "In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by a competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others." These writs would not lie against merely administrative action of the Government or a public officer which can in no sense be said to be quasi-judicial in nature;<sup>23</sup> or against ministerial acts.<sup>24</sup> But a proceeding is none the less a 'judicial' proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority.<sup>25</sup> No prohibition or *certiorari* will issue in order to interfere with the functions of the Legislature,<sup>1</sup> or with provisional executive orders which are subject to confirmation by the Legislature;<sup>2</sup> or against officers having advisory functions only.<sup>2-a</sup> (b) Such authority must have acted in excess of its legal authority or without authority or jurisdiction at

(13) *Khurshed v. Rent Controller*, A.I.R. 1947 Bom. 46; *In re Ramjidas*, (1935) 62 Cal. 1011.

(14) Cf. Halsbury, Vol. IX, p. 822, footnote (r).

(15) *Weston v. Sneys*, (1857) 1 H. & N. 703; Halsbury, Hailsham Ed., Vol. IX, p. 854.

(16) *R. v. Galway Justices*, (1894) 2 I.R. 409.

(17) *Ex parte Spencer*, (1839) 1 Per. & Dav. 358.

(18) *R. v. Bodmin JJ.*, (1947) 1 A.E.R. 109 (K.B.D.).

(19) *R. v. Recorder*, (1947) 1 A.E.R. 928 (K.B.).

(20) *R. v. Gillyard*, (1848) 12 Q.B. 527.

(21) *Re Clifford v. O'Sullivan*, (1821) 2 A.C. 570.

(22) *Frome United Breweries v. Bath Justices*, (1926) A.C. 586 (602).

(23) *R. v. London C.C.*, (1931) 2 K.B. 215; *Ryots of Garabandhu v. Parlakimedi*, (1943) 70 I.A. 129 (140).

(24) *Reg. v. Dublin Corporation*, (1878) 2 L.R. Ir. 371 (376); *R. v. Woodhouse*, (1906) 2 K.B. 501.

(25) *E. & T. Agencies v. Singapore, I.T.L.*, A.I.R. 1937 P.C. 265.

(1) *A. G. v. Manchester Ry.*, (1838) 1 R. & C.C. 436.

(2) *R. v. Hastings Local Board*, (1865) 6 B. & S. 401.

(2-a) *R. v. Macfarlane*, (1923) 32 C.L.R. 518.



all.<sup>3</sup> Thus, *certiorari* would not lie merely because the decision happens to be wrong or the tribunal acts without sufficient evidence or misdirects itself in considering the evidence.<sup>4</sup> (As to when a tribunal acts without or in excess of its jurisdiction, see below).

(c) The jurisdiction of the tribunal in question must be *inferior* to that of the High Court.<sup>5</sup> Where the inferior Court has the same jurisdiction as the High Court, e.g., in bankruptcy, the writ will be refused.<sup>6</sup> Similar is the case where the inferior tribunal is given exclusive jurisdiction by statute.<sup>5</sup> *Certiorari* cannot issue against an *independent* tribunal<sup>7</sup> or a Court of equal status.<sup>8</sup>

*When does a Court act without jurisdiction.*—A Court may be acting without or in excess of jurisdiction in the following circumstances:

(a) Where the Court is not properly constituted, e.g., where the members of the Court or any of them is disqualified to sit<sup>9</sup> or to have a bias in the matter which should have resulted in their not sitting.<sup>10</sup>

(b) Where the subject-matter of enquiry is beyond the scope of the inferior Court, either by reason of its nature, or by reason of the absence of some essential preliminary.<sup>11</sup>

(c) Where the Court has assumed a jurisdiction upon a wrong decision of the facts upon which the existence of the jurisdiction depends, the decision of those facts is open to review by a superior tribunal.<sup>12</sup>

But when a Court, having jurisdiction over a matter properly enters upon an enquiry but proceeds to his order upon an *erroneous finding*, its order cannot be said to be without jurisdiction and so it cannot be quashed by *certiorari*, though it may be quashed in appeal.<sup>13</sup> Thus, "A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a *wrong exercise* of a jurisdiction which he has and not a usurpation of a jurisdiction which he has not".<sup>4</sup>

When the inferior Court has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of evidence, or convicts without evidence.<sup>14-15</sup>

(d) But there is a complete failure of justice where a tribunal makes a quasi-judicial order against a party without *hearing* evidence on the point, at all.<sup>16</sup>

*Judicial and quasi-judicial tribunals.*—It would be necessary in this context to distinguish between judicial and administrative functions. It is not always that a Court exercises 'judicial' functions; similarly, an administrative body may sometimes exercise 'judicial' functions, and in such a case it is called a 'quasi-judicial' body or tribunal. What then, is the essence of the 'judicial' function?

(3) *R. v. Electricity Commrs.*, (1924) 1 K.B. 171.

(4) *R. v. Nat Bell Liquors, Ltd.*, (1922) 2 A.C. 128.

(5) *R. v. St. Edmundsbury*, (1947) 2 A.E.R. 170 (C.A.).

(6) *Skinner v. Northallerton Co.*, (1899) A.C. 439.

(7) *Goonesinha v. De Kretzer*, A.I.R. 1945 P.C. 83.

(8) *Queen v. Justices of Central Criminal Court*, (1883) 11 Q.B.D. 479.

(9) *R. v. Cheltenham Commissioners*, (1841) 1 Q.B. 467.

(10) *R. v. Rent Tribunal*, (1947) 1 A.E.R. 448 (449) K.B.D.

(11) *Colonial Bank of Australasia v. Wilson*, (1874) L.R. 5 P.C. 417.

(12) *Bhagwandin v. Gir Har*, A.I.R. 1940 P.C. 7.

(13-15) Halsbury, Vol. IX, para. 1493.

(16) *R. v. Kingston-upon-Hull Rent Tribunal*, (1949) 1 All.E.R. 260.

A Court has been defined as "a place where justice is *judicially* administered".<sup>17</sup> So it refers to a Court of Justice, i.e., a Judge or Judges when acting *judicially*,<sup>18</sup> but not when transacting mere *administrative* business.<sup>19</sup> On the other hand, the exercise of some judicial functions or even resort to some judicial procedure does not convert ■ administrative tribunal into a 'Court'.<sup>20</sup>

The term 'judicial' is thus not identical with the term 'Court'. A 'judicial' act, in its comprehensive sense, means 'an act done by a competent authority, upon consideration of facts and circumstances, and *imposing liability or affecting the rights* of others'.<sup>21</sup> But decisions affecting the rights of others may be made by three different categories of authorities, taking them broadly: The first are the Courts of law, or judicial tribunals, strictly speaking, who are constituted for determining questions of law. In the second category fall the administrative tribunals or governmental bodies who combine administrative with judicial functions. In the third category are the 'domestic tribunals' who are bodies of private persons and laymen, having no authority to determine questions of law: it is in a very loose sense that the third category of tribunals may be said to exercise a judicial function. What distinguishes Courts from any tribunal of the second or third category is that it is only the 'Court' which represents the 'judicial power' of the Sovereign,<sup>22</sup> viz., "the power which every Sovereign must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to *life, liberty or property*."

Secondly, what distinguishes a Court from an administrative authority is that the decisions of the Courts are *objective*, i.e., arrived at by the application of *fixed* standards; even the discretion which a Court of Justice is allowed to exercise in some particular cases, has to be exercised in accordance with certain fixed principles.<sup>23</sup> On the other hand, the decisions of administrative authorities are usually *subjective*, in the sense that they are reached without applying any standard at all, except that of expediency.<sup>24</sup> "Just as the absence of discretion is the mark of the *ministerial* duty, so it is the essential presence of *discretion* which distinguishes the *administrative* function, from the ministerial on the one hand, and from the judicial on the other".<sup>25</sup>

But when an administrative authority exercises discretion, *after first applying some fixed standards*, or only upon the existence of some *objective* fact or condition,<sup>1</sup> e.g., when ■ licensing authority refuses or grants a license after deciding whether ■ applicant is legally qualified to hold a licence,<sup>2</sup> the administrative authority may be said to combine administrative and judicial functions, or shortly, to exercise 'quasi-judicial' functions. It has already been explained that an administrative tribunal, exercising quasi-judicial functions, must observe the rules of 'natural justice' (see p. 54, *ante*), and cannot therefore come to a decision

(17) Coke on Littleton; Stroud, Judicial Dictionary.

(18) Cf. S. 20, Indian Penal Code.

(19) *Royal Aquarium v. Parkinson*, (1892) 1 Q.B. 409.

(20) *R. v. Electricity Commissioners*, (1924) 1 K.B. 171; *Shell Co. v. Fed. Commissioners*, (1931) A.C. 275.

(21) *Frome United Breweries v. Bath Justices*, (1926) A.C. 586 (602); *Local Govt. Board v. Arlidge*, (1915) A.C. 120 (140).

(22) *Shell Co. v. Fed. Commissioners*, (1931) A.C. 275, approving *Huddart Parker*

*v. Moorehead*, (1908) ■ C.L.R. 330 (357).

(23) *Sharp v. Wakefield*, (1891) A.C. 173 (179).

(24) Stephen's Commentaries, Vol. I, p. 279; *Franklin v. Minister of Planning*, (1947) 176 L.T. 312; (1948) A.C. 87.

(25) Cf. *In re Banwarilal* (1944) 48 C. W.N. 766 (800).

(1) Cf. *Rao v. Khushaldas*, A.I.R. 1949 Bom. 277 (281); *Wexford C.C. v. Local Govt.*, (1902) 2 Ir. 349 (373); *R. v. Boycott* (1939) 2 All E.R. 626.

(2) *R. v. Woodhouse*, (1906) 2 K.B. 501.

without a 'hearing', i.e., without giving a person an opportunity of putting forward his case, and this is in common with a Court. But at the same time an administrative tribunal is not bound to follow all the rules of procedure and evidence ■ are followed by the Courts.<sup>2-a-3</sup> Thus, it is free to have its hearing *in camera*,<sup>2-a</sup> while a Court has no discretion to sit in camera,<sup>4</sup> though the law allows it to sit in camera for the purpose of determining particular cases by reasons of policy.<sup>5</sup>

So, it is the 'hearing' which constitutes the judicial function<sup>6</sup> and not merely the determination of rights or settlement of disputes, but the decision of rights 'after hearing evidence between a proposal and an opposition.'<sup>7</sup> Hence, from the mere fact that an act of the Government or a public officer may have the effect of prejudicing the rights of private parties, it does not follow that such an act is necessarily of a judicial nature.<sup>8</sup> Where the officer does not hear any evidence nor is required to pass any formal orders on hearing objections, the action of the officer cannot be the subject of a proceeding in *certiorari*.<sup>9-10</sup> The essence of the judicial function is the coming to a decision after weighing a question from two sides.<sup>11</sup>

The distinction between judicial and quasi-judicial proceedings has been thus summarised by the Report of the Ministers' Powers Committee,<sup>12</sup> which has been later adopted judicially:<sup>13</sup> "A true judicial decision presupposes an existing dispute between two or more parties and involves four requisites:—(1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of *fact*, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is question of *law*, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law to the facts so found, including, where required, a ruling upon any disputed question of law.

A quasi-judicial decision, on the other hand, involves requisites (1) and (2), does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action."<sup>13</sup>

#### ILLUSTRATION

The (English) Mental Deficiency Act, 1913, provided that it was one of the duties of the local educational authority to make arrangements for ascertaining what children were 'defective' so as not to benefit from instruction in special schools. A boy of 11 was examined by Dr. Boycott who gave a certificate that the boy was defective; the certificate was also signed by another doctor who had not even seen the boy. The certificate was quashed by a writ of *certiorari*, holding that the duty imposed by the Act was a quasi-judicial act and that the signing of the certificate by a doctor who had not even seen the boy, was against the principles of natural justice:<sup>14-15</sup>

(2-a) *Local Government Board v. Arlidge*, (1915) A.C. 120.

(3) See also Willoughby, *Constitutional Law*, Vol. III, p. 1732.

(4) *Scott v. Scott*, (1913) A.C. 427.

(5) As to these, see Stephen's *Commentaries*, Vol. I, p. 58.

(6) Cf. *R. v. Kingston-upon-Hull*, (1949) 1 All E.R. 260.

(7) *R. v. London County Council*, (1931) 2 K.B. 215 (233).

(8) *R. v. London County Council*, (1931) 2 K.B. 215.

(9-10) *Shiva Rao v. Collector*, A.I.R. 1949 Mad. 56.

(11) *Kai Khasru v. Commissioner*, A.I. R. 1947 Bom. 153; *Rao v. Khusaldas*, A.I.

R. 1949 Bom. 277 (281).

(12) Report of the Ministers' Powers Committee, C.M.D. 4060.

(13) *Cooper v. Wilson*, (1937) 2 K. B. 309 (340).

(14) *R. v. Boycott*, (1939) 2 All.E.R. 626.

(15) The following are instances of quasi-judicial tribunals, from Indian decisions—(a) a municipal corporation making assessment [*Nundolal v. Calcutta Corporation*, (1885) 11 Cal. 275]. (b) Board of Revenue directing Zemindar to make settlement of rents [cf. *Ryots of Garahaulho v. Parlakimedi*, (1943) 70 I.A. 129. (c) an Industrial Tribunal [*Suryaprakash v. Industrial Court*, (1950) 5 D.L.R. ■ Bom.]



*Judicial review of administrative determination, in the U.S.A.*—In the United States, an administrative authority, acting in a judicial capacity, is not bound by the procedural requirements of a Court of justice as regards evidence, pleading, etc.<sup>16</sup>

Thus, it may—(a) receive hearsay evidence, uncertified documents, dispense with formal proof of their execution; (b) not strictly follow the doctrine of *stare decisis*; (c) adopt a summary procedure.

An administrative tribunal must, nevertheless, observe the requirement of 'due process,' viz., that it must make its determination after prior notice to the party to be affected and after offering him an opportunity to be heard;<sup>17</sup> or, where prior notice is not feasible owing to practical reasons, allow the party an opportunity to test the validity of the order on appeal to superior administrative authorities or to the Courts.

Broadly speaking, the Courts will exercise a right to review administrative determinations on the following grounds:<sup>18-19</sup>

(a) to ascertain whether the administrative body has violated the requirement of due process, or any other constitutional provision; (b) to ascertain whether the law under which the administrative agency is acting, is itself constitutional; (c) to ascertain whether the administrative body has properly construed the law or regulation under which it purports to act; (d) to ascertain whether the administrative body has acted *ultra vires*, i.e., beyond its jurisdiction; (e) to ascertain whether the administrative body has exercised its powers in an arbitrary, unreasonable, malicious, discriminatory or partial manner; (f) to ascertain whether the administrative agency has made a correct finding of facts and drawn proper conclusions from them.

But where by statute, the administrative body's finding of fact or decision is made *final*<sup>20</sup> and conclusive, the Court can question it only if the administrative body acts—(i) *ultra vires*;<sup>21</sup> or (ii) in bad faith or malice.<sup>22</sup>

*Distinction between Courts and 'domestic tribunals'.*—The phrase 'domestic tribunal' has been used to refer to committees of trade unions, of members' clubs, and of professional bodies,<sup>23</sup> established by statute, when acting in a quasi-judicial capacity.<sup>24-25</sup> But there are wide differences between the principles and procedure followed by Courts and such domestic tribunals.

In a Court of justice, the accused is entitled to be tried by the evidence, legally adduced and has a right to be represented by a skilled legal advocate. A domestic tribunal, on the other hand, is in general composed of *laymen*. It has no power to administer oath, and no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence. It may act on mere hearsay and sometimes the members present or some of them are themselves both the witnesses and the Judges. Before such a tribunal, *Consel* have no right of

(16) Willoughby III, p. 1732.

(17) *Hager v. Reclamation District*, (1884) 111 U.S. 701 (709).

(18) Willoughby III, p. 1659.

(19) *Interstate Commerce Commission v. Illinois, R.R. Co.*, (1910) 215 U.S. 452.

(20) *Murray v. Hoboken Co.*, (1865) 18 How. 272; *U.S. v. In Toy*, (1905) 198 U.S. 253.

(21) *Hilton v. Merritt*, (1884) 110 U.S. 97.

(22) *Buttfield v. Stranahan*, (1904) 192 U.S. 470.

(23) Stephen's Commentaries, Vol. I, p. 280.

(24-25) *Maclean v. Workers' Union*, (1929) 1 Ch. 602.

audience and there are no effective means for testing by cross-examination the truth of the statements that may be made.<sup>1</sup>

It follows therefore, that the decision of a domestic tribunal cannot be attacked on the ground that it is against the *weight* of evidence or that the tribunal acted on preconceived views.<sup>2</sup>

The only grounds upon which the decision of a domestic tribunal may be interfered with by a Court of law, by certiorari or otherwise are—(i) that the tribunal had no jurisdiction; (ii) that it did not follow the principles of natural justice; (iii) that it did not act in good faith.<sup>2</sup>

The rules of natural justice require that there must be due enquiry, that the accused must have notice of what he is accused and have an opportunity of being heard, and the decision must be honestly arrived at.<sup>1</sup> So, however, unjust the rules or the action of the tribunal may be, the Courts cannot interfere unless the tribunal has denied the accused a chance of defence and explanation or the tribunal has acted *mala fide*.<sup>2</sup> So, where the tribunal has acted honestly and in good faith, their decision does not become null and void simply owing to the presence in the tribunal of a member who had a dislike for the plaintiff but the plaintiff has submitted to the jurisdiction of the tribunal throughout the proceedings. The test is whether the presence of prejudiced persons inject such an element of bias into the tribunal as to give rise to a reasonable suspicion that the trial was not a fair one.<sup>2</sup>

#### JURISDICTION TO ISSUE THE JUDICIAL WRITS AGAINST COURT-MARTIAL AND MILITARY TRIBUNALS.

*England*.—Courts-martial should be distinguished from military tribunals set up by the military in a state of war or under martial law.<sup>3-5</sup>

(a) *Military tribunal*.—The tribunals set up by the military *are not* judicial bodies. Thus, the ordinary Courts have no right to issue a writ of prohibition or mandamus upon a military tribunal.<sup>6</sup> “To attempt to make the proceedings administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory.”<sup>6</sup>

As regards *habeas corpus*, there is conflict between Irish decisions but the position seems to be this: The ordinary Courts have jurisdiction to determine whether a state of war did exist justifying the setting up of a military tribunal.<sup>7</sup> So, if the Court holds that a state of war did exist, there is no remedy by *habeas corpus* against a sentence passed by the military tribunal.<sup>8</sup> But *habeas corpus* would lie if the Court holds that there was no state of war at the time of setting up of the tribunal.<sup>9</sup> It would also lie in the former case, after the restoration of peace,<sup>10</sup> unless an Act of Indemnity be passed in the meanwhile.<sup>11</sup>

(b) *Court-martial*.—A Court-martial, on the other hand, is a tribunal set up under the Military Law (*e.g.*, the Army Acts in England and India for the enforcement of military law, whether in time of peace or of war. Again, while a military tribunal set up under Martial law has jurisdiction over the ordinary citizens, the jurisdiction of a Court-martial is restricted only to persons subject to military law, *i.e.*, members of the Defence forces.

(1) *Maclean v. Workers' Union*, (1929) 1 Ch. 602.

(2) *O'Reilly v. Gittens*, (1949) 54 C.W. N. 124 (P.C.).

(3-5) Thus, under our Constitution, a Court-martial may be created under Art. 33, while a military tribunal may be set up under Art. 34.

(6) *Re Clifford and O'Sullivan*, (1921) 2 A.C. 262.

(7) *R. v. Strickland*, (1921) 2 Ir. R. 317.

(8) *Ex parte Erskine Childers*, (1923) Ir. R. 5.

(9) *Wolf Tone's Case*, (1798) 27 St. Tr. 613.

(10) *Higgins v. Willis*, (1921) 2 Ir. R. 386.

(11) *Tilonko v. A. G. for Natal*, (1907) A.C. 93.

There is provision for a *regular trial* before a Court-martial, though the procedure does not, in all respects, compare with the procedure followed by an ordinary Criminal Court. The sentences passed by Courts-martial become matters of record and can be enforced by the military authorities; while punishments inflicted by military tribunals under martial law have no legal sanction and that is why ■■■ Act of Indemnity is required to save the tribunals themselves and those who enforce those awards, from illegality (see p. 194, under Art. 34, *post*).

Courts-martial have their jurisdiction limited by the statute under which they are created. If they *exceed* that jurisdiction, *e.g.*, by applying military law to persons not subject to that law, or by exceeding the powers conferred by the statute, the Civil Courts may interfere with their action by the ordinary writs of habeas corpus, certiorari and the like.<sup>12</sup>

Similarly mandamus will issue to prevent Courts-martial from exceeding their jurisdiction,<sup>13</sup> but not to interfere with their proper jurisdiction, *e.g.*, in issues of military discipline.<sup>14</sup>

*Certiorari* will lie in respect of proceedings before a Court-martial only when it exceeds a jurisdiction, *e.g.*, by trying a person who is not a soldier or is not subject to military law,<sup>15</sup> or by determining matters outside the scope of military law, such as by affecting the 'civil' rights of a soldier. Where the Court-martial does not exceed its jurisdiction, the High Court cannot interfere on the ground that the Court-martial had not been properly constituted or had followed a wrong procedure,—these being matters of military law and procedure.<sup>16</sup>

*U.S.A.*—Similarly in the United States, it has been held that the Courts-martial being tribunals of special and limited jurisdiction, their judgments are always liable to collateral attack on ground of want or excess of jurisdiction.<sup>17</sup> But judgments which are within jurisdiction cannot be reviewed or set aside by civil tribunals.<sup>18</sup> A writ of *habeas corpus* is available to test the jurisdiction of a court-martial.<sup>19</sup> Thus, no usage of war could sanction a military trial for any offence whatever of a citizen in civil life, in nowise connected with the military service, at ■ place where the civil courts were in full operation.<sup>20</sup>

*India.*—As will appear from under Art. 33, *post*, Courts-martial may be established under the Indian Army, Navy and Air Force Acts. Courts-martial constituted under these Acts are special tribunals, and the proceedings before them cannot be said to be 'criminal proceedings' in the strict sense even when they try offences committed under the ordinary law.<sup>21</sup> But *habeas corpus* would lie against their judgments or orders when they are without jurisdiction or against all principles of natural justice.<sup>21-22</sup> Hence, the High Court cannot interfere, by *habeas corpus*, with a trial by a Court-martial on the ground of *insufficiency* of evidence, but may interfere if there has been no hearing at all or where the rules of natural justice have not been followed.<sup>23</sup>

(12) *Wolfe Tone's Case*, (1798) 27 St. Tr. 614. 296 (304).

(13) *Heddon v. Evans*, (1919) 35 T.L.R. 642.

(14) *Sutton v. Johnstone*, (1786) 1 T.R. 493; *Dawkins v. Paulet*, (1869) 5 Q.B. 94; *Dawkins v. Rokeby*, (1875) 7 H.L. 744.

(15) *R. v. Mansergh*, (1861) 1 B. & S. 400.

(16) *R. v. Secy. of State*, (1949) 1 All E. R. 242 (K.B.).

(17) *Givens v. Zerbst*, (1921) 255 U.S. 11 (19).

(18) *U. S. v. Pridgeon*, (1894) 153 U.S. 48; *Reeves v. Ainsworth*, (1911) 219 U.S.

(19) *Ex parte Merryman*, (1861) Fed. Cas. 9487.

(20) *Ex parte Milligan*, (1866) 4 Wall. 2.

(21) *Meads v. K. Emp.*, (1944) 49 C.W.N. (F.R.) 23, affirmed by *Meads v. King*, (1948) 52 C.W.N. 834 (P.C.).

(22) *Mohyuddin v. K. E.*, (1946) 81 C.L.J. (F.C.) 263.

(23) *Meads v. Emperor*, A.I.R. 1946 Lah. 112 (113) (This point was not touched on appeal, either by the Federal Court or by the Privy Council; see 1944 F.L.J. 265; L.R. 75 I.A. 185).



*When Certiorari is taken away by statute.*—*Certiorari* may be taken away by a statute only by express negative words to that effect,<sup>23-a</sup> but not by such words as that the matter shall be 'finally determined' in the inferior Court,<sup>24</sup> or that 'no other Court shall intermeddle'.<sup>25</sup> But it may be taken away by incorporating the provisions of a previous statute in which *certiorari* was taken away.<sup>1</sup> Clauses by which *certiorari* is taken away are strictly construed<sup>2</sup> and the bar applies only if the procedure laid down by the statute is followed and the conditions complied with.<sup>3</sup> A writ of *certiorari* cannot be barred by words such as 'final', 'without appeal' and the like, in an any enactment. "*Certiorari* can only be taken away by express negative words."<sup>4</sup>

But even where *certiorari* is taken away by statute, it will lie, even on the application of the defendant, where the inferior Court has acted *without or in excess of jurisdiction*, for then the Court would not be acting within the terms of that statute.<sup>5</sup> Similarly, will *certiorari* lie notwithstanding statutory bar, where the proceedings of the inferior Court have been vitiated by *fraud* or *malice*,<sup>6</sup> or where the order is bad on its face.<sup>7-8</sup> But where the inferior tribunal has jurisdiction to decide the matter, *certiorari* will not lie on grounds of appeal, simply on the ground that there is no right of appeal from the decision complained of.<sup>7</sup>

*Costs.*—In *England*, costs are not, generally, awarded in a successful *certiorari* proceeding against the tribunal, in the absence of misconduct or perverseness on the part of the tribunal. But where the tribunal contests the case by a counsel, the applicant should get costs.<sup>9-10</sup>

In *India*, Rule 10 of Order 35 of our Supreme Court Rules, 1950, leaves it entirely to the discretion of the Court.<sup>11</sup>

### QUO WARRANTO

(A) *In England: Quo Warranto, nature of.*—This writ<sup>12</sup> was issued to persons "who claimed or usurped any office, franchise, liberty or privilege belonging to the Crown, to enquire by what authority they maintained their claim", in order that the right to the office or franchise might be determined".<sup>13</sup>

It lay for usurping any "office of a public nature, and a *substantive* office, not merely the function or employment of a deputy or servant at the will and pleasure of others."<sup>14</sup> Membership of the Privy Council has been held to be an office for this purpose.<sup>15</sup> The writ is issued for the mere purpose of trying a claim to an office. Thus, even if a wrongful claim is made to an office which

(23-a) *R. v. Jukes*, (1800) 8 T. R. 542.

(24) *R. v. Jukes*, (1800) 8 T. R. 542.

(25) *R. v. Morley*, (1760) 2 Burr. 1040.

(1) *R. v. Yorkshire Justices*, (1834) 3 N. & M. 802.

(2) Halsbury, 2nd Ed., Vol. IX.

(3) *R. v. Minister of Health*, (1946) 2 A. E. R. 189 (K. B.).

(4) Halsbury, 2nd Ed., Vol. 9, p. 961.

(5) *Colonial Bank of Australasia v. Wilson*, (1874) L. R. 5 P. C. 417.

(6) *R. v. Gillyard*, (1848) 12 Q. B. 527.

(7) *R. v. Rent Tribunal*, (1947) 1 A. E. R. 449 (K. B.).

(8) See also *Hilton v. Meritt*, (1884) 110 U. S. 97; *Buttfield v. Stranahan*, (1904) 192 U. S. 470; *Inter-State Commerce Commission v. Union*, (1910) 215 U. S. 452.

(9-10) *R. v. Kingston-upon-Hull Rent Tribunal*, (1949) 1 All. E. R. 260.

(11) Vide S. C. J., (1950) Supplement, p. 20.

(12) In *England*, the writ of quo warranto or information in the nature of quo warranto which in course of time took the place of the writ, has been superseded by the Administration of Justice (Miscellaneous Provisions) Act, 1938, which has empowered the High Court to grant an injunction to restrain a person from acting in an office to which he was entitled, and to declare the office to be vacant. The injunction would however, issue only in circumstances under which the writ or information in the nature of quo warranto would have issued.

(13) Selway, quoted in Chalmers & Hood Phillips, p. 292; Halsbury, Hailsham Ed., Vol. IX, p. 804.

(14) *Darley v. The Queen*, (1845) 12 Cl. & F. 520.

(15) *King v. Speyer*, (1916) 1 K. B. 595 (858).

does not exist or a new office is set up, an information in the nature of quo warranto may lie.<sup>16</sup>

*Conditions for the issue of Quo Warranto.*—An information in the nature of Quo Warranto will issue in respect of an office, only if the following conditions are satisfied:

(i) The office must have been created by charter from the Crown or by statute. Thus, it will not lie against an officer of a private corporation.<sup>17</sup>

(ii) The duties of the office must be of a public nature.<sup>18</sup> Thus, it will not lie in respect of offices of a private charitable foundation or of a private association.<sup>19</sup>

(iii) The tenure of the office must be 'permanent' in the sense of not being terminable at pleasure.<sup>20</sup> For, where the officer holds his office at the mere pleasure of another, he may be legally dismissed again immediately after the Court reinstates him on the ground that he was illegally dismissed and the Court's action would thus be futile.<sup>21</sup> On the other hand, if the object of the information is to remove the holder of the office, that can be legally done by the employer without intervention of the Court.<sup>22</sup>

(iv) The person proceeded against must have been in actual possession and user of the office in question.<sup>23</sup> There must be an unconditional acceptance of the office and steps necessary to constitute admission to the office must be taken;<sup>24</sup> the taking of steps *preliminary* to admission will not be sufficient.<sup>25</sup>

*On the other hand,*—(a) Quo Warranto will not lie for the purpose of trying the right to an office which is no longer in existence.<sup>26</sup> But resignation of the office after a rule *nisi* has been issued will be no bar to the rule being made absolute.<sup>1</sup>

(b) Statutory remedies displace Quo Warranto as a remedy in cases *within* their scope, but the remedy remains available in all cases outside that category.<sup>2</sup>

(c) When the title to a *corporate* office is in question, it is absolutely in the discretion of the Court to grant or refuse the information. It will not be granted as a matter of course, only if a reasonable doubt as to the legal validity of the title is shown.<sup>3</sup>

*Who may apply for Quo Warranto.*—(a) A private person cannot apply for information in the nature of quo warranto calling upon a corporation or persons claiming to be a corporation, to show cause by what authority they claim to act as such. Such a suit can only be filed by the Attorney-General, on behalf of the Crown.<sup>4</sup> But a private person can bring such an application if the object is to have information as to the individual titles of the members of a corporation, i.e., in what authority they claim to exercise their individual functions.<sup>4</sup>

(b) The applicant must have some interest in the election or office in question. The information will not be issued at the instance of a mere man of straw.<sup>5</sup> But every inhabitant of a municipal corporation is entitled to question the election of the corporation even though he is not qualified to vote.<sup>6</sup>

(16) *Rex v. Lloyd*, (1860) 2 L.T. L.T. 459.  
(N.S.) 232.

(17) Halsbury, Vol. IX.

(18) *R. v. St. Martin's*, (1851) 17 Q.B. 149.

(19) *R. v. Monsley*, (1846) 11 Q.B. 946.

(20) *Darley v. R.*, (1846) 12 Cl. & Fin. 520 (H.L.).

(21) *Ex parte Richards*, (1878) 3 Q.B. D. 368.

(22) *Bradley v. Sylvester*, (1871) 25

(23) *R. v. Whitwell*, (1792) 5 T.R. 85.

(24) *R. v. Tate*, (1803) 4 East. 337.

(25) *R. v. Saunders*, (1802) 3 East. 119.

[*Contra R. v. Cassel*, (1916) 1 K.B. 595].

(1) *R. v. Warlow*, (1813) 2 M. & S. 75.

(2) *R. v. Beer*, (1903) 2 K.B. 693.

(3) *R. v. Wardroper*, (1873) 8 Q.B. 210.

(4) Halsbury, Vol. IX.

(5) *R. v. Briggs*, (1864) 11 L.T. 372.

(6) *R. v. Hodge*, (1819) 2 B. & A. 314.

(c) But the right to impeach an election would be lost by acquiescence, with knowledge of the circumstances which render it invalid.<sup>7</sup> A person, who as an official helped the defendant to exercise the office,<sup>8</sup> or as legal adviser advised him, that the election was good,<sup>9</sup> or was a party to an agreement not to enforce the bye-law upon which he relies,<sup>10</sup> is not entitled to impeach the election. But the right is not lost merely by reason of attending meetings at which the defendant functioned in his impeached capacity, provided it is not shown that the applicant concurred in the defendant's election.<sup>11</sup>

(B) *In India*.—There was no statutory provision analogous to this remedy under the existing law. The prerogative writ, too, does not appear to have been used except in one reported case,<sup>12</sup> to prevent a person who had not been duly elected, from exercising the functions of a Commissioner under the Calcutta Municipal Act. In a recent case,<sup>13</sup> an attempt to use the writ failed because the office was not situated within the Presidency town of Calcutta. In this case,<sup>13</sup> the Privy Council observed that information in the nature of *quo warranto* is a civil proceeding, so that a new trial may be ordered.

*Supreme Court Procedure in Mandamus, Prohibition, Certiorari, Quo Warranto*.—Order 35, Rr. 6-10 of the Supreme Court Rules, 1950,<sup>14</sup> provide:—

"6. An application for a direction or order or writ in the nature of *mandamus*, prohibition, *certiorari quo warranto* shall be filed in the Registry and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by an affidavit verifying the facts relied on, and at least six copies of the said statement and affidavit shall be lodged in the Registry of the Court. The application shall be made by notice of motion.

7. Such application shall be heard by a Division Court, except in vacation, when it may be heard by a single Judge. Unless the Court otherwise directs, there shall be at least eight clear days between the service of the notice of motion and the day named therein for the hearing of the motion.

8. Copies of the said statement shall be served with the notice of motion and every party to the proceedings shall supply to any other party, on demand and on payment of the proper charges, copies of the said affidavits.

9. The notice shall be served on all persons directly affected, and on such other persons as the Court may direct:

Provided that on the hearing of any such motion, any person who desires to be heard in opposition to the motion and appears to the Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice of motion and shall be liable to costs in the discretion of the Court if the order shall be made.

10. The Court may in such proceedings impose such terms as to costs and as to the giving of security as it thinks fit."

The brevity of the above rules shows that on points of merit, the Supreme Court will follow the principles established by English decisions.

*Analogous Provisions*.—As to whether the writs specified in Art. 32 (2) may be issued directly against the Government of India or of a State, see under the 2nd Proviso to Art. 361, *post*.

#### CLAUSE (3)

*Scope of Cl. (3): Jurisdiction of other Courts to issue these writs*.—While the Supreme Court as well as the High Courts [Art. 226 (1)] are vested by the Constitution itself with power to issue these writs for enforcing the Fundamental Rights, the present clause authorises Parliament to empower inferior Courts to issue such writs within their respective local jurisdictions.

(7) *R. v. Slythe*, (1827) 9 D. & R. 226.  
 (8) *R. v. Greene*, (1842) 2 G. & D. 24.  
 (9) *R. v. Payne*, (1818) 2 Chit. 369.  
 (10) *R. v. Mortlock*, (1789) 3 T.R. 300.  
 (11) *R. v. Benney*, (1831) 1 B. & A. 684.  
 (12) *In re Corckhill*, (1895) 22 Cal. 717.  
 (13) *Hamid v. Banwarilal*, (1947) 51 C.W.N. 716 (P.C.) reversing (1944) 48 C.W.N. 766.  
 (14) Vide *S.C.J.*, (1950) Supplement, p. 20.



## CLAUSE (4)

## OTHER CONSTITUTIONS

*U.S.A.*—There is no provision for the suspension of any of the writs other than that of *habeas corpus*.

Art. I, Sec. 9 (2) of the Constitution says—

"The privilege of the writ of *Habeas Corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

It has been held that the power of suspension given above cannot be exercised by the President without express authorization of Congress.<sup>15-16</sup> "Congress is of necessity to judge whether the public safety does or does not require it."<sup>15-16</sup> But Congress cannot authorise a suspension of the writ outside the theatre of actual war or invasion, and it is for the Courts to say whether such a condition prevails at any particular place.<sup>17</sup>

*Eire.*—Art. 28 (3) 3<sup>d</sup> of the Constitution of 1937 says—

"Nothing in this constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in pursuance of any such law."

"In this sub-section, 'Time of war' includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall be resolved that arising out of such armed conflict a National emergency exists affecting the vital interests of the State." (First Amendment of the Constitution Act, 1939).

"'Time of war' shall also include such after the termination of the said armed conflict as may elapse until each of the Houses of the Oireachtas shall have resolved that the said National emergency occasioned by such armed conflict has ceased to exist." (Second Amendment of the Constitution Act, 1941).

*German Reich.*—Art. 48 of the Weimar Constitution of 1919 provided—

"Where public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take the measures necessary for their restoration, intervening in case of need with the help of armed forces. For this purpose he is permitted, for the time being, to abrogate either wholly or partially the fundamental rights laid down in Arts. 114, 115, 117, 118, 123, 124 and 153.

The President of the Reich must, without delay, inform the Reichstag of any measures taken in accordance with paragraph 1 or 2 of this Article. Such measures shall be abrogated upon the demand of the Reichstag.

Where there is danger in delay, the State Government may take provisional measures of the kind indicated in paragraph 2, for its own territory. Such measures shall be abrogated upon the demand of the President of the Reich or the Reichstag.

Details are to be determined by a law of the Reich".

*Burma.*—Cl. (3) of Sec. 25 of the Constitution of Burma says—

"The right to enforce these remedies shall not be suspended unless, in times of war, invasion, rebellion, insurrection or grave emergency, the public safety may so require."

Also note Art. 27.—

"Except in times of invasion, rebellion, insurrection or grave emergency, no citizen shall be denied redress by due process of law for any actionable wrong done to or suffered by him."

This Article thus imports the American doctrine of 'due process' [see pp. 112, *ante*] only as regards 'actionable wrongs' and also excepts invasion, rebellion, insurrection and grave emergency from that 'due process'.

(15-16) Ex parte *Merryman*, (1861) Taney's Rep. 246. (17) Ex parte *Milligan*, (1866) 4 Wall. 2.

## INDIA

*Scope of Cl. (4): Suspension of Fundamental Rights.*—This clause authorises the suspension of the fundamental rights in times of emergency, in accordance with the provisions of this Constitution,—which means,—according to Art. 359, *post*.

Fundamental rights are guaranteed by the State for the development of the individual. In a case of emergency, when the very existence of the State is jeopardised, the State cannot safeguard rights of the individual to the detriment of its own life. The State's right of survival thus takes precedence over individual rights in the interest of the individual himself.

The mode of suspension provided by our Constitution is an order of the President, subject to legislative approval, *see further under Art. 359, post*.

**33.** Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Power to Parliament to modify the rights conferred by this Part in their application to Forces.

## OTHER CONSTITUTIONS

*England.*—In England, a member of the armed forces stands under ■ dual liability. On the one hand, he is subject to all the special duties and discipline of the army; on the other hand, he is subject to all the duties and liabilities of ■ ordinary citizen. From this results an apparently paradoxical proposition. A soldier is bound to obey any lawful order which he receives from his military superior, but obedience to superior orders is not of itself a defence to ■ charge of crime, committed in obedience to such orders. A soldier cannot, any more than a civilian, avoid responsibility for breach of the law pleading that he broke the law in *bona fide* obedience to the orders of a superior. So, "*he may be liable to be shot by a court-martial if he disobeys an order, and to be hanged up by ■ judge and a jury if he obeys it.*" The true rule laid down by the Courts is that a soldier is bound to obey, and will be protected if he obeys, an order of his superior which is *not manifestly illegal*, but he cannot escape liability to the ordinary law if he commits a crime by acting in obedience to an order for which the superior might be reasonably supposed not to have any good ground.<sup>18</sup>

On the other hand, there is a Code of special law, called military law, to enforce discipline amongst soldiers. This is embodied in the Army Act, 1881, the King's Regulations and Army Orders. It is a Code to which *soldiers alone* are subject, and it constitutes a number of acts "military offences". The military offences mainly include offences committed by one soldier against another, but they also include certain offences which are ordinary crimes. In respect of military offences a *soldier* is subject to the jurisdiction of the Courts-martial, but that does not relieve him of his duties as an ordinary citizen, and *he may be tried in the ordinary Courts as well for breaches of the ordinary law*.

But over military offences, the jurisdiction of Courts-martial is exclusive. Thus, a superior officer cannot be sued in the ordinary Courts for wrongly suspending his subordinate for a military offence and bringing him to trial before a

(18) *Keighly v. Bell*, (1866) 4 F. & F. 763.

Court-martial by which he is acquitted.<sup>19</sup> But if the officer punishes a subordinate for an act wholly beyond military control, he would be liable before the ordinary Court.<sup>20</sup>

*U.S.A.*—The position in the United States is similar to that in England. Members of military forces, when in the enemy territory, are amenable only to military tribunals;<sup>21</sup> but when within the United States territory, they are punishable not only by courts-martial under the articles of war, but also under the criminal laws of the State in which the offence may be committed, and for this purpose, a soldier shall be surrendered by the military authorities to the civil authorities, except in time of war or when he is actually awaiting a trial by the court-martial or is undergoing a sentence passed by it.<sup>22</sup>

Courts-martial are not parts of the judicial system of the United States as provided for by Art. III of the Constitution and so trial of the military forces by courts-martial is exempted from the rules of indictment and jury trial in criminal cases.<sup>23</sup>

*Eire.*—Art. 38 (4) and (6) of the Constitution of 1937 are as follows—

“(4) 1. Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.

2. A member of the defence forces not on active service shall not be tried by any court-martial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any court-martial or other military tribunal under any law for the enforcement of military discipline.

(6) The provisions of Arts. 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section (3) or section (4) of this article.”

*Burma.*—Art. 28 of the Burmese Constitution is to the same effect as Art. 33 of the Constitution of India.

## INDIA

*Scope of Art. 33: Power of Parliament with respect to Armed Forces.*—This Article provides an exception to the foregoing provisions of Part III. It says that the provisions relating to Fundamental Rights, which are otherwise applicable to all persons, may be restricted or abrogated by Parliament in their application as to members of the armed forces, in view of their special position, and the need of discipline amongst them.

The special feature of the present provision of our Constitution is that it applies not only to the Armed Forces but also extends to the ordinary police who are charged with the maintenance of ‘public order’ [*Vide* Entries 1 and 2 of List II of Sch. VII.]

*Existing law.*—The Indian Army Act<sup>23-a</sup> (VIII of 1911); the Indian Air Force Act (XIV of 1932); and the Indian Navy (Discipline) Act (XXXIV of 1934), respectively deal with the control and discipline of the members of Indian Army, Air and Naval Forces. As in England, these Acts provide that the members of

(19) *Johnston v. Sutton*, (1786) 1 T. R. 510 (548).

(20) *Warden v. Bailey*, (1811) 4 Taunt. 67 (88).

(21) *Coleman v. Tennessee*, (1878) 97 U. S. 509.

(22) *Kahn v. Anderson*, (1921) 255 U.S. 1 (9).

(23) *Dynes v. Hoover*, (1857) 11 How. 65; *Kahn v. Anderson*, (1921) 255 U.S. 1.

(23-a) See also Territorial Army Act (LVI of 1948).



these Forces are triable exclusively by Court-martial in respect of purely 'military offences', while they are triable both by the ordinary Courts as well as Courts-martial in respect of offences under the ordinary law.<sup>24</sup>

*Legislative Power.*—Read Entry 2 of List I, as regards Parliament's exclusive power to legislate with respect to 'Naval, military and air forces; any other armed forces of the Union'.

**34.** Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

Restriction on rights conferred by this Part while martial law is in force in any area.

#### OTHER CONSTITUTIONS

*England.*—Though the decisions of the Privy Council have been otherwise as regards the colonies and Ireland,<sup>25</sup> so far as Great Britain herself is concerned, the following propositions are now established: (a) Martial law, in the proper sense of the term, in which it means the suspension of ordinary law and the temporary government of the country or parts of it by military tribunals, is unknown to the law of England.<sup>1</sup> In England, martial law means the common law right of the Crown as well as every citizen to maintain order at any cost. If the right amount of force is used to repel any violent resistance to the law or insurrection, there will be no redress at law against the use of such force. Martial law in this sense, need not be proclaimed, and officers and soldiers have no special privileges or responsibilities in the matter,<sup>2</sup> and if excessive or unnecessary measures are adopted, the person responsible for such acts shall be liable before the ordinary Courts.<sup>3</sup> (b) Martial law in the Continental sense cannot be proclaimed by the Executive by virtue of royal prerogative at least in time of peace.<sup>3</sup> (c) Some authorities maintain that in strict theory, the Crown has a prerogative to declare martial law in time of war, but no such power has been exercised in England since the time of Charles I, and it may be said to be obsolete in view of the measure adopted during the severest crisis of World War II. There was no suggestion of proclaiming martial law by prerogative nor of trial of the civilians by military tribunals but instead, Parliament passed the Emergency Powers Act, 1940, authorising the creation of special war zone Courts to act in place of the ordinary Courts in the event of actual invasion. In fact, however, the setting up of these special Courts was not necessary and the ordinary Courts continued to function throughout the gravest days of the war.

Hence, the supersession of the ordinary Courts can take place in England only by legislation, and in all cases where it has been declared by statute, *e.g.*, in

(24) Cf. *Meads v. K. Emp.*, (1944) 49 C.W.N. (F.R.) 23, affirmed by A.I.R. 1948 P.C. 156.

(25) *Ex parte Marais*, (1902) A.C. 109; Chalmers and Hood Phillips, pp. 501-504; Keith, pp. 440-2; Stephen's Commentaries, Vol. I, p. 568.

(1) Dicey, *Law of the Constitution*, 9th Ed., p. 293.

(2) Rep. of the Featherstone Commission, (1893) C. 7234; Dicey, pp. 621-624; Select Committee on Employment of Military, (1908) H.C. 236.

(3) Chalmers and Hood Phillips, p. 502.

Ireland, where it has been followed by an Act of Indemnity.<sup>4</sup> Acts of Indemnity are passed by Parliament after the cessation of a war for the protection of the military and others in respect of unlawful acts done during the war, whether under a declaration of martial law or otherwise. In the absence of an Act of Indemnity, the acts of the military during war or rebellion can be challenged in the ordinary Courts after the cessation of the hostilities<sup>5</sup> and it is for the ordinary Courts to determine whether a state of war existed or not at the time of the act in question.<sup>6</sup>

*U. S. A.*—The President, as the Commander-in-Chief of the armed forces, has the power to employ them to repel domestic violence in the States, on the application of the State Legislature or Executive [Art. 4 (4)], and also without such application if the resistance is against the execution of federal laws,<sup>7</sup> and to declare martial law for that purpose.<sup>7-a</sup>

When honestly and reasonably coping with an insurrection or riot, a member of the military forces is not liable for his acts,<sup>8</sup> but when the exigency is over, he would be liable before the ordinary Courts for acts done beyond the scope of *reasonable* necessity.<sup>9</sup> There is no power of the Legislature, under the American Constitution, to pass an Act of Indemnity.

The President is also competent to appoint military commissions or military Courts for the trial of civilians who had committed acts of a military character in regions under martial law, but the President has no power to establish a military Court for the trial of civilians in areas remote for the actual theatre of war or insurrection where the civil courts are open.<sup>10</sup> Martial law can never exist where the Courts are open and it is for the Courts to determine whether there exists such a state of war or not.<sup>11</sup> Even Congress cannot proclaim martial law in the absence of *actual* invasion.<sup>12</sup>

"Martial law cannot arise from a *threatened* invasion. The necessity must be *actual* and present; the invasion real, such as *effectually* closes the Courts and deposes the civil administration."<sup>10</sup>

*France.*—In France and other Continental countries, Martial law means the suspension of the ordinary law and the substitution of government by the armed forces. The rule of the military is established by the declaration of a 'state of seige' by the Legislature, or, if the Legislature is not in session, by the President subject to approval by the Legislature. The powers of the military and the duration of their authority are all determined by the legislation.<sup>12</sup>

#### INDIA

*Scope of Art. 34.*—This article refers to martial law and Act of Indemnity. There is no specific legislative entry relating to martial law. But the exception in Entry 1 of List II (■ of naval, military, air forces or any other armed forces in aid of the civil power), together with the residuary entry 97 of List I shows that the power to declare martial law or to use the armed forces to re-establish civil order is a legislative power and that it belongs exclusively to Parliament. Art. 34 further empowers Parliament to pass a law of indemnity, legalising acts done during the operation of martial law, which would otherwise have been wrongs under the ordinary law.

(4) Keith, Constitutional Law, pp. 440-1.

(5) *Higgins v. Willis*, (1921) 2 Ir. R. 386.

(6) *King v. Strickland*, (1921) 2 Ir. R. 317.

(7) *In re Debs*, (1895) 158 U.S. 564.

[Also see my article on the President of India in (1949) F.L.J. 144 (Jour.).]

(7-a) Kelly and Harbison, American Constitution, pp. 443-447.

(8) *Moyer v. Peabody*, (1909) 212 U.S. 78.

(9) Burdick, Law of the American Constitution, p. 261.

(10) Cf. Art. 70 of the Constitution of the Irish Free State, 1922.

(11) *Ex parte Milligan*, (1866) 4 Wall. 2.

(12) Cf. Chalmers ■ Hood Phillips, p. 501.

**Martial Law.**—In international law, Martial law means the law administered by a Military Commander in occupied enemy territory in time of war. The present article does not mean that, for it refers to 'maintenance or restoration of order in any area *within* the territory of India'. It means that Parliament may by law impose martial law in the Continental sense in case of grave insurrection within the territory and the authority and powers of the military under such law will be as laid down in that law. The words 'validating sentence' etc., show that military tribunals may be created by such legislation. It has been held in England that a military tribunal is not a Court of law and that the ordinary Courts cannot interfere with them by prohibition.<sup>13</sup> But after the emergency is over, there is nothing to prevent the Courts to question their decisions as well as the acts of the military authorities, unless an Act of Indemnity is passed. It has also been stated (*see* p. 185, *ante*) that not being Courts of justice, the sentences passed by military tribunals have no legal sanction, and, therefore, unless an Act of Indemnity be passed, validating them, the tribunals themselves as well as the officers executing their sentences would be liable to the ordinary law, as soon as martial law was over. Hence, this article empowers Parliament to pass an Act of Indemnity.

**Act of Indemnity.**—An Act of Indemnity is, however, a contingency upon which the military cannot rely too much in doing wanton acts. For, usually Acts of Indemnity protect only *bona fide* acts,<sup>14</sup> e.g., the (English) Act of Indemnity, 1920, which followed World War I.<sup>15</sup> It may be expected that our Parliament, too, will follow this practice. The absence of the expression 'purported to be done' in the present article should be noted. Like the English Acts, however, Art. 34 provides for the protection not only of military officers but also civil officers for any act done, during the continuance of martial law, 'in connection with the maintenance or restoration of order'.

Legislation to give effect  
to the provisions of this  
Part.

### 35. Notwithstanding anything in this Constitution,—

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part; and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

(13) *In re Clifford & O'Sullivan*, (1921) A.C. 570.

(14) *Phillips v. Eyre*, (1869) 4 Q.B. 225  
(243); *Wright v. Fitzgerald*, (1798) 27 St.

Tr. 765.

(15) *Wade & Phillips*, p. 357; *Stephen's Commentaries*, Vol. I, p. 572.



*Explanation.*—In this article, the expression “law in force” has the same meaning as in Article 372.

#### OTHER CONSTITUTIONS

*Burma.*—Art. 39 of the Burmese Constitution says—

“The Parliament shall make laws to give effect to those provisions of this Chapter which require such legislation and to prescribe punishments for those acts which are declared to be offences in this Chapter and are not already punishable.”

#### INDIA

*Scope of Cl. (a): Legislation by Parliament to give effect to Fundamental Rights.*—Some of the provisions relating to Fundamental Rights in Part III authorise legislation to give effect to such provisions and also to prescribe punishment for violation of those provisions which are declared offences by the Constitution. This power of legislation is, by the present clause, given to the Union Parliament exclusively, for, otherwise, the laws relating to fundamental rights would not have been uniform throughout the country. The power is specifically denied to the State Legislatures.

*Sub-cl. (i).*—The provisions of this Part which require legislation by Parliament are:

Art. 16 (3): Prescribing residence within the State to be a condition for employment under ■ State.

Art. 32 (3): Vesting of inferior Courts with powers to issue writs for the enforcement of fundamental rights.

Art. 33: Power of Parliament to modify application of fundamental rights as regards Armed Forces and the Police.

Art. 34: Act of indemnity after application of martial law.

*Sub-cl. (ii).*—The provisions of this Part which declare offences are:

Art. 17: The enforcement of any disability arising out of untouchability is an offence.

Art. 23 (1): Traffic in human beings, imposition of begar or similar form of forced labour, are offences punishable in accordance with law.

*Scope of Cl. (b): Validity of ‘law in force’.*—This clause simply validates any law in force at the date of commencement of the Constitution which may relate to any of the matters referred to in Cl. (a) of the present article, *until* Parliament enters upon the field to legislate.

### PART IV

#### DIRECTIVE PRINCIPLES ■ STATE POLICY

**36.** In this Part, unless the context otherwise requires, “the State” has the same meaning ■ in Part III.

*Definition.*

#### INDIA

*Scope of Art. 36.*—This article says that the definition of the ‘State’ in Art. 12 shall apply throughout Part IV, wherever that word is used. This means that not only the Union and State authorities, but also local authorities shall have a moral obligation to follow the directives; e.g., the promotion of cottage industries, prohibition of consumption of intoxicants.

**37.** The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Application of the principles contained in this Part.

#### OTHER CONSTITUTIONS

*Eire.*—Art. 45 of the Constitution of Eire, 1937, says—

“The principles of social policy set forth in this article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this Constitution.”

*Burma.*—Art. 32 of the Constitution of Burma, 1948—

“The principles set forth in this Chapter are intended for the general guidance of the State. The application of these principles in legislation and administration shall be the care of the State but shall not be enforceable in any court of law.”

#### INDIA

**UTILITY OF THE DIRECTIVES.**—The Directives lay down the lines on which the State of India should work under this Constitution. Their contents may be divided under several groups: (i) Certain ideals, particularly economic, which the framers of the Constitution wish that the State should strive for. (ii) Certain directions to the future Legislature and the future Executive to show in what manner they should exercise their legislative and executive powers. (iii) Certain rights of the citizens which shall not be enforceable by the Courts like the ‘Fundamental Rights’ but which the State shall nevertheless aim at securing, by regulation of its legislative and administrative policy.

Though these Directives are not cognisable by the Courts and if the Government of the day fails to carry out these objects no Court can make the Government ensure them, yet these principles have been declared to be “*fundamental* in the governance of the country.” And if any Government ignores them, they will “certainly have to answer for them before the *electorate* at the election time.” The idea of incorporating in the Constitution ‘non-justiciable Directives’ is taken from the Constitution of Eire, 1937 (a division of fundamental rights into justiciable and non-justiciable categories had also been recommended by the Sapru Committee).

Though unenforceable in the Courts, it has been suggested that the Courts, in deciding cases relating to the subject-matter of the declarations, are bound to take cognisance of the general *tendency* of these declarations, even while legislative effect has not yet been given to them.<sup>16</sup> Again, if any Bill is brought in the Legislature which is in direct contravention of any of these Directives, the President or the Governor may refuse his assent to such Bill on that ground, though the Courts may not declare the Act void, if it is passed.

But, when all is said, a detailed treatment of the Directives would be out of place in a juridical Commentary inasmuch as they are non-justiciable. No Court would be entitled to declare any legislation as invalid on the ground that it does not conform to the *spirit* of any of the directive principles. Nor will the Court be competent to compel the Government to carry out any directive within the time limited by the Constitution, *e.g.*, the provision for free and compulsory primary education, within the period of 10 years as required by Art. 45. So viewed, the Directives are in the nature of a moral homily<sup>17</sup> or “a manifesto of aims and aspirations”.<sup>17-a</sup>

(16) Kohn, Constitution of the Irish Free State, 1932, p. 110.

(17) Dr. Rowlatt in the Dail Eireann, quoted in O’Sullivan’s Irish Free State and

its Senate.

(17-a) Prof. Wheare, *vide* C. W. N. liv.

**38.** The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may ■ social order in which justice, social, economic and political, shall inform all the institutions of the national life.

State to secure ■ social order for the promotion of welfare of the people.

## OTHER CONSTITUTIONS.

*Eire.*—Cl. (1) of Art. 45 of the Constitution of Eire, 1937—

“The State shall strive to promote the welfare of the whole people by securing and protecting ■ effectively as it may ■ social order in which justice and charity shall inform all the institutions of the national life.”

Certain principles of policy to be followed by the State.

**39.** The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to ■ adequate means of livelihood ;

(b) that the ownership and control of the material resources of the community are so distributed ■ best to subserve the common good ;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;

(d) that there is equal pay for equal work for both men and women ;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

## OTHER CONSTITUTIONS

*Eire.*—Cls. (2)-(4) of Art. 45 of the Constitution of Eire, 1937—

“(2) The State shall, in particular, direct its policy towards securing—

(i) that the citizens (all of whom, men and women equally, have the right to ■ adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs; (ii) that the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good; (iii) that, especially, the operation of free competition shall not be allowed so to develop as to result ■ the concentration of the ownership or control of essential commodities in a few individuals to the ■ detriment; . . . . .”

“(3) (i) The State shall favour and, where necessary, supplement private initiative in industry and commerce. (ii) The State shall endeavour to secure that private enterprise shall be so conducted ■ to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.”

“(4) (ii) The State shall endeavour to ensure that the strength and health of workers, men ■ women, and the tender age of children shall not be abused and that citizens shall ■ forced by economic necessity to enter avocations unsuited to their sex, age or strength.”

*Burma.*—Art. 37 (1) of the Constitution of Burma, 1948—

“The State shall ■ that the strength ■ and health of workers and the tender age of children shall not be abused and that they shall not be forced by economic necessity to take up occupations unsuited to their sex, age and strength.”



**U.S.S.R.**—Art. 122 of the Soviet Constitution, 1936, provides—

“Women in the U.S.S.R. are accorded equal rights with men in all spheres of economic, state, cultural, social and political life. The possibility of exercising these rights is ensured to women by granting them ■ equal right with men to work, payment for work, rest and leisure, social insurance and education, and by state protection of the interests of mother and child, pre-maternity and maternity leave with full pay, and the provision of a wide network of maternity homes, nurseries and kindergartens.”

**Fourth French Republic.**—The Preamble to the Constitution of 1946 declares—

“The law guarantees to women equal rights with men in all domains.”

**40.** The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Organisation of village panchayats.

#### INDIA

*Legislative power.*—See Entry 5 of List II, 7th Sch.

**41.** The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Right to work, to education and to public assistance in certain cases.

#### OTHER CONSTITUTIONS

**Burma.**—Art. 33 of the Constitution of 1948—

“The State shall direct its policy towards securing to each citizens—(i) the right to work; (ii) the right to maintenance in old age and during sickness or loss of capacity to work; (iii) the right to rest and leisure; and (iv) the right to education. . . .”

Art. 40, again, says—

“The State shall ensure disabled *ex-Servicemen* ■ decent living and free occupational training. The children of fallen soldiers and children orphaned by war shall be under the special care of the State.”

**Fourth French Republic.**—The Preamble to the French Constitution of 1946 says—

“Every one has the duty to work and the right to obtain employment. . . . Every human being who, because of his age, his physical or mental condition, or because of the economic situation, finds himself unable to work, has the right to obtain from the community the means to lead a decent existence. . . . The nation guarantees equal access of children and adults to education, professional training and culture. . . .”

**U.S.S.R.**—Arts. 118, 120 and 121 of the Soviet Constitution, 1936, are as follows:

**Art. 118.**—Citizens of the U.S.S.R. have the right to work, that is, are guaranteed the right to employment and payment for their work in accordance with its quantity and quality. The right to work is ensured by the socialist organization of the national economy, the steady growth of the productive forces of Soviet Society, the elimination of the possibility of economic crises, and the abolition of unemployment.

**Art. 120.**—Citizens of the U.S.S.R. have the right to maintenance in old age and also in case of sickness or loss of capacity to work. This right is ensured by the extensive development of social insurance of workers and employees at state expense, free medical service for the working people and the provision of a wide network of health resorts for the use of the working people.

**Art. 121.**—Citizens of the U.S.S.R. have the right to education. This right is ensured by universal, compulsory elementary education; by education, including higher education, being free of charge; by the system of state stipends for the overwhelming majority of students in the universities and colleges; by instruction in schools being conducted in the native language, and by the organization in the factories, state farms, machine and tractor stations and collective farms of free vocational, technical and agronomic training for the working people.”

## INDIA

*Existing laws.*—See the Employees' State Insurance Act (XXXIV of 1948) which provides for certain benefits to employees in factories and other establishments, in case of sickness, maternity and 'employment injury.' Also, the Workmen's Compensation Act (VIII of 1923); Entries 23 and 24 of List III of the 7th Sch., *post*.

Provision for just and humane conditions of work and maternity relief.

**42.** The State shall make provision for securing just and humane conditions of work and for maternity relief.

## OTHER CONSTITUTIONS

*Burma.*—Art. 37 (2) of the Constitution of 1948—

The State shall specially direct its policy towards protecting the interests of nursing mothers and infants by establishing maternity and infant welfare centres, children's homes and day nurseries and towards securing to mothers in employment the right to leave with pay before and after child birth."

## INDIA

*Existing law.*—See the Factories Act (LXIII of 1948).

**43.** The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring ■ decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on ■ individual or co-operative basis in rural areas.

## OTHER CONSTITUTIONS

*Fourth French Republic.*—The Preamble to the French Constitution of 1946 says—

"The nation ensures to the individual and the family the conditions necessary to their development. It guarantees to all, and notably to the child, the mother and the aged worker, protection of health, material security, rest and leisure."

*U.S.S.R.*—Art. 119 of the Soviet Constitution of 1936, says—

"Citizens of the U.S.S.R. have the right to rest and leisure. The right to rest and leisure is ensured by the reduction of the working day to seven hours for the overwhelming majority of the workers, the institution of annual vacations with full pay for workers and employees ■ and the provision of a wide network of sanatoria, rest homes and clubs for the accommodation of the working people."

*Burma.*—Arts. 41-42 of the Constitution of 1948—

"41. The economic life of the Union shall be planned with the aim of increasing the public wealth, of improving the material conditions of the people and raising their cultural level, of consolidating the independence of the Union and strengthening its defensive capacity.

42. The State shall direct its policy towards giving material assistance to economic organizations not working for private profit. Preference shall be given to co-operative and similar economic organizations."

## INDIA

*Existing law.*—The Minimum Wages Act (XI of 1948) empowers the Government to fix minimum rates of wages in certain employments, such as in mills, road construction, public motor transport, agriculture, and to fix the normal working hours for a day. Also see in this connection, the Factories Act (LXIII of 1948) the Payment of Wages Act (IV of 1936); and other Acts specified under Entry 24 of List III, 7th Sch. *post*.

Uniform civil code for the citizens.

**44.** The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

#### INDIA

*Scope and Object of Art. 44.*—The object of this article is to introduce a uniform personal law for the purpose of national consolidation. It proceeds on the assumption that there is no necessary connection between religion and personal law in a civilized society. While the Constitution guarantees freedom of conscience and of religion (Art. 25), it seeks—"to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage", just as it has been done even in Muslim countries like Turkey or Egypt. The object is not to encroach upon religious liberties. Cl. (2) (a) of Art. 25 already reserves such right of the State.

*Legislative Power.*—See Entry 5 of List III of Sch. VII.

**45.** The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Provision for free and compulsory education for children.

#### OTHER CONSTITUTIONS

*Burma.*—The 2nd para. of Art. 33 of the Constitution of Burma, 1948—

"In particular the State shall make provision for free and compulsory primary education."

Art. 34, again, says—

"The State shall pay special attention to the young and promote their education."

*Eire.*—Art. 42 (4) of the Constitution of 1937 provides—

"The State shall provide for free primary education...."

*U.S.S.R.*—See Art. 121 of the Soviet Constitution, reproduced at p. 198 *ante*.

*Fourth French Republic.*—The Preamble to the French Constitution of 1946 declares—

"The establishment of free, secular, public education on all levels is a duty of the State."

#### INDIA

*Compulsory child education.*—Civil liberty would be hollow unless it provides for education to the citizens to the extent of his choice. But, the State may also make education compulsory up to a certain minimum extent. A statute imposing compulsory education is no encroachment on any fundamental right, for no one has any right to remain ignorant.<sup>18</sup> Hence, the provision in Art. 30 (1), *ante*, must be read subject to Art. 45.

*Legislative Power.*—See Entry 11 of List II, 7th Sch.

**46.** The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.



## OTHER CONSTITUTIONS

*Eire.*—Cl. (4) 1 of Art. 45 of the Constitution of 1937—

"The State pledges itself to safeguard with special care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged."

*Burma.*—Art. 35 of the Constitution of Burma, 1948—

"The State shall promote with special care the educational and economic interests of the weaker and less advanced sections of the people and shall protect them from social injustice and all forms of exploitation."

**47.** The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

## OTHER CONSTITUTIONS

*Burma.*—Art. 36 of the Constitution of Burma, 1948—

"The State shall regard the raising of the standard of living of its people and the improvement of public health as among its primary duties."

Art. 38, says—

"The State shall promote the improvement of public health by organizing and controlling health services, hospitals, dispensaries, sanatoria, nursing and convalescent homes and other health institutions."

Art. 39, again, says—

"The State shall take special care of the physical education of the people in general and of the youth in particular in order to increase the health and working capacity of the people and in order to strengthen the defensive capacity of the State."

**48.** The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

Organisation of agriculture and animal husbandry.

**49.** It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by Parliament by law to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, ■ the case may be.

Protection of monuments and places and objects of national importance.

Separation of judiciary from executive.

**50.** The State shall take steps to separate the judiciary from the executive in the public services of the State.

## INDIA

*Meaning of Separation of the Judiciary from the Executive*—"This general principles involves two consequences, first, that ■ judge or magistrate who tries a

case must not be in any manner connected with the prosecution, or interested in the prosecution. Second, that he must not be in direct administrative subordination to any one connected with the prosecution (or indeed the defence).

Quite clearly it is impossible for a judge to take a wholly impartial view of the case he is trying if he feels himself to any extent interested in or responsible for the success of one side or the other. That is the first aspect. It is equally impossible for him to take an impartial view of the case before him if he knows that his posting, promotion, and prospects generally depend on his pleasing the executive head of the district, the District Magistrate, who is also the head of the local police, who has frequent confidential conferences with them, and generally controls the work of the Police Superintendent.

Thus, the separation of functions means and involves the elimination of these two evils. That they are evils few will question."<sup>19</sup>

Promotion of international peace and security.

## 51. The State shall endeavour to—

- (a) promote international peace and security ;
- (b) maintain just and honourable relations between nations ;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another ; and
- (d) encourage settlement of international disputes by arbitration.

### OTHER CONSTITUTIONS

*Eire.*—Art. 29 of the Constitution of Eire, 1937, says—

"(1) Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. (2) Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination. (3) Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

*Fourth French Republic.*—The Preamble to the French Constitution of 1946, declares—

"The French Republic, faithful to its traditions, abides by the rules of international public law. It will not undertake wars of conquest and will never use its arms against the freedom of any people. On condition of reciprocity, France accepts the limitations of sovereignty necessary to the organization and defence of peace."

### RESPECT FOR INTERNATIONAL LAW

*U.S.A.*—Rules of international law are applied by the municipal Courts in America on the theory of their implied adoption by the State, as a part of its own municipal law. It is, of course, open to Congress to supersede or modify international law in its application to the United States, or it may be controlled by treaties entered into by the United States. But "till an act (of Congress) be passed, the Court is bound by the law of nations, which is part of the law of the land."<sup>20</sup> Again, the Court will be slow to interpret an Act of Congress to violate a rule of international law, "if any other possible construction remains".<sup>21</sup>

Where principles of international law are applicable, they do not require to be proved as foreign municipal laws do. The Court must take judicial cognizance of the principles, and, if necessary, ascertain them by study of the proper sources

(19) Speech of Meredith, J., quoted in (1949) 2 Indian Law Review, p. 102: see also Kumaraswamy Raja's article on Separation of the Judiciary in the Amrita Bazar Patrika, Republic Souvenir, p. 109. [See also p. 202, *post*].

(20) *The Nereide*, 9 Cr. 388.

(21) *The Charming Betsy*, 2 Cr. 64.

of information,<sup>22</sup> such as, works of jurists, commentators, judicial decisions, and acts and usages of civilized nations.<sup>23</sup>

*England.*—English Courts, too, will treat rules of international law as incorporated into the domestic law, so far as they are not inconsistent with rules enacted by statutes or finally declared by their tribunals.<sup>24</sup> In interpreting statutes, the Courts act on the presumption that Parliament did not intend to violate the established principles of international law,<sup>25</sup> and may recoil, in case of *ambiguity*, from ■ construction which would involve a breach of the accepted rules of international law.<sup>2</sup>

If, on the other hand, an Act of Parliament is *clearly* in conflict with some rule of international law, the municipal Courts are bound to enforce that Act,<sup>2</sup> and that rule of international law shall have no validity in England.<sup>3</sup>

Again, only such rules of international law are regarded by the English Courts as ■ part of English law (not being in conflict with any rule of municipal law) as (a) have been received and acted upon in English Courts, or (b) are of such a nature and have been so widely and generally accepted,<sup>4</sup> that it could hardly be supposed that any civilised State would repudiate them. But mere opinion of jurists, however eminent, would not, in themselves, be binding.<sup>5</sup>

*India.*—Indian Courts, too, would apply rules of international law, unless they are overridden by clear rules of domestic law, and would act upon the general presumption just referred to.

*Weight of treaties and international agreements.*—See under Art. 253, *post*.

## PART V

### THE UNION

#### General

#### THE THEORY OF SEPARATION OF POWERS

In a juridical Commentary, we are not concerned with the political implications of this doctrine, which may be found in any text-book on Political Science.<sup>6</sup> We shall discuss the question from the juristic standpoint. So far as the Courts are concerned the application of the doctrine may be sought to assert two propositions,<sup>7</sup> *viz.* (a) that the Legislature cannot make any delegation of its powers at all; (b) that none of the three organs of government, legislative, executive and judicial, can exercise any power which *properly* belongs to either of the other two.

We shall discuss the question of delegated legislation more fully in Chap. I, Part XI, *post*. Under the present caption we shall discuss the broader question (b) above, *viz.*, whether any organ of government, under a written Constitution like ours, can assume to exercise any power properly belonging to any other organ, under the Constitution.

(22) *The Scotia*, 14 Wall. 170.

(23) *Hilton v. Guyot*, 159 U.S. 113.

(24) *Chung Chi Cheung v. King*, (1939) A.C. 160.

(25) *Bloxam v. Favre*, (1884) 9 P. D. 130.

(1) Craies, *Statute Law*, p. 71.

(2) *Mortensen v. Peters*, (1906) ■ Fraser, 93.

(3) *Chung Chi Cheung v. King*, (1939) A.C. 160; *Co-operative Committee v. A.*

*G. of Canada*, (1947) A.C. 87.

(4) *In re Piracy Jure Gentium*, (1934) A.C. 586.

(5) *West Rand Gold Mining Co. v. Rex*, (1905) ■ K.B. 391 (407).

(6) *E.g.* Garner, *Introduction to Political Science*, Ch. XIII; Willoughby, *Government of Modern States*, Chs. XIV-XV; Gilchrist, *Political Science*, Ch. XII.

(7) Cf. *Wishart v. Fraser*, (1941) 64 C.L.R. 470.



The theory of Separation of Powers, as it was originally enunciated, aimed at a *personal* separation of powers. This is the sense in which Montesquieu,<sup>8</sup> the modern exponent of the doctrine, asserted—"When the legislative and executive powers are united in the same *person*, or in the same body of magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive powers. Were it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man or the same body to exercise these three powers. . . ." This is also the sense in which Blackstone<sup>9</sup> observed. "Wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty." Again, this is the sense in which the framers of the American Constitution imported the doctrine in framing that Constitution. Thus, Madison<sup>10</sup> said—"The accumulation of all powers, legislative, executive and judiciary, in the same hands whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

The impossibility of having a rigid *personal* separation of powers has, however, been illustrated by the *American* Constitution itself, where the President has got legislative powers in his right to send messages to Congress and the right to veto; on the other hand, Congress has the judicial power of trying impeachments and the Senate participates in the executive power of treaty-making and making appointments.

In modern practice, therefore, the theory of separation of powers has come to mean an *organic* separation or a separation of *functions*, viz., that one organ of government should not usurp functions belonging to another organ. But even there any rigid separation is impracticable<sup>11</sup> under modern conditions when the problems of government are interdependent. In order to function efficiently, each department must exercise some *incidental* powers which may be said to be strictly of a different character than its essential functions. For example, the Courts must, in order to function efficiently, possess the power of making rules for maintaining discipline or regulating procedure,<sup>11-a</sup> even though that power may be of the nature of a legislative power. The power of making rules of procedure in the Courts is not regarded as of the *essence* of the functions of the Legislature.<sup>12</sup> Similarly, the ascertainment of a state of facts upon testimony of witnesses may be incident to some executive action and is not confined to the judicial power.<sup>13</sup> Again, in interpreting laws and in formulating case law, the Courts do, in fact, perform a function analogous to law-making.

Of course, in the Parliamentary system of government as it exists in *England*, there is a blending of the legislative and executive functions in the hands of the Executive organ, and, on the other hand, the Legislature has supreme powers to determine its own powers and those of the other organs of government, but even there, the Legislature refrains from usurping what are *essentially* deemed to be functions belonging to another organ of government. Thus, by a self-denying ordinance, the English Parliament has provided that no measure relating to the raising of revenue or the expenditure of the public moneys shall even be considered by it, except on the recommendation of the Executive,<sup>14</sup> because

(8) Montesquieu, *Espirit des Lois*, 1748.

(9) Blackstone, *Commentaries*, 1765.

(10) Madison, the *Federalist* No. 47; see also *Kilbourne v. Thompson*, (1880) 103 U. S. 168 (190).

(11) *Cf. R. v. Federal Court of Bankruptcy*, (1938) 59 C.L.R. 555 (577).

(11-a) See e.g., Art. 145 (1), *post*.

(12) *Wayman v. Southward*, (1825) 10 Wh. 1 (42).

(13) Willoughby, *Constitutional Law*, Vol. III, p. 1653.

(14) *Cf. Willoughby, Government of Modern States*, p. 239.

financial administration has been regarded as an essential responsibility and function of the Executive. At the same time, it is an equally fundamental principle of the English system that the Executive shall have no power to impose taxes in any form without the concurrence of the Legislature,—taxation being regarded as an essentially legislative function.<sup>16</sup>

The modern interpretation of the doctrine of Separation of Powers, therefore, is that one organ or department of government should not usurp the functions which *essentially* belong to another organ. Thus, the formulation of legislative *policy* or the *general principles* of law is an essential function of the Legislature and cannot be usurped by another organ, say, the Executive.<sup>16</sup> The form of government has no final effect upon the application of the doctrine, though it may limit the *extent*<sup>17</sup> of its application. Hence, the fact that the Constitution of *India* adopts the Parliamentary form of government to the exclusion of the Presidential form of the American type should not be supposed as absolutely excluding the application of the doctrine of separation of powers. For, the doctrine has been largely applied in *Australia*, where also the Parliamentary system of the British type prevails.

In fact, the extent of the application of the doctrine is determined by the answer to two fundamental questions—(a) Has the organ in question an unlimited power to determine its own powers and functions? (b) To what organ does the power in question essentially belong?

(a) On the first question, the fact of a Constitution being written, offers a definite answer, namely, that all the three organs derive their powers from the same instrument and each exercises powers limited by the same.<sup>18</sup> So stated, the doctrine, in effect, means that an organ with limited powers must not exceed its powers as defined by the instrument by which powers have been conferred upon it, and the limitation is not necessarily dependent upon the federal or unitary character of the government.<sup>19</sup>

(b) But there is no clear agreement as to the precise scope of the three kinds of power or function. Shortly speaking,—“The legislative power is the power to *make laws* and to alter them at discretion; the executive power is the power to see that the *laws are duly executed* and enforced; the judicial power is the power to *construe and apply the law* when controversies arise concerning what has been done or omitted under it.”<sup>20</sup> In other words—

(i) *Legislative Function*.—The legislative function consists in the laying down of rules of conduct binding on the members of the State and includes the making of new law, and the alteration or repeal of existing law. In a modern State, however, the function of the Legislature does not consist simply of law-making. In formulating a policy, it has to determine *how* the policy shall be carried out, by *whom* and how *funds* shall be available for the purpose.<sup>21</sup>

(ii) *Executive Function*.—The executive function includes the direction of the policy and administration of the affairs of the State within the limits of the law of the land,<sup>22</sup> and the detailed carrying on of government according to law.

(15) *Attorney-General v. Wilts United Dairies*, (1921) 91 L.J. K.B. 897; *Ferries v. Scottish Milk Board*, (1937) A.C. 126.

(16) *Mutual Film Corporation v. Industrial Commission*, (1915) 228 U.S. 230; *Yakus v. U. S.*, (1943) 321 U.S. 414.

(17) *Victorian Stevedoring Co. v. Dignan*, (1931) 1 C.L.R. 73 (114).

(18) Cf. Cooley, *Constitutional Limita-*

*tions*, 7th Ed., p. 126.

(19) Cf. *R. v. B—h*, (1878) 1 A. C. 889 (905).

(20) Cooley, *Constitutional Law*, p. 48.

(21) *Yakus v. U. S.*, (1943) 321 U. S. 414.

(22) Keith, *Introduction to Br. Constitutional Law*, p. 2.

From the standpoint of Political Science, the Executive is concerned with "the execution of the will of the State as. . . has been formulated and expressed in terms of law."<sup>23</sup>

(iii) *Judicial Function*.—The primary function of the judicial organ is to interpret the law and to apply it in all cases and disputes brought before the Court for their decision. The judicial power is "the power which every sovereign authority must of necessity have to *decide controversies* between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property."<sup>24</sup> As to interpretation of the law, it is to be noted that the Courts have *no general power* to interpret the laws passed by the Legislature; they only decide cases properly brought before them, and in the determination of those particular cases, they can interpret the will of the Legislature according to established canons of interpretation.

But though there is a general agreement as to the broad differentiation between the three functions, there is indeed no such definite demarcation at the margins, and different views are taken under different Constitutions in the light of the extent to which the doctrine of Separation of Powers has been intended to be applied by the framers of that Constitution. Anyway, we may make an attempt to discover the generally accepted propositions indicating the boundaries between these different functions:

*Executive and Legislative Functions*.—The essentials of the legislative function being the determination of the legislative *policy* and its formulation and promulgation as defined and binding rules of conduct,<sup>25</sup> the Executive cannot, in the exercise of its administrative powers, assume the power to make laws, without statutory authority.<sup>1</sup> The power to 'make law' means the power to determine what the law shall be, as distinguished from any question relating to execution of a law.<sup>2</sup> Similarly, *taxation* and *appropriation of public money* are regarded as legitimate functions of the Legislature in all countries which have adopted the English system of representative government.<sup>3</sup> The Executive would not be allowed to usurp these functions even indirectly. Hence, the Executive cannot make an agreement involving expenditure of public money,<sup>4</sup> nor impose a financial burden on the subject without authority of the Legislature.<sup>5</sup>

Similarly, the setting up of Courts is a legislative power,<sup>6</sup> and the Executive cannot, therefore, establish a tribunal without Parliamentary authority.<sup>7</sup>

*Judicial and Legislative Functions*.—"The distinction between a judicial and a legislative act is well-defined. The one determines what the law is, and what rights the parties have with reference to transactions *already had*; the other prescribes what the law shall be in *future* cases arising under it."<sup>8</sup> "A judicial enquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and

(23) Garner, Political Science and Government, p. 677.

(24) *Huddart Parker v. Moorehead*, (1908) 8 C.L.R. 330 (357), approved by the Privy Council in *Shell Co. v. Fed. Commissioners*, (1931) A.C. 275 (295).

(25) *Yakus v. U. S.*, (1943) 321 U. S. 414.

(1) As to how far the Legislature can delegate this function, see under 'Subordinate Legislation' p. 52, ante.

(2) Cf. *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (239, 248).

(3) Cf. Arts. 110, 114-117, 265-266 of our Constitution.

(4) *Commonwealth v. Colonial Combing Co.*, (1922) 31 C.L.R. 421.

(5) *A. G. v. Commonwealth*, (1935) 52 C.L.R. 533.

(6) Cf. Entry 3 of List II of Sch. VII of our Constitution.

(7) *Waterside Workers' Federation v. Commonwealth*, (1920) 14 C.A.R. 276.

(8) *Field, J. in Sinking Fund Cases*, (1878) 99 U.S. 700.



end. Legislation, on the other hand, looks to the future, and changes existing conditions by making ■ new rule to be applied thereafter to all or some part of those subject to its power."<sup>9</sup> "To declare what the law is *or has been* is a judicial power; to declare what the law *shall be* is legislative".<sup>10</sup> It is not for the Judges to *alter* the law, even though they have reasons to doubt the wisdom or justice of any provision or to find that the Legislature has made a mistake or was even deceived.<sup>11</sup>

Nor will the Judiciary encroach upon the proper sphere of the Legislature on other matters. Thus, the *levying of a tax*, that is to say, the determination that ■ given tax shall be imposed, assessed and collected in a certain manner, is a legislative function.<sup>12</sup> The Legislature may prescribe the basis, fix the rate and require payment as it may deem proper.<sup>13</sup> The Courts cannot therefore, question the validity of a tax on the mere ground of its excessiveness. "The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the Courts, but to the people by whom its members are elected."<sup>14</sup> The Courts can interfere with the taxing power of the Legislature only when the Legislature violates some provision of the Constitution, *e.g.*, the guarantee of equal protection of the laws.<sup>15</sup> Similarly, the *prescribing of penalties* for the violation of laws is ■ legislative act and the Courts have no power to add to the penalties prescribed by law.<sup>16</sup>

Nor would the Court in the exercise of its powers, go to the extent of controlling the Legislature as regards its internal matters, *e.g.*—(i) to pass upon the credentials of a person claiming membership of a legislative body; (ii) to prescribe rules of procedure in the legislature.<sup>16-a</sup>

*Judicial and Executive Functions.*—Since it is the business of the Courts to apply the Constitution and the laws in cases properly brought before them, the Judiciary exercises control over Executive action in so far as it would refuse to uphold as valid any act of the government which is not supported by the Constitution<sup>17</sup> or by some law.<sup>18</sup> The authority of the Courts as regards Executive action arises when the Executive *exceeds* its authority, in which case the agents and instruments through which the action is carried out, are personally responsible to law and the Courts.<sup>17</sup> Even under the unwritten Constitution of England, it is the duty of the Courts to see whether the Executive acts in *excess* of the law.<sup>18</sup>

"The Constitution has many commands that are not enforceable by Courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. The Constitution has left the performance of many duties in the governmental scheme to depend on the fidelity of the executive ■ and legislative action and, ultimately, on the vigilance of the people ■ exercising their political rights."<sup>19</sup>

But it is not the business of the Courts to pass judgment upon the *policy* of executive action, *e.g.*, the acts of the department of foreign affairs.<sup>20</sup> The exercise of *political* power is not within the province of the judicial department.<sup>21</sup>

(9) *Prentiss v. Atlantic Coast Co.*, 211 U. S. 210.

(10) *Ogden v. Blackledge*, 2 Cr. 276.

(11) *Labrador v. The Queen*, (1893) A.C. 104.

(12) Willoughby, *Constitutional Law*, Vol. III, p. 667.

(13) *Pacific Insurance Co. v. Soule*, 7 Wall. 433.

(14) *Veazie Bank v. Fenno*, (1869) 8 Wall. 533.

(15) Cf. Art. 14 of our Constitution.

(16) *Stewart & Brq. v. Bowles*, (1943) 322 U.S. 398.

(16-a) Willoughby, *Constitutional Law*,

Vol. III, p. 1622.

(17) *Kendall v. United States*, (1838) 12 Pet. 524.

(18) *Eastern Trust Co. v. McKenzie Co.*, (1915) A.C. 750; *Eshugbayi v. Nigerian Government*, (1931) A.C. 662; *Liversidge v. Anderson*, (1942) A.C. 206.

(19) *Colegrove v. Green*, (1945) 328 U.S. 549 (556).

(20) *Cherokee Nation v. Georgia*, (1831) 6 Wall. 50.

(21) *Williams v. Suffolk Ins. Co.*, (1839) 13 Pet. 415; *Quackenbush v. U. S.*, (1900) 177 U.S. 25.

It is on the above principle that the *American* Judiciary has refused to determine the following questions as belonging to the province of the Executive authority: (i) The correctness of the decision of the President, acting under authority of a law, as to the necessity of calling out the militia to repel an invasion or to suppress an insurrection.<sup>22</sup> (ii) How long it would be lawful for the government to continue military occupation of a territory affected with disorder.<sup>23</sup> (iii) To determine whether a foreign State is at peace or in a state of war or neutrality with the United States.<sup>24</sup> (iv) To determine which of two or more contending foreign States shall be recognized by the American Government.<sup>25</sup> (v) The question whether a given person is to be recognized as the accredited agent of a foreign government.<sup>1</sup> (vi) Whether a treaty or agreement entered into by the United States has been sufficiently ratified by the foreign State concerned.<sup>2</sup> (vii) The title or sovereignty of the United States over a foreign territory.<sup>3</sup>

On the other hand, the Executive has no authority to pass upon the validity of a judgment and it is bound to assist in enforcing it even though the Executive may believe it to be erroneous.<sup>4</sup> It is the duty of the Executive to carry out the decisions of Courts of competent jurisdiction and not to avoid or circumvent them. Thus, in *The King v. Speyer*,<sup>5</sup> Lord Reading (L.C.J.) observed—

“This is the King’s Court; we sit here to administer justice and to interpret the laws of the realm in the King’s name. It is respectful and proper to assume that once the law is declared by a competent judicial authority, it will be followed by the Crown.”

“It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to sue, and it is duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.”<sup>6</sup>

On the same principle, it has been held, in *India*, that Government may in proper cases be bound by an injunction issued in a proceeding to which it is not a party.<sup>7</sup>

“But then it was asked—What would happen if the Collector ignored the order of the Court? What remedy would the appellant have if it had omitted to ask for specific relief against the Collector? It is highly improbable that any officer of the Government would set the Court in defiance. It is impossible to suppose that Government would countenance such conduct as that.”<sup>8</sup>

*Our Constitution*, of course, differs from the American<sup>8</sup> and Australian<sup>9</sup> Constitutions in so far as there is no attempt at any express introduction of the doctrine of Separation of Powers, by ‘vesting’ the executive, legislative and judicial powers in different organs. *Our Constitution* vests the ‘executive power’ in the President (Art. 53 (1)), but there is no corresponding ‘vesting’ provision as regards the legislative and judicial powers. From this, it is evident that the framers did not intend to introduce any rigid application of the doctrine of Separation of Powers to our Constitution.

So, at least as between the Legislature and the Judiciary there is no such rigid separation of powers under *our Constitution*, as debars the *American* Legislature to “set aside judgments of Courts, compel them to grant new trials, order the

(22) *Martin v. Mott*, 12 Wh. 19.

(23) *Neeley v. Henkel*, 180 U.S. 109.

(24) *Williams v. Suffolk Insurance Co.*, (1839) 13 Pat. 415.

(25) *Jones v. U. S.*, (1890) 137 U. S.

20.

(1) *Ex parte Baiz*, 135 U.S. 403.

(2) *Terlinden v. Ames*, 184 U.S. 270.

(3) *Foster v. Neilson*, 2 Pet. 253; *Wilson v. Shaw*, 204 U.S. 24.

(4) Cooley, *Constitutional Law*, p. 203.

(5) *The King v. Speyer*, (1916) 1 K. B. 596.

(6) *Eastern Trust Co. v. McKensie Mann & Co.*, (1915) A.C. 750.

(7) *Fischer v. Secretary of State*, (1898) 22 Mad. 270 P.C.

(8) Cf. Art. 1, Sec. 1; Art. 2, Sec. 1 (1); Art. 3, Sec. 1 of the Constitution of the U.S.A.

(9) Cf. Secs. 1, 61 and 71 of the Commonwealth of Australia Constitution Act.

discharge of offenders or direct what steps shall be taken in the progress of a judicial enquiry."<sup>10</sup> The fundamental principle followed in the United States is that the Legislature cannot pass judgments or decrees.<sup>11</sup> Hence,—

(a) the Legislature cannot override judicial decisions by retrospective legislation.

"Legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Court in the exercise of their undoubted authority have made. . . . this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a Court of review to which parties might appeal when dissatisfied with the rulings of the Courts."<sup>12</sup>

Hence, nothing short of an amendment of the Constitution itself can avoid the undesirable effects of an unpopular decision.

(b) Similarly, a resolution of the Legislature whereby a decree of a Court is set aside and a retrial is directed, purports to do a 'judicial' and not a legislative act.<sup>12</sup>

(c) It would be equally incompetent for the Legislature, 'by retrospective legislation, to make valid any *proceedings* which have been had in the Courts but which were void for want of jurisdiction between the parties', for, a proceeding without jurisdiction being void, the curative Act must be in the nature of a judgment.<sup>13</sup>

(d) Again, the Legislature cannot determine what shall be the rights of parties in respect of *past* transactions, *i.e.*, to make declaratory statutes with retrospective effect.<sup>14</sup>

"Wherever an act undertakes to *determine* a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is, to that extent, a judicial one, and not the proper exercise of legislative functions."<sup>14</sup>

Owing to the avoidance of the full importation of the doctrine of Separation of Powers, the contrary rules of English jurisprudence, relating to the foregoing matters, will prevail under *our* Constitution:

Under the *English* system, the Legislature may validly *annul* judicial decisions by directing that they be reopened and retried on a different view of the law.<sup>15</sup> It may also directly pass declaratory Acts laying down propositions which in effect set aside decisions of the Courts.<sup>16</sup> For example, the decision in *Priestly v. Fowler*<sup>17</sup> was superseded by the Employers' Liability Act, 1880; similarly, *Taff Vale Ry. v. Amalgamated Society*<sup>18</sup> was superseded by the Trades Disputes Act, 1906. Again, in *Bowles v. Bank of England*,<sup>19</sup> it was decided, following *Stockdale v. Hansard*,<sup>20</sup> that it was unlawful for the Government to collect taxes under the authority of the Resolutions of the Committee of Ways and Means (resolution of either House of Parliament is not law). But the Provisional Collection of Taxes Act, 1913, nullified this decision by giving statutory force, for a limited period, to resolutions of the Committee of Ways and Means. Similarly, the Indian Divorce Validating Act, 1921, validated with retrospective effect, divorces made by Indian Courts which had been declared invalid in *Keyes v. Keyes*.<sup>20-a</sup>

The Legislature, under the English system, may also enact, *retrospectively* that decisions which were *ultra vires* owing to want of jurisdiction, should be

(10) *Stephens v. Cherokee Nation*, (1899) 174 U.S. 445.

(11) Cooley, Constitutional Law, p. 395.

(12) Cooley's Constitutional Limitations, 8th Ed., p. 190.

(13) Cooley, Constitutional Law, p. 401.

(14) The Sinking Fund Cases, (1878) 99 U.S. 700; Willoughby, Constitutional Law, Vol. III, p. 1620.

(15) *Piare Dusadh v. Emperor*, A.I.R. 1944 F.C. 1 (8).

(16) Craies on Statute Law, 4th Ed., 61.

(17) (1837) 3 M. & W. 1.

(18) (1901) A.C. 426.

(19) (1913) 1 Ch. 57.

(20) (1839) 9 A. & E. 1.

(20-a) L.R. 1921 P. 204.



treated as decisions of duly constituted and competent tribunals.<sup>21</sup> Such legislation has been held, even in Australia,<sup>22</sup> not to constitute an exercise of the 'judicial' power. Similarly, where the Legislature changes a law, it may give it a retrospective effect, so as to affect pending proceedings also, by enacting that pending proceedings relating to the matter 'shall be dismissed and be void.'<sup>23</sup> But where *no amendment of the law is made*, and the Legislature directly says that some particular pending proceedings shall be discharged, it is a judicial act,—■ direct disposal of the cases by the Legislature itself,—which it cannot do.<sup>24</sup> Thus, in an *Australian* case,<sup>25</sup> it was held that a regulation made to defeat ■ possible High Court decision in a case standing for judgment is incapable of retrospective effect with respect to a liability already accrued. Similarly, it would not be competent for the Commonwealth Parliament to place a meaning upon an Act of Parliament for the purpose of determining a proceeding pending in the Court,—for, the interpretation of the law is for the Courts.<sup>1</sup> Again, an alteration by the Legislature of the law as settled by the decisions of the Courts does not raise any inference that those decisions were wrong or even that those who had proposed the alteration were of that opinion.<sup>2</sup>

As under the English system, it will be open to the Legislature under *our Constitution*, to override the effect of a judicial decision by legislation.<sup>3</sup> The Legislature is even competent to prevent the Court from coming to any decision, by amending its laws,—though that course may be called capricious or arbitrary.<sup>3</sup> The only limitation under the Constitution upon retrospective legislation is that contained in Art. 20 (1), which we have already discussed.

The above discussion should not, however, suggest that under our Constitution, there will be no differentiation between the functions of the different Organs, or that any of the three Organs shall be allowed to assume any powers 'properly' belonging to any other Organ according to the acknowledged principles of constitutional jurisprudence, as discussed in the foregoing pages. As regards certain powers, the Constitution not only specifically enjoins by whom such powers shall be exercised but also prohibits the exercise of those powers by any other authority. For example, Art. 265 expressly provides that "no tax shall be levied or collected except by authority of law." Similarly, Art. 31 enjoins "no person shall be deprived of his property save by authority of law." So, neither of these powers can be exercised by the other two Organs, *viz.*, the Executive or the Judiciary, except under the legislative authority. As regards these matters, however, it is the express constitutional prohibition and not the doctrine of Separation of Powers that prevents the exercise of such powers by any Organ other than the one specified.

## PART V.

### CHAPTER I—THE EXECUTIVE.

#### *The President and Vice-President.*

The President of India.

#### **52.** There shall be a President of India.

(21) *Tilonko v. Attorney-General*, (1907) A.C. 93; *Piarc Dusadh v. Emperor*, A.I.R. 1944 F.C. 1 (9).

(22) *Federal Commissioner v. Munro*, (1931) 38 C.L.R. 153.

(23) *Abeyesekara v. Joyatilaka*, (1932) A.C. 260.

(24) *Gasanta v. Emperor*, A.I.R. 1944 F.C. 86 (91).

(25) *Sendall v. Fed. Commissioner*,

(1911) 12 C.L.R. 604.

(1) *Federated Engine Drivers' Association v. Broken Hill Co.*, (1913) 16 C.L.R. 245.

(2) *Bharat Insurance Co. v. Income-tax Commissioner*, A.I.R. 1934 P.C. 45.

(3) Cf. *Jnan Prasanna v. Province of Bengal*, (1948) 53 C.W.N. 27 (70, 81) (F.B.); *In re Valyudam*, A.I.R. 1950 Mad. 324 (332).

## OTHER CONSTITUTIONS.

*U.S.A.*—The Constitution simply vests the 'executive power' in the President. But the American President is not only the head of the political system, but also of the national life; not a mere party chief but "the majesty of the people incarnate".<sup>4</sup> He combines in himself the two offices of the English Crown and Prime Minister,—in the words of Bagehot, the dignified' as well as the 'efficient' functions.

The position of the American President in the political life of the nation may be best summarised in the words of Woodrow Wilson<sup>5</sup>—

"The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs. . . . He is the representative of no constituency but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist on it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for united action, and it craves ■ single leader."

The powers of the President are even widening just as the Federal Government is gaining in strength as against the States, owing to the influence of external events such as war, national economic crisis and the like. While the framers of the Constitution conceived of Congress as the most important organ in the State, the President has in fact come to be the most important authority in the United States, uncontrolled by little save a remote fear of impeachment. Thus, the American President has come to be 'the foremost ruler of the world';<sup>6</sup> but the principles of American Government have prevented him from becoming ■ deposit.<sup>6</sup>

Though "the President of the United States governs but does not reign" (*Sir Henry Maine*), yet, as *Laski* observes,—“The President of the United States is both more or less than a King; he is, also, both more or less than a Prime Minister”.<sup>7</sup> On the one hand, the American President is the ceremonial head of the State and has to attend functions which, in England, are performed by the King. On the other hand, the President is the 'final source of all executive decision', ■ 'vital source of legislative suggestion' and 'the authoritative exponent of the nation's foreign policy.' Since the Cabinet is nothing more than the President's advisory Council, all the above powers are to be exercised by the President on his *sole* responsibility and so *Laski* observes,—“the only person responsibly charged with thinking and planning in terms of the whole Union is the President.”<sup>7</sup>

On the other hand, the President's position is more difficult than that of the English Prime Minister in so far as the latter has not, in normal circumstances, to face ■ recalcitrant House of Commons and that it is the policy of the Prime Minister which is the policy followed by Parliament so long as the Prime Minister is in office. But the American President is 'at no point the master of the Legislature'. Even when his party has a majority in the Congress, he must win the good-will of that party in the Congress and the Congress is never, 'a rubber stamp for presidential policy'.<sup>8</sup> The President may thus initiate policy but cannot control it, and when his opposition party dominates in the Congress, or either House of it, he can proceed with no certainty. In England, the House of Commons cannot refuse to follow the lead of the Prime Minister without overthrowing him. But the American Congress can enforce its will against the President without any penalty, for, the President is not responsible to Congress.

(4) Brogan, *Government of the People*, p. 119.

(5) W. Wilson, *Constitutional Government in the United States*, p. 68.

(6) Haskin, *American Government*, p. 56;

Bryce, *Modern Democracies*, Vol. II, p. 79.

(7) *Laski*, *American Presidency*, 1943, pp. 23, 31.

(8) Brogan, *Government of the People*, p. 118.

Again, even though the President may carry his policy through Congress, he must have a constant apprehension of the powers of the Supreme Court which may at any moment nullify a measure which has been adopted by the nation's representatives; and, so far, that Court has seldom yielded to the will of the President as against the Court's view of the Constitution.<sup>9</sup>

*Fourth French Republic.*—It has been said that the position of the President of the Fourth Republic is even less effective than that of the President of the Third Republic,<sup>10</sup> who, according to Sir Henry Maine, neither reigned nor governed. The President of the Fourth Republic can act *only* through the joint counter-signature of an individual Minister as well as that of the President of the Council of Ministers (Art. 38). On the other hand, he has no direct contract with the people, being elected by the Legislature, and has, further, no power of veto over legislation (Art. 36). The power of dissolution is also hedged in with conditions (Art. 51).

Nevertheless, the French President possesses a peculiar function, contrary to the British practice, *viz.*, that he presides over the Council of Ministers (Art. 32), so that he has got an extraordinary scope for *influencing* the decisions of his Ministers.

*Eire.*—Art. 12 (1) of the Constitution of Eire, 1937 says—

"There shall be a President of Ireland (*Uachtaran na h-Eireann*) hereinafter called "the President," who shall take precedence over all other persons in the State...."

The President of Eire is to take precedence over all the persons in the State, but is not designated as its head.<sup>11</sup> His powers and functions are largely, but *not wholly*, formal. The Constitution expressly provides [Art. 13 (9)], that the powers and functions of the President must be exercised only with the advice of the 'Government' (which corresponds to the English Cabinet). But he has the power to act 'in his absolute discretion' on two matters [Art. 13 (2)]. Thus, he may refuse a dissolution to a Prime Minister who has ceased to command a majority in the Dail, and thus bring about a fall of the Ministry [Art. 28 (10)]. On the other hand, the Irish President has the power of referring Bills to a *referendum*, in certain circumstances [Arts. 27, 47 (2)], in order to secure that the Legislature shall not override the wishes of the political sovereign—the people themselves. Being elected by the people directly, and possessing the above powers, the position of the Irish President is far better than that of the French President though it is inferior to that of the American President.

*Burma.*—Sec. 45 of the Constitution of Burma says—

"There shall be a President of the Union hereinafter called "the President" who shall take precedence over all other persons throughout the Union."

This is a reproduction of Art. 12 (1) of the Constitution of Eire. The position of the President of Burma will be substantially the same as that of Eire, since the other provisions of the Irish Constitution, relating to the exercise of the powers of the President are also adopted, largely, by the Burmese Constitution.

#### INDIA.

PARLIAMENTARY AND PRESIDENTIAL FORMS OF GOVERNMENT.—Barring the solitary instance of a 'collegiate executive' in Switzerland, it may be said that the Executive organisations of the better known States of the world fall under two main types, the Presidential and the Parliamentary forms.

In a Parliamentary Government, the tenure of office of the virtual executive is dependent on the will of the Legislature; in a Presidential Government the tenure of office of the executive is independent of the will of the Legislature (*Leacock*). Thus, in the Presidential forms of which the model is

(9) *Laski*, American Presidency, 1943, pp. 67-69. Abroad, 1947, p. 112.

(10) *Roucek*, Governments and Politics its Senate. (11) Cf. O'Sullivan, Irish Free State and



the *United States*,—the President is the *real* head of the Executive, who is elected by the people for a fixed term. He is independent of the Legislature as regards his tenure and is not responsible to the Legislature for his acts. He may, of course, act with the advice of ministers, but they are appointed by him as his *counsellors* and are responsible to him and not to the Legislature. Under the Parliamentary system represented by *England*, on the other hand, the head of the Executive (the Crown) is a mere titular head, and the virtual executive power is wielded by the Cabinet, a body formed of the members of the Legislature and responsible to the popular House of the Legislature for their office and actions.

The framers of the *Indian Constitution* have adopted the best features from the Constitutions of the leading countries of the world, and on the present point, therefore, they have set up a curious *combination* of the Presidential and Parliamentary systems. Being a Republic, India cannot have a hereditary King. So, an elected President will be at the head of the Executive power in India. The tenure of his term will be for a fixed term of years as of the American President. He also resembles the American President inasmuch as he will be removable by the Legislature under the special quasi-judicial procedure of impeachment. But, on the other hand, he will be more akin to the English King than the American President inasmuch as he shall have no 'functions' to discharge, on his own authority. All the powers that are vested by the Constitution in the President, are expected to be exercised on the advice of the Ministers responsible to the Legislature as in England, though there is no obligatory provision in the Constitution itself, to this effect. [See under Art. 74, *post*].

The reasons why the framers of the Indian Constitution have discarded the American model after providing for the election of the President of the Republic by an electoral college formed of members of the Legislatures not only of the Union but also of the States, have thus been explained by themselves:<sup>12</sup> In combining stability with responsibility, they have given more importance to the latter and have preferred the system of 'daily assessment of responsibility' to the theory of 'periodic assessment' upon which the American system is founded. Under the American system, conflicts are bound to occur between the Executive, Legislature and Judiciary; and, on the other hand, according to many modern American writers the absence of co-ordination between the Legislature and the Executive is ■ source of weakness of the American political system. What is wanted in India on her attaining freedom from one and a half century of bondage is ■ *smooth* form of Government which would be conducive to the manifold development of the country without the least friction,—and to this end, the Cabinet or Parliamentary system of Government of which India has already had some experience, is better suited than the Presidential.

So, India shall have a constitutional President superimposed on the Parliamentary system of the British type.

POSITION OF THE INDIAN PRESIDENT IN THE CONSTITUTION.—The framers of *our Constitution* have explained that they have outlined the position of the President of India on the *Irish* model, *viz.*, that of an elected President, acting on the advice of Ministers responsible to the Legislature. But as we shall see, the Indian President will ■ not be an exact replica of the Irish model. Like the President of Eire, the President of India, too, is not named in the Constitution as the 'Head of the State.' The Indian Constitution even goes one step further than the Constitution of Eire, towards the Republican ideal. While the Irish Constitution says that the President "shall take precedence over all other persons in the State", the Indian Constitution omits any such words from the Consti-

(12) Constituent Assembly Debates, Vol. VII. pp. 32-33.

tution. On the other hand, the Indian President is neither the repository of all powers of the State as the English King is, nor would he be the head of the political system like the American President who has been styled as "the majesty of the people incarnate."<sup>13</sup>

Though the Indian Constitution says that the executive power 'shall be vested' in the President, just as it is said in the Constitution of the United States of America [Art. II, Sec. 1 (1)], the Indian President is not going to be the chief Executive or the *real* head of the Executive like the American President. He will have to exercise the powers vested by the Constitution "in accordance with the Constitution". One of these provisions of the Constitution is that "there shall be a Council of ministers to aid and advise the President in the exercise of his functions" [Art. 74 (1)]. Thus, the constitutional position of the English King, which has grown up around the legal theory of absolutism by conventions and the 'unwritten law', has been reduced to writing in the Indian Constitution, following the Irish precedent. [Cf. Art. 13 (9) of Eire; p. 212, *ante*]. The Irish President is not, however, required to act with the advice of his Cabinet in two matters, in respect of which he has "an absolute discretion" to act, according to the Constitution itself. The more important of these two functions, for the present discourse, is the right to refuse a dissolution of the Legislature to a defeated Ministry.<sup>14</sup> [Art. 13 (2), Eire]. But the *Indian* President (unlike the Governor-General under the Government of India Act, 1935) is not vested with any 'discretionary' power by the Constitution.

There is another material point upon which the Indian President will differ from the President of Eire and resemble the English Crown,—*viz.*, the right of the President *to be informed* of the decisions of the Council of Ministers and also to call for any other information relating to the administration of the affairs of the Union and proposals for legislation [Art. 78 (b)]. The Irish Ministers have no such obligation and the President has no right to call for any 'information' from the Government, not to give them any suggestion or advice of his own. But though the English Crown takes no part in the formal deliberations of his Ministers, he is constitutionally entitled to criticise the conduct of the Executive, and for this purpose, he has a right to be informed on all important matters and deliberations of the Cabinet, which may not be disclosed to anybody else.<sup>15</sup> And for this purpose, Cabinet decisions are now recorded in formal minutes. So, though the Crown cannot exercise any of its powers except on the responsibility of some Minister, and though the Crown has the constitutional obligation not to do anything which may conflict with the fundamental principle of ministerial responsibility, the Crown can still act as an impartial mediator in political issues, and can meet with opposition leaders (as it did in 1931 and 1936,<sup>16</sup> and give the Cabinet its views, but it rests with the Cabinet finally, whether they would act upon such advice of the Crown. Much would, of course, depend upon the personality of the Crown, and an example as late as that of George V illustrates that though the Crown has no function, it still retains the three important political rights of which Bagehot spoke: "The right to be consulted, the right to encourage and the right to warn", which are nonetheless indispensable even for the highly developed system of ministerial responsibility.

It is in view of the above experience in England that *our Constitution* has adopted the right of the President to be informed. He has still another very important power, *viz.*, to direct the Prime Minister to place before the Council

(13) Brogan, *Government of the People*.

(14) As to how the President of India will exercise the power of dissolution, see under Art. 74, *post*.

(15) Keith, *Constitutional Law*, p. 157; Chalmers & Hood Phillips, p. 199.

(16) Keith, *Constitutional Law*, p. 159.

of Ministers for a joint consideration, any decision which has been taken by ■ Minister, *individually*, without a joint deliberation by the Council of Ministers [Art. 78 (c)]. This power will enable the President to exercise an effective supervision of the Cabinet without having ■ seat therein and will enhance the utility of the President as the constitutional head,—by way of pointing out and arresting the defects and shortcomings of the actions of individual Ministers.

On the other hand, so far as the text of the Constitution itself is concerned, there is no provision to compel the President to act according to the advice of the Ministers, and there is no provision, corresponding to the English rule,<sup>17</sup> requiring the President to act only under the counter-signature of a Minister. On the other hand, the President himself is authorised to make rules [Art. 77 (2)], as to how his orders and instruments are to be authenticated. So, if any President ventures to act against the wishes of the Ministers, in any matter, there is nothing in the Constitution to bring him to task save impeachment. It is also to be noted that while the Ministers shall owe their power to only one of the Houses of the Union Parliament, *viz.*, the House of the People [Art. 75 (3)], the President shall be elected not only by the elected members of both Houses of Parliament, but also the elected members of the Legislative Assemblies of the States. So, the President's authority will be more broad-based than that of the Council of Ministers.

From the above, it is clear that the Indian President will not be an exact replica of the head of the Executive of any other country, but will combine some features of all of them.

**53.** (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall—

(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority ; or

(b) prevent Parliament from conferring by law functions on authorities other than the President.

#### CLAUSE (1) OTHER CONSTITUTIONS

*U.S.A.*—Art. 2, Sec. 1 (1) of the Constitution of the United States says—

“The executive power shall be vested in ■ President of the United States of America”.

It has already been explained [see p. 211 *ante*] that the American President is a *real* head of the Executive inasmuch as barring the shadow possibility of impeachment,<sup>17-a</sup> he is not accountable to any organ under the Constitution ; nor is he bound to act according to anybody's advice, except in those matters in which the Constitution requires him to act with the concurrence of the Senate (*e.g.*, in the matter of appointments and treaties).

(17) Chalmers & Hood Phillips, *Constitutional Law*, p. 197.

(17-a) See p. 233, *post*.



*Australia*.—Sec. 61 of the Australian Constitution Act says—

"The executive power of the Commonwealth . . . is exercisable by the Governor-General . . . and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

'Laws' of the Commonwealth mean Acts of the Commonwealth Parliament.<sup>18</sup>

The Governor-General acts, in all matters, on the advice of his ministers.<sup>19</sup>

*Canada*.—S. 9 of the Br. North America Act says—

"The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

*Eire*.—Art. 12 (1) of the Constitution of Eire, 1937, says—

"There shall be a President . . . who shall exercise and perform the power and functions conferred on the President by this Constitution and by law."

*Ceylon*.—Sec. 45 of the Ceylon (Constitution) Order in Council, 1946, provides—

"The executive power of the Island shall continue to be vested in His Majesty and may be exercised, on behalf of his Majesty, by the Governor-General in accordance with the provisions of this Order and of any other law for the time being in force".

*Burma*.—Sec. 45 of the Burmese Constitution says—

"that the President shall exercise and perform the powers and functions conferred on the President by this Constitution and by law."

Sec. 59 says—

"Subject to the Provisions of this Constitution, the executive authority of the Union shall be vested in the President."

*Government of India Act, 1935*.—Sec. 7 (1) of the Act provided—

"(1) Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him. . . ."

## INDIA

SCOPE OF CL. (1): EXECUTIVE POWER OF PRESIDENT.—This clause has a threefold function:

(a) It vests the executive power of the Union in the President. (b) It enables him to exercise this power either directly, i.e., personally or through officers subordinate to him. (c) It delimits the scope of his power by declaring that it must be exercised in accordance with the Constitution.

'Executive Power of the Union'.—See Art. 73, *post*, as to the extent of the executive power of the Union.

'Executive Power'.—The Executive power, according to political scientists, means the power which is concerned with the 'execution of the will of the State' (Garner). Now, in a democratic State, the will of the State is expressed through the Legislature. The primary function of the Executive, thus, is not deliberation, but the carrying out or administration of the laws enacted by the Legislature. In the modern State, however, the business of the Executive is not so simple as it was in the days of Aristotle. In fact, owing to the manifold extension of the functions of the State, all residuary powers of government have practically passed into the hands of the Executive and it can no longer be said that the executive power simply consists of the power to execute the laws.

A more comprehensive idea of the Executive powers is thus given by modern writers. Thus, according to Wynes<sup>20</sup>—

(18) *Commonwealth v. Colonial Co.* (Wooltops Case), (1922) 31 C.L.R. 421 (431).

(19) Nicholas, *Australian Constitution*

1948, p. 49.

(20) Wynes, *Legislative and Executive Powers in Australia*, p. 318.

"The Executive may be defined as the authority within the State which administers the law, carries on the business of government and maintains order within, and security from without, the State."

The various powers that are thus included within the comprehensive expression "executive power" in a modern State, have been grouped by political writers under the following heads: (a) Administrative power, *i.e.*, the execution of the laws and the administration of the government. (b) Diplomatic power, *i.e.*, the conduct of foreign affairs. (c) Military power, *i.e.*, the organisation of the armed forces and the conduct of war. (d) Legislative power, *i.e.*, the summoning, prorogation, etc., of the Legislature, initiation of and assent to legislation and the like (e) Judicial power, *i.e.*, the granting of pardons, reprieves, etc., to persons convicted of crime.

The President of India has been vested with powers of all the above kinds, by different provisions of the Constitution,<sup>21</sup> as summarised below:

#### A SUMMARY OF THE POWERS OF THE PRESIDENT OF INDIA

I. *The Administrative Power.*—In the matter of administration, not being a *real* head of the Executive like the American President, the Indian President shall not have any administrative function to discharge nor shall he have that power of control and supervision over the Departments of the Government as the American President possesses. But though the various Departments of Government of the Union will be carried on under the control and responsibility of the respective Ministers in charge, the President will remain the *formal* head of the administration, and as such, all executive action of the Union must be expressed to be taken in the *name* of the President.<sup>22</sup>

For the same reason, all contracts and assurances of property made on behalf of the Government of India must be expressed to be made by the President and executed in such manner as the President may direct or authorise.<sup>22-a</sup>

Again though, he may not be the 'real' head of the administration, all officers of the Union shall be his 'subordinates'<sup>23</sup> and he shall have a right to be informed of the affairs of the Union.<sup>24</sup>

The administrative power also includes the power to *appoint and remove* the high dignitaries of the State and other administrative commissions. Under our Constitution, the President shall have the power to appoint—(i) The Prime Minister of India.<sup>25</sup> (ii) Other Ministers of the Union.<sup>25</sup> (iii) The Attorney-General for India.<sup>1</sup> (iv) The Comptroller and Auditor-General of India.<sup>2</sup> (v) The Judges of the Supreme Court.<sup>3</sup> (vi) Judges of the High Courts of the States.<sup>4</sup> (vii) The Governor of a State.<sup>5</sup> (viii) An Inter-State Council.<sup>6</sup> (ix) The Union Public Service Commission and a Joint Commission for a group of States.<sup>7</sup> (x) The Finance Commission.<sup>8</sup> (xi) Election Commissioners.<sup>9</sup> (xii) Special Officer for Scheduled Castes and Scheduled Tribes.<sup>10</sup> (xiii) A Commission to report on the administration of Scheduled areas; and a Commission to investigate into conditions of backward class.<sup>12</sup> (xiv) A Commission on languages.<sup>13</sup>

(21) See also my Article on 'The President of India' in (1949) F.L.J. 98-146 (Jour.).

(22) Art. 77.

(22-a) Art. 299 (1).

(23) Art. 53 (1).

(24) Art. 78 (b).

(25) Art. 74.

(1) Art. 76.

(2) Art. 148.

(3) Art. 124.

(4) Art. 217.

(5) Art. 155.

(6) Art. 263.

(7) Art. 316.

(8) Art. 280.

(9) Art. 324 (2).

(10) Art. 338 (1).

(11) Art. 339 (1).

(12) Art. 340 (1).

(13) Art. 344 (1).

The President shall also have the power to *remove* (i) his Ministers, individually;<sup>14</sup> (ii) the Attorney-General for India;<sup>15</sup> (iii) the Governor of a State.<sup>16</sup>

As regards other officers of the Government, *our Constitution* seeks to avoid the vice of the above system, by withholding from the President any general power of appointment or removal besides the few cases specified in the Constitution itself; and by making the "Union Public Services, All-India Services and Union Public Service Commission",—an exclusive legislative subject for the Union Parliament, and by making it obligatory on the part of the President to consult the Public Service Commission [Art. 286 (3)], excepting certain specified cases.<sup>17</sup>

The 'executive' power primarily means the execution of the law which function logically comes under the present head. Though, in *our Constitution* there is no provision specifically requiring the President to take care that 'the laws are faithfully executed,'<sup>18</sup> and though there is no separation of authority as between the Union and the States in the matter of execution of the Union and State laws,—inasmuch as it will be the duty of the States to execute both the State laws and the Union laws as are applicable in that State,<sup>19</sup>—the executive power of the Union shall extend to the giving of *directions*<sup>20</sup> to the States to ensure due compliance with the Union laws.<sup>21</sup>

II. *The Military power.*—The military powers of the Indian President shall be lesser than those of either the American President or of the English Crown. The *supreme command* of the Defence Forces is, of course, vested in the President of India, but the Constitution expressly lays down that the exercise of this power shall be regulated by law.<sup>22</sup> Parliament has exclusive legislative power relating to the *Defence Forces*;<sup>23</sup> over war and peace.<sup>24</sup> So, under the present power, it will not be possible for the Indian President either to declare war or to employ the forces without or in anticipation of Parliamentary sanction nor would it enable the Indian President to assume emergency powers such as the American President did during the World Wars, in exercise of his powers as Commander-in-Chief.

III. *The Diplomatic power.*—The diplomatic power is a very wide subject and is sometimes spoken of as identical with the power over foreign or external affairs, which comprise "all matters which bring the Union into relation with any foreign country". The legislative power as regards these matters as well as the power of making treaties and implementing them, of course belongs to Parliament.<sup>24</sup> But though the *final* power as regards these things is vested in Parliament, the Legislature cannot take the initiative in such matters. The task of *negotiating* treaties and agreements with other countries, subject to ratification by Parliament, will thus belong to the President and Ministers. Again, though diplomatic representation as a subject of legislation belongs to Parliament, like the heads of other States, the President of India will represent India in international affairs and will have the power of appointing Indian representatives to other countries and of receiving diplomatic representatives of other States as shall be recognised by Parliament.

IV.—*Legislative powers.*—Like the Crown in England, the President of India is a component part of the Union Parliament. The powers which the President is vested with in relation to legislation may be summarised as follows:

(14) Art. 75 (2).

(15) Art. 76 (4).

(16) Art. 156 (1).

(17) *Vide* my article on the President of India in (1949) F.L.J. at p. 105 (Jur.).

(18) *Cf.* Art. II, Sec. 3, of the Constitution of the U.S.A.

(19) *Cf.* my article on 'The Indian Constitution through American eyes' (1949) F.

L.J. at p. 173.

(20) Arts. 256, 257 (1).

(21) As to the executive power of the Union to give directions to the States in other matters, see Arts. 257 (2) (3); 339 (2); 353 (a); 360 (3).

(22) Art. 53 (2).

(23) Entries 1, 2, 15 of List I, Sch. VII.

(24) Entries 10-14, List I, Sch. VII.



(a) The power to summon, prorogue and dissolve Parliament.<sup>25</sup> (b) The right of opening address.<sup>1</sup> (c) The right to address and to send messages.<sup>2</sup> (d) The power to cause certain reports and statements to be laid before Parliament, so that Parliament may have the opportunity to take its action upon them, such as (i) the Annual Financial Statement<sup>3</sup> and Supplementary Budget, if any;<sup>4</sup> (ii) the report of the Comptroller and Auditor-General of India relating to the accounts of the Government of India;<sup>5</sup> (iii) the recommendations made by the Finance Commission, together with explanatory memorandum of the action taken thereon;<sup>6</sup> (iv) the annual report of the Union Public Service Commission, explaining the reasons where any advice of the Commission has not been accepted;<sup>7</sup> (v) the report of the Special Officer for Scheduled Castes and Tribes;<sup>8</sup> (vi) the report of the Commission to investigate into the conditions of the backward classes, with a memorandum explaining the action taken thereon;<sup>9</sup> (e) The power of sanctioning introduction of certain legislative measures, such as, for alteration of State boundaries;<sup>10</sup> Money Bills;<sup>11</sup> Bills involving expenditure;<sup>11-a</sup> Bills affecting taxation in which the States are interested;<sup>12</sup> State Bills imposing restrictions on freedom of trade.<sup>13</sup> (f) Assent to legislation and the power to veto Union Bills,<sup>14</sup> and reserved State Bills.<sup>15</sup> (g) The power to legislate by Ordinances during recess of Parliament.<sup>16</sup>

V. *The Pardoning power.*<sup>17</sup> See under Art. 72, *post*.

VI. *Emergency Powers.*—The above is an account of the powers of the President in normal times. Besides, he shall have *extraordinary* powers to deal with an emergency, *viz.*, external aggression or internal disturbance by reason of which the security of India or any part thereof is threatened,<sup>18</sup> or, the failure of the constitutional machinery in a State owing to some other cause;<sup>19</sup> or, a financial crisis.<sup>20</sup>

VII. *Miscellaneous Powers.*—As the head of the Executive power, the President has been vested by the Constitution with certain powers which may be said to be residuary in nature, and are required to be vested in some authority, in order to let the machinery of Government set up by the Constitution, to go on instead of coming to a deadlock for want of specific provisions.

First, may be mentioned the rule-making powers of the President. These are as follows:

(i) The President shall make rules as to how orders and instruments made by the Government of India, in the name of the President shall be authenticated, and how the business of the Government of India shall be conveniently transacted and allocated among Ministers.<sup>21</sup> (ii) The President shall, in consultation with the Chairman of the Council of States and the Speaker of the House of the People, make rules as to the procedure with respect to joint sittings of, and communications between the two Houses.<sup>22</sup> (iii) The President shall specify the period at the expiration of which a member's seat in Parliament shall fall

(25) Art. 85 (2).

(1) Art. 87 (1).

(2) Art. 86.

(3) Art. 112 (1).

(4) Art. 115 (1).

(5) Art. 151 (1).

(6) Art. 281.

(7) Art. 323 (1).

(8) Art. 338 (1).

(9) Art. 340 (3).

(10) Art. 3.

(11) Art. 117.

(11-a) Art. 117 (3).

(12) Art. 274 (1).

(13) Proviso to Art. 304.

(14) Art. 111.

(15) Art. 201.

(16) Art. 123.

(17) Art. 72.

(18) Art. 352.

(19) Arts. 356, 365.

(20) Art. 360.

(21) Art. 77 (2), (3).

(22) Art. 118 (3).

vacant, in case he does not resign his seat in the Legislature of a State, in case of a double membership.<sup>23</sup> (iv) The President's approval shall be required for rules made by the Supreme Court for regulating the practice and procedure of that Court.<sup>24</sup> (v) The President shall make regulations determining the number of members of the Union Public Service Commission, their tenure and conditions of service and similar provisions as regards the staff of the Commission;<sup>25</sup> and regulations specifying the matters in which it shall not be necessary to consult the Union Public Service Commission in respect of Services of the Union [Art. 286 (3)].

On some other matters, the President's rule-making power is made subject to any law that may be made by Parliament relating thereto.<sup>1</sup>

The President shall have the power to refer any question of public importance for the opinion of the Supreme Court.<sup>2</sup>

The Constitution confers upon the President certain '*interim*' powers, to be exercised by him so long as Parliament does not elect to 'occupy' those fields. Thus,—

(a) Grants-in-aid to the States which are in need of assistance, shall be sanctioned by the President, until Parliament makes the necessary provisions.<sup>3</sup>

(b) The percentage of the proceeds of income-tax to be assigned to and distributed among the States shall be prescribed by the President, until a fresh basis is decided on the recommendation of the Finance Commission.<sup>4</sup>

(c) Until Parliament legislates, the President shall make rules regulating the recruitment and conditions of service of persons serving the Union.<sup>5</sup>

"Or through officers subordinate to him".—This expression is taken from Ss. 7 (1) and 49 (1) of the Government of India Act, 1935, and enables the President to delegate powers to officers subordinate to him. It is neither possible nor desirable that the President shall do all his acts personally.

A question arose under the Government of India Act, 1935, as to whether the Ministers were officers subordinate to the Governor, in view of the above expression. It was held by the Privy Council<sup>6</sup> that they were so, and when the Constitution adopts the same expression, it may be expected that the same interpretation will be put upon this expression under the Constitution as well. It is to be noted that under the Constitution the 'executive power' of the Union and the State is vested in the President [Art. 53 (1)] and the Governor [Art. 154 (1)], respectively. So, no other person can exercise an executive power unless he is an 'officer subordinate to' the President or the Governor, as the case may be. Again, as under the Act of 1935, though the Ministers are responsible to the Legislature, they shall be appointed by the President (Art. 75) or the Governor (Art. 163) and shall hold office during the pleasure of the President or the Governor respectively. Hence, the Ministers shall in fact be officers 'subordinate to' the President or the Governor in relation to the executive power, notwithstanding their responsibility to the Legislature.

This seems rather anomalous, but it merely expresses in statutory language what is the unwritten law in the *English Constitution*. In the English Constitution, though the Cabinet is the real executive authority, the Ministers have no legal status as such and in legal theory, they are mere servants of the Crown in

(23) Art. 101 (3).

(24) Art. 145.

(25) Art. 318.

(1) *E.g.*, Art. 324 (5).

(2) Art. 143 (1).

(3) Art. 275 (2).

(4) Art. 270 (4) (b) (i).

(5) Art. 309, Proviso.

(6) *Emperor v. Sibnath*, A.I.R. 1945 P. C. 156 (162-3); reversing *Emperor v. Hemendra*, A.I.R. 1939 Cal. 529.

whom the executive authority is vested, and they are accountable to Parliament only as servants of the Crown, and are also liable to be dismissed by the Crown at his pleasure.

*"In accordance with this Constitution"*.—These words are intended to make the President a constitutional ruler. His oath (Art. 60) also emphasises his moral duty to 'preserve, protect and defend the Constitution'. If he seeks to exercise any function otherwise than in accordance with the Constitution, he will render himself liable to impeachment (Art. 61).

It is to be noted that the words 'and the law', which occurred in the Draft Constitution after the words 'in accordance with the Constitution', have been omitted by the Constituent Assembly. The result is that the only limitation to the President's powers is the Constitution. As in the *United States*, the Indian President's constitutional powers cannot be regulated or restricted by legislation. There is thus a departure from the Australian Constitution<sup>7</sup> where the *extent* of the 'executive powers' is left to the operation of the law.

The only power which our Parliament shall have in relation to the 'executive power' of the President is that given by Art. 53 (3) (b), *viz.* of vesting subordinate functions on other persons. Of course, certain provisions of the Constitution itself empower Parliament to regulate the 'exercise' of the President's powers, *e.g.*, Arts. 53 (2); 324 (2), (5); 354 (2); 356 (3); 359 (3).

#### CL. (2)

#### OTHER CONSTITUTIONS

*U.S.A.*—Art II, S. 2 (1) of the Constitution says—

"The President shall be Commander-in-Chief of the Army and Navy of the United States."

Owing to the application of the doctrine of Separation of Powers, the above power of the President is placed on an independent footing, as an 'executive' power, and there is no provision in the Constitution, subjecting it to Congressional regulation. In the result, it has been held that the President, as the Commander-in-Chief, is competent to take much action, without legislative sanction, and even against the wishes of Congress.

Congress has, under its power to "raise and support armies" [Art. 1, S. 8 (12)], and "to provide and maintain a navy" [Art. 1, S. 8 (13)], the exclusive authority to lay down the rules governing the organization and maintenance of the military forces, the establishment of forts, arsenals and other military equipments, belongs to Congress. On the other hand, the President has the exclusive authority in the matter of disposition of troops, direction of vessels of war, the planning and execution of campaigns and all orders issued by the President, as the Commander-in-Chief (which are not otherwise unconstitutional) have the force of *law*.<sup>8</sup> Each of the two organs of government is thus supreme in its own sphere. This distinction was explained by the Supreme Court, in *Ex parte Milligan*,<sup>9</sup> in these words: "Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigour and success, *except such as interferes* with the command of forces and conduct of campaigns. That power and duty belongs to the President".<sup>9</sup>

Thus, the American President possesses the constitutional power to send troops outside the United States, without interference by the Congress, at least

(7) Wynes, *Legislative & Executive* 556.  
Powers, p. 321.

(8) *United States v. Freeman*, 3 How.

(9) *Ex parte Milligan*, (1866) 4 Wall, 2.



in time of war.<sup>10</sup> This power was exercised by President Wilson on several occasions, even though war was not declared by Congress, *e.g.*, between United States and China or Mexico.<sup>10</sup> Again, under this power, President Wilson armed merchant vessels with defensive guns, even against the refusal of Congress to give the necessary authorisation.<sup>10</sup>

As Brogan<sup>11</sup> observes—"The 'war power' is a vague and undefinable residuum of power on which the President can draw." Thus, during World War II, apart from Congressional authority, the President assumed the following powers under his position as Commander-in-Chief:

(i) to intervene in labour disputes and strikes in war industries (creating the National War Labour Board); (ii) to take over the management of industrial plants working on war contracts; (iii) to utilise domestic transportation facilities for the prosecution of war; (iv) to requisition merchant vessels for war use; (v) to employ the Army and Navy to operate war industries and plants affected by strikes; (vi) to channel labour into essential war industries [by setting up the War Manpower Commission].

*Eire.*—Art. 13 (4) of the Constitution of 1937 provides—

"(4) The supreme command of the defence forces is hereby vested in the President.

(5) (i) The exercise of the supreme command of the defence forces shall be regulated by law. (ii) All commissioned officers of the defence forces shall hold their commissions from the President."

*Australia.*—S. 68 of the Constitution Act says—

"The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General. . . ." The power is, however, exercised on ministerial advice and to the extent as defined by the Legislature.<sup>11-a</sup>

#### INDIA

SCOPE OF CL. (2): SUPREME COMMAND OF THE DEFENCE FORCES.—Like the head of the Executive of other free countries, the President of India shall have the *supreme command of the Defence Forces*. As in the *United States*,<sup>12</sup> the above power would not necessarily empower the President to take a personal command in the field. But, unlike the Constitution of the *U.S.A.*, our *Constitution* expressly provides that the exercise of this power of supreme command 'shall be regulated by law'.<sup>12-a</sup>

Further, the generality of 'war power' vested in our Parliament by Entry 14 of List I (Union List), Sch. VII,—"War and Peace",—enables Parliament to give directions to the President as to the exercise of the power of command of the Defence Forces and the power to carry on a military campaign, and it will not be possible for the President to *override* the wishes of Parliament in respect of any matter appertaining to the conduct of war. It does not appear, however, that the Indian President shall have no power to act in anticipation of Parliamentary sanction, to deal with an emergency like an actual invasion.<sup>13</sup> In such a case, the Indian President, acting as the commander of the Defence Forces, and with the advice of responsible Ministers, should have the power to employ the forces in advance to repel invasion, pending a formal declaration of war by Parliament.<sup>13</sup> In fact, the Constitution vests in the President (Art. 352)

(10) Willoughby, *Constitutional Law of the United States*, Vol. III, p. 1567.

(11) Brogan, *Government of the People*, 1943, p. xix.

(11-a) Nicholas, *Australian Constitution*, p. 83.

(12) *United States v. Eliason*, 16 Pet. 291.

(12-a) In *England*, the supreme command

belongs to the Crown free of Parliamentary control [*China Navigation v. A. G.* (1932) 2 K.B. 197].

(13) The *Irish Constitution*, 1937, vests such a power in the Executive by Art. 28, Sec. 3 of which says—"War shall not be declared and the State shall not participate in any war save with the assent of the *Dail Eireann*."

the power to determine, in anticipation of Parliamentary decision, whether such an emergency has arisen.

In some countries, the military power of the Executive includes the power to declare *War and Peace*. Thus, in *England*, "the Sovereign alone has the power of declaring war and peace."<sup>14</sup> Not only has the Crown the prerogative to declare war, it has also the final authority to determine whether a state of war exists with any country.<sup>15</sup>

The *American Constitution*, on the other hand, vests the power 'to declare war' exclusively in the Congress [Art. 1, Sec. 8 (11)]. No other authority can involve the United States in a war,—though, of course, the President, as Commander-in-Chief, may act in such way that war becomes inevitable.<sup>16</sup>

"*Shall be regulated by law*".—'Law' in this context obviously refers to Acts of Parliament.<sup>17</sup>

### CL. (3).

#### OTHER CONSTITUTIONS

*Burma*.—Sec. 59 of the Burmese Constitution provides—

" . . . . but nothing in this section shall prevent the Parliament from conferring functions upon subordinate authorities, or be deemed to transfer to the President any functions vested in any court, judge, or officer, or any local or other authority by any existing law."

*Government of India Act, 1935*.—Sec. 7 (1) of the Act provided—

" . . . . but nothing in this section shall prevent the Federal Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing law on any Court, judge or officer, or on any local or other authority."

#### INDIA

Cl. (3) (a): *Saving of existing laws*.—Sec. 124 of the Government of India Act, 1935, authorised the delegation of any functions relating to the executive authority of the Federation to the Government of any Province, by Acts of the Federal Legislature. The present clause saves those laws and explains that the vesting of the executive power of the Union in the President does not mean an automatic resumption of those delegated functions by the President.

Cl. (3) (b): *Power of Parliament ■ regards President's functions*.—This clause means that though the executive power is vested in the President by the Constitution it will not prevent Parliament from delegating the discharge of subordinate or ministerial functions to any other person or authority subject to the direction and control of the President and within the limits set forth by the Constitution. Thus, though Parliament may not transfer the supreme command of the Defence Forces to any person other than the President, it would be competent for Parliament to provide that particular subordinate functions in relation to the command of the Forces shall be exercised by other person or persons, subject to the supreme command of the President. This is an essential provision simply because, it would not be physically possible for the President to exercise all powers personally nor to provide how each particular function shall be exercised. But powers which are expressly vested by the Constitution in the

In the case of actual invasion, however, the Government may take whatever steps they consider necessary for the protection of the State, and Dail Eiremann if not sitting shall be summoned to meet at the earliest practicable date."

(14) *The Hoop*, (1799) 1 C. Rob. 196.

(15) *Janson v. Driefontein Mines*, (1902) A.C. 484; *Kawasaki v. Bantham Co., Ltd.*, (1939) 2 K.B. 544.

(16) Munro, *Government of the United States*, (1944), p. 454.

(17) Cf. *The Commonwealth v. Colonial Combing Co.*, (1922) 31 C.L.R. 421 (431).

President cannot be transferred by Parliament to any other authority. This sub-clause reminds one of the observations of the Supreme Court in *Kendall v. U. S.*<sup>18</sup> "It by no means follows that every officer in every branch of that (the executive) department is under the exclusive direction of the President. . . . It would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the Constitution, and in such cases the duty and responsibility grow out of and are subject to the control of the law and not to the direction of the President."

Election of President.

**54.** The President shall be elected by the members of an electoral college consisting of—

- (a) the elected members of both Houses of Parliament ; and
- (b) the elected members of the Legislative Assemblies of the States.

#### OTHER CONSTITUTIONS.

*U. S. A.*—The original mode of election prescribed by Art. II (1) has been superseded by the 12th Amendment of 1804. Under the amended provision, the elections is held as follows:<sup>19</sup> The election of the President is made indirectly, by an electoral College. The number of electors chosen from each State is equal to its representation in the Congress, i.e., equal to the number of its representatives in the House of Representatives and the Senate. The electors meet in their respective States and vote by ballot. The person having the greatest number of votes by such ballot shall be the President, if such number be a majority of the whole number of electors appointed. But if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose, by ballot, the President. The Constitution itself does not say how the electors are to be chosen. But in practice, the electors have come to be chosen by popular election, which has become complicated owing to the growth and strength of party organisations. Long before the Presidential elections, the various parties hold their national conventions and select their own candidates for the President. When the primary voters vote for the electoral college, therefore, they also know for which Presidential candidate they are voting and, as soon as the popular vote is counted, not only the electors are known but also, in effect, the President, and the meeting of the electoral college, afterwards, has become superfluous and a matter of form. By the operation of the party system, the election of the President has thus come to be practically direct. Again, owing to the growth of the party system in the U.S.A., the object of the framers of the Constitution that the best man should be chosen by the people, judged only by the test of merit, has been perverted by a system by which only the strength of the different parties is fought out and the President who is elected is ■ mere nominee of the successful party.

The system of election by States has also led to the curious result that the man who receives the largest number of votes is not necessarily ■lected President. This is because the voters do not ballot directly for the Presidential candidates themselves. The election is not a plebiscite. They vote for electors in each State to

(18) *Kendall v. U. S.*, (1838) 12 Pet. 524 (610).

(19) Munro, *Constitution of the United States*, 1944, p. 74.



cast the electoral votes of the State. Each State has ■ certain number of electoral votes, based on its representation. It has as many electors as it has Senators and members of the House of Representatives. There are 96 Senators and 435 Representatives, which makes ■ total of 531 electoral votes of which 266 are needed for a Presidential candidate to be elected. A candidate who receives a majority of the votes of the citizens in an individual State is given the entire electoral votes of that State. But as between the States the number of electoral votes varies, according to population. Hence, candidates for the Presidency tend to concentrate their election campaigns in certain key States with larger number of electoral votes, such as New York, which controls 47.

This is because the contest is usually close in the struggle for the votes of these populous States, and by just tipping the scales with a 51 per cent. majority, candidates can win a large number of electoral votes.

*Eire.*—Art. 12 (2) of the Constitution of 1937 says—

“(2) (i) The President shall be elected by direct vote of the people. (ii) Every citizen who has the right to vote at ■ election for members of Dail Eireann shall have the right to vote at an election for President. (iii) The voting shall be by secret ballot and on the system of proportional representation by means of the single transferable vote.”

Art. 12 (4) and (5) again, provide—

“(4) 2. Every candidate for election, not a former or retiring President, must be nominated either by—(i) not less than twenty persons, each of whom is at the time a member of one of the Houses of the Oireachtas; or (ii) by the Councils of not less than four administrative counties (including county boroughs) as defined by law.

3. No person and no such Council shall be entitled to subscribe to the nomination of more than one candidate in respect of the same election;

4. Former or retiring Presidents may become candidates on their own nomination.

5. Where only one candidate is nominated for the office of President it shall not be necessary to proceed to a ballot for his election.

“(5) Subject to the provisions of this article, elections for the office of President shall be regulated by law.”

*Fourth French Republic.*—Art. 29 of the French Constitution of 1946 provides that “the President of the Republic shall be elected by the Parliament.”

*Burma.*—Sec. 46 of the Burmese Constitution provides—

“The President shall be elected by both Chambers of Parliament in joint session by secret ballot. Subject to the provisions of this Chapter, election to the office of the President shall be regulated by an Act of the Parliament.”

### INDIA

*Art. 54: Reasons for adopting Indirect Election for election of President.*—Pandit Nehru gave the following reasons in the Constituent Assembly<sup>20</sup> why a direct election of the President on the adult suffrage was discarded—

(i) The framers of the Indian Constitution wanted to emphasise that the power really vested in the Ministry and the Legislature and not in the President as such. “If we had the President elected on adult franchise and it did not give him any real powers, it might become a little anomalous.” (ii) A tremendous loss of time, energy and money would be involved in ■ Presidential election ■ adult suffrage. We shall have elections to the Federal Parliament. An enormous Presidential election added to this would be a tremendous affair—some of which we might not even be able to carry out.” (iii) It would be impossible to provide an electoral machinery for ■ election in which at least 185 millions of people would have to participate.

*Reasons why Members of State Assemblies have been included in the Electoral College.*—The Union Legislature would ordinarily be dominated by one party, which would form the Ministry. If this group elected the President, inevitably they could choose their own man; the President and the Ministry would thus represent exactly the same thing. The framers of the Constitution have, therefore, struck a middle course and asked members of legislatures all over India in all the Units to take part in the election.<sup>21</sup> By Art. 55 (2), however, the votes of members of Parliament have been *weighted* so as to secure that the total voting strength of the members of Parliament equals that of the Assemblies of all the States taken together.

Manner of election of President.

**55.** (1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

(2) For the purpose of securing such uniformity among the States *inter se* as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner :—

(a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly ;

(b) if, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one ;

(c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of both Houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

*Explanation.*—In this article, the expression “population” means the population as ascertained at the last preceding census of which the relevant figures have been published.

#### OTHER CONSTITUTIONS

*Eire.*—See under Art. 54, above.

#### INDIA

CL. (3) : PROPORTIONAL REPRESENTATION BY THE SINGLE TRANSFERABLE VOTE.—The system of voting by secret ballot on the system of proportional repre-

(21) Const. Assembly Debates, Vol. IV, No. 6, p. 734.

sentation by means of the single transferable vote is adopted from the Constitution of Eire [Art. 12 (2)]. It is the method advocated by Thomas Hare.<sup>22</sup> In our Constitution, this device is adopted not only for the election of the President but also for election of representatives of the States in the Council of States [Art. 80 (4)], for election of members of the Legislative Council of a State [Art. 171 (4)].

The object of introducing proportional representation at these elections is to give each minority group an effective share in the political life. The advantages claimed for the Single Transferable System, further, are—(i) All currents of political opinion can be truly reflected under this system, and any group can elect one representative if it can muster sufficient votes to reach the 'quota'. (ii) The power and interest of each vote is increased by giving him successive choices.

*How the Single Transferable Vote system works.*—The essential features of this system may be summarised as follows: The election is held by general ticket and the country is divided into electoral districts, to form multi-member constituencies. All the candidates who compete for the seats allotted to a constituency, have their names printed on one ballot paper. Each elector has only one vote in the sense that it will be capable of electing one candidate only. But that vote will not be wasted in case the candidate whom he wishes to elect has got more than the required number of votes, called the 'quota'. The elector is required to indicate his first, second and third preferences and so on, by placing the figures 1, 2, 3, etc., against each candidate.

At the time of counting the votes, a quota is fixed. Any member who gets this quota of votes, is declared elected. This quota is fixed thus—

$$\frac{\text{Total number of ballot papers} + 1}{\text{Number of candidates to be elected} + 1}$$

Supposing the total number of ballot papers to be 18,000 and the number of candidates to be elected to be 6, the quota will be—

$$\frac{18,000}{6+1} + 1 = 2572.$$

In the first count, the first preferences alone are counted and any candidate (A) who receives the above quota of first preferences is declared elected. These 2572 ballot papers are then put aside and are not to be of any further use.

Now, A has a surplus of first preferences in his favour which are of no use to him. These excess ballot papers giving the first preference to A are then recounted, according to the second preferences and these surplus votes are then transferred to the other candidates, and are added to the first preference votes obtained by each, until some of them also reaches the quota and so on, until 6 candidates reach the quota.

When all the required number of candidates do not receive the quota by distribution of surpluses, the process is reversed,—by dropping out the candidate who has the least number of first preferences, and the second preferences in these ballot papers are then given to the appropriate candidate against whose name they are placed.

(22) Thomas Hare, *Treatise on the Election of Representatives—Parliamentary and Municipal* (1859). For a detailed working of this system, see also App. I to Horwill, *Proportional Representation*; Hoag and Hal-

let, *Proportional Representation*, (1926); Gosnell, Article ■ *Proportional Representation* in the *Encyclopaedia of Social Sciences*, Vol. XII.



**56.** (1) The President shall hold office for a term of five years from the date on which he enters upon his office :

Term of office of President.

Provided that—

(a) the President may, by writing under his hand addressed to the Vice-President, resign his office ;

(b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in Article 61 ;

(c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

#### OTHER CONSTITUTIONS

*U.S.A.*—The President “shall hold office during the term of four years” [Art. II, Sec. 1 (1)] ; Art. II, Sec. 1 (6) provides—

“In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties, of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.”

As to resignation, Sec. 151 of the U.S. Rev. Stat. provides that it shall be made by ‘an instrument in writing, declaring the same. . . . delivered into the office of the Secretary of State’.

As to removal, Art. II, Sec. 4 provides—

“The President . . . . shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanours.”

*Eire.*—Art. 12 (3) 1° of the Constitution of 1937 says—

“The President shall hold office for 7 years from the date upon which he enters upon his office, unless before the expiration of that period he dies, or resigns, or is removed from office, or becomes permanently incapacitated, such incapacity being established to the satisfaction of the Supreme Court consisting of not less than five judges.”

*Fourth French Republic.*—Art. 29 of the Constitution of 1946 provides that the President “shall be elected for seven years”. Art. 41 says—

“If the President is not able to exercise his office for reasons duly noted by a vote of the Parliament, or in the event of a vacancy caused by death, resignation or any other circumstance, the President of the Republic shall assume the interim functions of the President of the Republic. . . . .”

Art. 42, again, says—

“The President of the Republic may not be tried except for high treason. He may be indicted by the National Assembly and arraigned before the High Court of Justice under the conditions set forth in Art. 57.”

*Burma.*—Sec. 48 (1) of the Burmese Constitution says—

“The President shall hold office for five years from the date on which he enters upon his office, unless before the expiration of that period he resigns or dies, or is removed from office, or becomes permanently incapacitated.”

## INDIA

*Scope of Art. 56: Term of Office of President.*—This article lays down that the normal term of office of the President is 5 years. But that it may terminate earlier, in any of the following ways—(i) By resignation in writing addressed to the Vice-President, which shall be forthwith communicated by the Vice-President to the Speaker of the House of the People. (ii) By removal for violation of the Constitution, by the process of impeachment as provided by Art. 61, *post*.

*Cl. (1) (b): 'Violation of the Constitution'.*—The Constitution does not define what is meant by the above expression. In the *United States*, impeachment lies (Art. II, Sec. 4) for 'treason, bribery or other high crimes and misdemeanours'. The expression 'misbehaviour' appears in the Constitution of *Eire*. There is an additional ground in the *Burmese Constitution*—'gross misconduct'.

**57.** A person who holds, or who has held, office ■ President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.

Eligibility for re-election.

## OTHER CONSTITUTIONS

*U.S.A.*—In the Constitution itself, there is no bar against re-election and nearly all important Presidents have been elected twice. Until 1940, there was a convention that a President should not be re-elected more than once, for, it was feared that the same person holding the Presidentship for three terms might become a dictator. In 1940, however, during the emergency of World War II, President Roosevelt was elected for the third term. Many people regard it as an exception which is not to take place again.

*Eire.*—Art. 12 (3) 2° of the Constitution of 1937 says—

"A person who holds, or who has held, office as President, shall be eligible for re-election to that office once, but only once."

So, no person shall be eligible for the office of President for more than 2 terms. This embodies the American convention.

*Burma.*—Sec. 48 (2) of the Burmese Constitution says—

"No person shall serve as President for more than two terms in all."

This is an adoption of the Irish principle.

*Fourth French Republic.*—Art. 29 of the Constitution of 1946 says that the President "shall be eligible for re-election only once."

## INDIA

*Scope of Art. 57: Eligibility of President for re-election.*—On this point, our Constitution differs from the American and Irish precedents, by imposing ■ limit to re-eligibility. Under our Constitution, it will be possible to re-elect a worthy President ■ many times as he holds the people's confidence.

Qualifications for election as President.

**58.** (1) No person shall be eligible for election as President unless he—

(a) is a citizen of India,

(b) has completed the age of thirty-five years, and

(c) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation.*—For the purposes of this Article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor or Rajpramukh or Uparajpramukh of any State or is a Minister either for the Union or for any State.

### OTHER CONSTITUTIONS

*U.S.A.*—Art. II, Sec. 1 (5) of the Constitution says—

“No person except ■ natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States.”

*Eire.*—Art. 12 (4) 1° of the Constitution of 1937 says—

“Every citizen who has reached his 35th year of age is eligible for election to the office of President.”

*Burma.*—Sec. 49 of the Burmese Constitution says—

“No person shall be eligible for election to the office of President unless he—

(i) is ■ citizen of the Union who was, or both of whose parents were, born in any of the territories included within the Union, and

(ii) is qualified for election to the Union Parliament.”

### INDIA.

*Scope of Art. 58: Qualifications for election as President.*—Read with Art. 85, *post*, the present Article lays down the qualifications for being elected as President. While 25 is the minimum age requirement for being a member of the House of the People, 35 is the age requirement for being elected ■ president.

As to ‘office of profit’, see under Art. 102 (1) (a), *post*.

The *Explanation* provides that a sitting Governor, Rajpramukh or Uparajpramukh, Minister of the Union or of a State or the Vice-President may seek election as President. A President may also seek re-election (Art. 57). In order to prevent abuse of authority by such candidates, the superintendence, direction and control of election for the office of President has been vested, by Article 324 (*post*), in an Election Commission which is subject to control of Parliament, and the decision of doubts and disputes relating to election of President is left to the Supreme Court (Art. 71, *post*).

**59.** (1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if ■ member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated

Conditions of President's office.



his seat in that House on the date on which he enters upon his office as President.

(2) The President shall not hold any other office of profit.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the second Schedule.

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. II, Sec. 7, says—

"The President shall, at times stated, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

*Eire.*—Art. 12 (6) of the Constitution of 1937, says—

"1° The President shall not be a member of either House of the Oireachtas. 2° If a member of either House of the Oireachtas be elected President, he shall be deemed to have vacated his seat in that House. 3° The President shall not hold any other office or position of emolument."

Art. 12 (11) again provides—

"1° The President shall have an official residence in or near the city of Dublin. 2° The President shall receive such emoluments and allowances as may be determined by law. 3° The emoluments and allowances of the President shall not be diminished during his term of office."

*Burma.*—Sec. 47 of the Constitution of Burma says—

"(1) The President shall not be a member of either Chamber of Parliament. (2) If a member of either Chamber of Parliament be elected President, he shall be deemed to have vacated his seat in that Chamber. (3) The President shall not hold any other office or position of emolument."

Sec. 55 says—

"The President shall have an official residence and shall receive such emoluments and allowances as shall be prescribed by law. Emoluments and allowances of the President shall not be varied during his term of office."

*Fourth French Republic.*—Art. 43 of the Constitution of 1946 says—

"The office of the President is incompatible with any other public office."

#### INDIA

Cl. (2): 'Office of profit.'—See the meaning of this expression under Art. 102 (1) (a), *post*.

**60.** Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the seniormost Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

Oath or affirmation by the President.

“ I, A, B., do swear in the name of God that I will solemnly affirm faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India.”

#### OTHER CONSTITUTIONS.

*U.S.A.*—Art. II, Sec. 1 (8) of the Constitution says—

“Before the (President) enters on the execution of his office he shall take the following oath or affirmation:

‘I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.’”

*Eire.*—Art. 12 (8) of the Constitution of 1937, says—

“(8) The President shall enter upon his office by taking and subscribing publicly, in the presence of members of both Houses of the Oireachtas, of judges of the Supreme Court and of the High Court, and other public personages, the following declaration: ‘In the presence of Almighty God I.....do solemnly and sincerely promise and declare that I will maintain the constitution of Ireland and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. May God direct and sustain me.’”

*Burma.*—Sec. 51 of the Constitution of Burma says—

“The President shall enter upon his office by making and subscribing publicly in the presence of both Chambers of Parliament assembled and of the Judges of the Supreme Court, the following declaration:—‘I.....do solemnly and sincerely promise and declare that I will maintain the Constitution of the Union and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, that I will diligently avert every injury and danger to the Union and that I will dedicate myself to the service of the Union.’”

#### INDIA.

*Art. 60: Object of Oath.*—The oath does not add to the *legal* liability nor his powers as created by the other provisions of the Constitution.<sup>23</sup> The object is only to impose a *moral* obligation.

**61** (1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

Procedure for impeachment of the President.

(2) No such charge shall be preferred unless—  
(a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days’ notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

(23) Cf. Willoughby, *Constitutional Law of the United States*, Vol. 3, p. 1473.

(b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is passed.

#### OTHER CONSTITUTIONS

*U.S.A.*—Sec. 4 of Art. II of the Constitution of the United States says—

"The President, Vice-President, and all civil officers of the United States, shall be removed from office by impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours."

The process of trial by impeachment was adopted in the American Constitution from the English, with some differences on points of detail. The procedure for impeachment in the United States has been thus described: First of all, some members of the House of Representatives, on the floor of the House, brings charges against a civil officer of the government. These charges, if the House believes that they are deserving of investigation, are then referred to a special committee. This special committee of the House, after looking into the matter, may recommend to the whole House that the charges be incorporated in articles of impeachment and transmitted to the Senate for action. When that is done, all further proceedings rest with the Senate. *The House has no part in determining the verdict.*<sup>24</sup>

The Senate has the sole power to try impeachments [Art. 1, Sec. 3 (6)]. After the charge is transmitted by the House of Representatives to the Senate, the Senate hears the impeachments as a regular trial, where witnesses are heard and the accused is permitted to be represented by counsel. A *two-thirds vote* of the Senators present at the impeachment is necessary for a conviction. Senators are placed under oath or affirmation at a trial of impeachment. The Vice-President presides in the case of trial of officers other than the President. At the trial of the President, the Chief Justice presides. There have been very few federal impeachments in the United States since the inception of the Constitution, and owing to the requirement of a two-thirds majority, conviction has been found to be difficult.<sup>25</sup> Only one President has so far been impeached (Pres. Johnson, 1868); but he was acquitted.

*Eire.*—Under Art. 12 (10) of the Constitution of Eire, 1937, either House of the Oireachtas (Legislature) may impeach the President for misbehaviour, and after investigation of the charge he may be removed by a resolution passed by two-thirds of the other House. Cls. (2)-(7) of S. 54 of the Burmese Constitution, quoted below, reproduce, verbatim, the provisions of Art. 12 (10) of the Constitution of Eire.

(24) Munro, Constitution of the United States, pp. 11-12.

(25) Munro, Constitution of the United States, p. 11.



*Fourth French Republic.*—Art. 57 of the French Constitution, 1946, lays down the procedure for indictment of the President as well as the Ministers. The procedure is as follows:

“The indictment shall be by the National Assembly and thereafter the person impeached will be arraigned before the High Court of Justice. The Assembly shall vote upon this question by secret ballot and by an absolute majority of its members, with the exception of those who may be called upon to participate in the prosecution, investigation or judgment of the case”.

*Burma.*—Sec. 54 of the Burmese Constitution provides—

“(1) The President may be impeached for—(i) high treason; (ii) violation of the Constitution; or (iii) gross misconduct.

(2) The charge shall be preferred by either Chamber of Parliament subject to and in accordance with the provisions of this section.

(3) A proposal to either Chamber of Parliament to prefer a charge against the President under this section shall not be entertained except upon a notice of resolution in writing signed by not less than one-fourth of the total membership of that Chamber.

(4) No such proposal shall be adopted by either Chamber of Parliament save upon a resolution of that Chamber supported by not less than two-thirds of the total membership thereof.

(5) When a charge has been preferred by one Chamber of Parliament, the other Chamber shall investigate the charge or cause the charge to be investigated.

(6) The President shall have the right to appear and to be represented at the investigation of the charge.

(7) If, as the result of the investigation, a resolution be passed, supported by not less than two-thirds of the total membership of the Chamber of Parliament by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained and that the offence, the subject of the charge, was such as to render him unfit to continue in office, such resolution shall operate to remove the President from his office.”

## INDIA

*Cl. (3): Scope of Cl. (3): Investigation of the charge.*—Cl. (3) of this article should be read with the Proviso to Art. 361 (1). When a charge of impeachment is preferred by either House of Parliament, the other House is to investigate the charge. But instead of making the investigation itself, it may delegate the work of investigation to any Court body or tribunal appointed by the House for that purpose. Of course, mere investigation is not final. Removal of the President will require the resolution of that House to which the charge has been preferred under sub-cl. (4) of the present article.

Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.

**62.** (1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after, and in no case later than six months from, the date of occurrence of the vacancy; and the person elected to fill the vacancy shall, subject to the provisions of article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

## OTHER CONSTITUTIONS

*Eire and Burma.*—Art. 12 (3) 3<sup>o</sup> of Eire and Art. 50 of the Burmese Constitution deal with similar matter.

The Vice-President of India. **63.** There shall be a Vice-President of India.

## OTHER CONSTITUTIONS.

*U.S.A.*—Provision for a Vice-President is made by Art. II, Sec. 1 (1) of the Constitution.

*Eire and Burma.*—There is no provision for the office of Vice-President. In case of a vacancy in the office of the President, his functions are to be performed by a Commission,—under these two Constitutions (*see* under Art. 65, *below*).

4

The Vice-President to be *ex-officio* Chairman of the Council of States. **64.** The Vice-President shall be *ex-officio* Chairman of the Council of States and shall not hold any other office of profit :

Provided that during any period when the Vice-President acts as President or discharges the functions of the President under article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under article 97.

## OTHER CONSTITUTIONS

*U.S.A.*—The normal function of the Vice-President is to act as the President of the Senate, "but he shall have no vote, unless they (Senators) be equally divided" [Art. I, Sec. 3 (4)]. When the office of the President becomes vacant, he acts as the President [Art. II, Sec. 1 (6)].

## INDIA

*Scope of Arts. 64-65: Functions of the Vice-President.*—The Vice-President will be the highest dignitary of India, coming *next after* the President. The normal function of the Vice-President will be to act as the *ex-officio* Chairman of the Council of States. [See Art. 89 (1), *post.*] But if there occurs any vacancy in the office of the President by reason of his death, resignation, removal or otherwise, the Vice-President shall act as President until a new President is elected and enters upon his office. But when the Vice-President thus acts as the President, he shall cease to perform the duties of the Chairman of the Council of States and then the Deputy Chairman of the Council of States shall act as its Chairman. Similarly, the Vice-President shall act in place of the President during the temporary absence of the President, illness or any other cause by which he is unable to discharge his functions.

The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence, of President.

**65.** (1) In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

(2) When the President is unable to discharge his functions owing to absence, illness, or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. II, Sec. 1 (6) provides—

"In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office the same shall devolve on the Vice-President."

The Constitution does not define what is meant by 'inability' and none is authorised to determine whether any President is suffering from inability at any moment. It is striking that during the entire history of the American Constitution, there has not been a single instance of a Vice-President acting for a President on ground of the latter's inability and that illness has not been construed as inability.<sup>1</sup>

*Burma.*—Sec. 64 of the Burmese Constitution says—

"(1) In the event of the death, resignation, removal from office, absence or incapacity whether temporary or permanent, of the President, or at any time at which the office of the President may be vacant, the powers and functions conferred on the President by this Constitution shall be exercised and performed by a Commission constituted as hereinafter provided. (2) The Commission shall consist of the following persons, namely, the Chief Justice of the Union, the Speaker of the Chamber of Nationalities and the Speaker of the Chamber of Deputies. (3) Such Judge of the Supreme Court as has been appointed to perform the duties of the Chief Justice, or if there is no such Judge, then the senior available Judge of the Supreme Court, shall act as a member of the Commission in place of the Chief Justice on any occasion in which the office of the Chief Justice is vacant or on which the Chief Justice is unable to act. (4) The Deputy Speaker of the Chamber of Nationalities shall act as a member of the Commission in the place of the Speaker of the Chamber of Nationalities on any occasion in which the office of the Speaker of the Chamber is vacant or on which the said Speaker is unable to act. (5) The Deputy Speaker of the Chamber of Deputies shall act as a member of the Commission in place of the Speaker of the Chamber on any occasion on which the office of the Speaker of the

(1) Willoughby, *Constitutional Law*, Vol. III, pp. 1470-1; Munro, *Government of the United States*, p. 168; Burdick, *American Constitution*, p. 60.



Chamber of Deputies is vacant ■ ■ which the said Speaker is unable to act. (6) The Commission may act by any two of its members and may act notwithstanding a vacancy, ■ its membership. (7) The provisions of this Constitution which relate to the exercise and performance by the President of the powers and functions conferred on him by this Constitution shall apply to the exercise and performance of the said powers and functions under this section."

The above is an adaptation of the provisions of Art. 14 (1)—(5) of the Constitution of Eire, 1937, which are similar. Instead of a Vice-President, a Commission shall perform the functions of the President in cases of vacancy in the latter office.

#### INDIA

Cl. (1): '*Otherwise*'.—This includes setting aside of election of a President under Art. 71, *post*.

Cl. (2): '*Unable to discharge his functions*'.—Primarily, it is the President himself who is to determine whether he is at any time unable to discharge his functions. But if the President is unable to determine that, say, owing to a sudden attack of serious illness, Parliament may determine that under its residuary power under Art. 70, *post*.

**66.** (1) The Vice-President shall be elected by the members of both Houses of Parliament assembled at ■ Election of Vice-President. joint meeting in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

(2) The Vice-President shall not be ■ member of either House of Parliament or of a House of the Legislature of any State, and if ■ member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office ■ Vice-President.

(3) No person shall be eligible for election as Vice-President unless he—

(a) is a citizen of India ;

(b) has completed the age of thirty-five years ; and

(c) is qualified for election as a member of the Council of States.

(4) A person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation.*—For the purposes of this Article, ■ person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor or Rajpramukh or Uparajpramukh of any State or is ■ Minister either for the Union or for any State.

#### OTHER CONSTITUTIONS

*U.S.A.*—The Vice-President is elected by an electoral college in the same manner as the President (*see* p. 224, *ante*). If ■ candidate for the office of the Vice-President has a majority, the election goes to the Senate. The Senators,

each having one vote elect the Vice-President out of the two candidates standing highest on the list returned by the electors. An absolute majority of all the members of the Senate is required for such election. [The Twelfth Amendment (1804)].

#### INDIA

*Scope of Art. 66: Election of Vice-President.*—Cls. (2)-(4) contain provisions similar to those of Arts. 58-59 relating to the President. But the mode of election prescribed by Cl. (1) differs from the mode of election of President as provided by Art. 54, *ante*. The election of the Vice-President will also be indirect and under the system of proportional representation by means of the single transferable vote. But his election will be different from that of the President in as much as the State Legislatures, shall have no part in it. The Vice-President will be elected by members of both Houses of Parliament assembled at ■ joint meeting.

**67.** The Vice-President shall hold office  
 Term of office of Vice-President. for a term of five years from the date on which he enters upon his office :

Provided that—

(a) a Vice-President may, by writing under his hand addressed to the President, resign his office ;

(b) a Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People ; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution ;

(c) a Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

#### OTHER CONSTITUTIONS

*U.S.A.*—The term of office of the Vice-President is the same as that of the President, *viz.*, 4 years and the mode of removal is also the same.

#### INDIA

*Scope of Art. 67: Term of Vice-President.*—This Article is analogous to Art. 56, *ante*, relating to the President. The term of the Vice-President is the same, *viz.*, 5 years. But the procedure for removal of the Vice-President as provided by Proviso (b) of the present article *differs* from that of the President as laid down in Art. 61, *ante*. No regular impeachment will be necessary to remove a Vice-President. A resolution passed by ■ majority of all the members of the Council of States and agreed to by the House of the People will suffice for this purpose. [Compare Arts. 90 (c) and 94 (c), *post*].

*'Agreed to by the House of the People'.*—These words, read with reference to the preceding words 'the then members' mean that while in the Council of States the resolution must be passed by ■ majority of the total membership of that House (excepting those whose seats were vacant.,—in the House of the People, it would suffice if the majority of the House who voted, agreed to the resolution.

Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.

**68.** (1) An election to fill a vacancy caused by the expiration of the term of office of Vice-President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after the occurrence of the vacancy, and the person elected to fill the vacancy shall, subject to the provisions of article 67, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

**69.** Every Vice-President shall, before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation in the following form, that is to say—

Oath or affirmation by the Vice-President.

“ I., A. B., do \_\_\_\_\_ swear in the name of God that I will bear solemnly affirm true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter. ”

Discharge of President's functions in other contingencies.

**70.** Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. II, Sec. 1 (6) says—

“ . . . . . and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act ■ President, and such officer shall act accordingly until the disability be removed or ■ President shall be elected.”

Congress has passed an Act in 1792, under the above article.<sup>2</sup>

#### INDIA

*Scope of Art. 70: Discharge of President's Function in 'other contingencies'.*—This article corresponds to Art. II, Sec. 1 (6) of the United States Constitution and empowers Parliament to make provision ■ for the discharge of the President's functions when ■ vacancy takes place in the offices of President and Vice-President, simultaneously, owing to removal, death, resignation or otherwise.

Matters relating to or connected with the election of a President or Vice-President.

**71.** (1) All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.

(2) See Burdick's American Constitution, p. 60.



(2) If the election of a person ■ President or Vice-President is declared void by the Supreme Court, acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.

(3) Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President.

*Cl. (1): Decision of doubts and disputes relating to Presidential election.*—Under Art. 324 (1), *post*, the superintendence, direction and control of the election of President and Vice-President is vested in the Election Commission, but the decision of doubts and disputes relating to election to any of these two offices is, by the present clause, vested in the Supreme Court. The present clause thus supplements Art. 131 which defines the original jurisdiction of the Supreme Court. But the procedure according to which the Supreme Court will 'inquire into and decide' such a dispute is left to the Supreme Court itself and its decision is declared 'final'. The result is, that the decision of the Supreme Court cannot be overridden by Parliament, even though it may regulate any matter relating to the election of President and Vice-President. [Art. 71 (3)].

*Cl. (2): Effect of adverse decision as to election of sitting President.*—This clause merely applies the doctrine of *factum valet* to the acts of ■ President, whose election is subsequently set aside by the Supreme Court under Cl. (1). The decision of the Supreme Court, in short, shall have no retrospective effect as to acts done, by the person whose election as President is declared void, on or before the date of the decision of the Supreme Court.

*Cl. (3): Legislative power.*—The words 'subject to the provisions of the Constitution' make the power of Parliament to legislate as regards election of President and Vice-President be very narrow. Thus, it shall have no power as to decision of doubts and disputes which is given to the Supreme Court by Cl. (1) of the present Article. Further, Art. 324 vests the superintendence, direction, control and conduct of elections to the offices of President and Vice-President, in the Election Commission. Subject to the provisions of the above two Articles, Parliament shall have the power to regulate any matter relating to or connected with such election.

*Analogous Provision.*—While the decision of disputes arising from election of President and Vice-President is vested in the Supreme Court by the present Article,—Art. 324 provides that decision of disputes arising out of elections to the Legislatures shall be made by election tribunals to be appointed by the Election Commission.

**72.** (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

(a) in all cases where the punishment or sentence is by a Court Martial ;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends ;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor or Rajpramukh of a State under any law for the time being in force.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. II, Sec. 2 (1) of the Constitution says—

“He (the President) shall have the power to grant reprieves and pardons for offences against the United States except in case of impeachment.”

This is called the judicial power of the President. The pardoning power may be exercised by him at any time after the offence has been committed, either before or after trial or conviction<sup>3</sup>; and this power may not be limited by Congress, either as to persons or as to the effect of pardon.<sup>4</sup> The President may even pardon a *criminal* contempt of Court<sup>4</sup> as distinguished from civil contempt. The only limit is that it cannot bar impeachment. The pardoning power is not exercised by the President according to his own caprice but on the recommendation of the Department of Justice, after the latter has made a study of the records relating to the case.<sup>5</sup>

*England.*—The pardoning power is a royal prerogative, exercised on the advice of the Home Secretary. It is an executive act, but the Home Secretary is authorised by the Criminal Appeal Act, 1907, to refer a case to the Court of Criminal Appeal. Ordinarily the power is exercised after sentence when there is some special reason why a sentence shall not be carried out; but a pardon is also available before conviction.<sup>6</sup> It cannot, however, be pleaded in bar to an impeachment (Act of Settlement, 1701). Further, it is only an offence of a public character<sup>7</sup> that may be pardoned, and not an action between subject and subject.

*Eire.*—Art. 13 (6) of the Constitution of 1937 says—

“The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities.”

*Burma.*—Art. 60 of the Burmese Constitution says—

“The right of pardon shall be vested in the President.”

*Fourth French Republic.*—Arts. 34 and 35 of the French Constitution of 1946 provide—

(3) *Ex parte Garland*, (1866) 4 Wall. 333.

(4) *Ex parte Grossman*, (1925) 267 U.S. 87.

(5) Munro, *Government of the United States*.

(6) *R. v. Boyas*, (1861) 1 B. & S. 311.

(7) 3 Co. Inst. 235.

"34. The President of the Republic shall preside over the Superior Council of the Judiciary.

35. The President of the Republic shall have the right of pardon in the Superior Council of the Judiciary."

*Ceylon.*—Art. 10 of the Ceylon (Office of the Governor-General) Letters Patent, 1947, says—

"When any such offence has been committed for which the offender may be tried in the Island, the Governor-General may, as he shall see fit, in Our ■■■■ and on Our behalf, grant ■ pardon to any accomplice in such offence who shall give such information ■ shall lead to the conviction of the principal offender, or of any one of such principal offenders if more than one, and further may grant to any offender convicted of any such offence in any Court within the Island, ■ pardon, either free or subject to lawful conditions, ■ any respite, either indefinite or for such period as the Governor-General may think fit, of the execution of any sentence passed on such offender, and may remit the whole or any part of such sentence or of any penalties or forfeitures otherwise due to Us."

Art. 3 of the Royal Instructions, 1947, lay down—

"We do hereby direct and enjoin that the Governor-General in the exercise of the powers conferred upon him by Art. 10 of the Letters Patent shall not grant ■ pardon, respite or remission to any offender without first receiving, in every case, the advice of one of his Ministers. Where any offender shall have been condemned to suffer death by the sentence of any Court, the Governor-General shall cause ■ report to be made to him by the Judge who tried the case; and he shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent, together with the Attorney-General's advice, to the Minister whose function it is to advise the Governor-General on the exercise of the said powers."

*Government of India Act, 1935.*—Under Sec. 295 of the Government of India Act, and Sec. 402-A, Criminal Procedure Code, the pardoning power was divided between the Governor-General and the Provincial Governors. Broadly speaking, the power to grant 'pardon' belonged to the Governor-General and His Majesty, while the power of suspension, remission, etc., belonged concurrently to the Governor-General and the Provincial Governor.

## INDIA

SCOPE OF ART. 72: THE PARDONING POWER OF PRESIDENT.—This article confers upon the President the 'pardoning power', without prejudice to similar power possessed by the Governor or Rajpramukh of a State (*see below*), or of the military authorities under Army Acts<sup>7-a</sup> as regards convictions by Court Martial.

The object of the pardoning power is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections. It is an 'executive' power and its exercise shall not be subject to either legislative<sup>8</sup> or judicial<sup>9</sup> control. But like other powers, this power will also be exercised on Ministerial advice and, in all probability, the opinion of the Court which passed the sentence will be consulted [*Cf.* Sec. 401 (2) of the Criminal Procedure Code].

The pardoning power comprises a variety of acts, such as pardon, reprieve, respite, remission, suspension, commutation. The differences between these are explained below.

EXTENT OF PARDONING POWERS OF PRESIDENT AND GOVERNOR ■ RAJPRAMUKH.—Under *our* Constitution, the pardoning power shall be possessed by the President as well as the State Governors and Rajpramukhs.

(7-a) Thus, S. 177 of the Air Force Act (XLV of 1950) empowers the Central Government, the Commander-in-Chief, ■ air or other officer commanding ■ group, or 'the prescribed officer' to pardon, remit, mitigate or commute a punishment awarded by a

Court-martial under that Act.  
(8) *Ex parte Garland*, (1866) 4 Wall. 333.  
(9) *Horwits v. Connor*, (1908) 6 C.L. R. 38.



The President shall have the pardoning power in respect of—

(i) Offences against Union laws coming within Art. 73 (1).

(ii) In all cases of sentence of death. [But the power of the State Governor or the Rajpramukh of a State to grant suspension, remission or commutation of ■ sentence of death, conferred by any law, such as Secs. 401-402 of the Cr. P. Code or Sec. 54, I.P.C., shall remain unaffected].

(iii) In all cases where the punishment is by ■ Court Martial, without affecting any statutory power belonging to any Officer of the armed Forces to suspend, remit or commute sentence passed by a Court Martial [Art. 72 (2)].

On the other hand, the Governor of a State shall have the pardoning power in relation to any offence against any law relating to a matter to which the executive power of the State extends (Art. 161).

#### CLAUSE (1)

*Pardon.*—A pardon should be distinguished from the power of the sovereign to enter a *nolle prosequi*, which stops a criminal proceeding,<sup>10</sup> and the object of which is to prevent vexatious prosecutions. This power is given to the Advocate-General by Sec. 333 of our Criminal Procedure Code. That section specifically provides that *nolle prosequi* will not amount to an 'acquittal' unless the Court otherwise directs [see p. 106, *ante*].

A pardon, on the other hand, is an act of grace which releases a person from *punishment* for some offence. A pardon may be either full, limited or conditional.

(i) A *full* pardon wipes out the offence in the eye of law and rescinds the sentence as well as the conviction.<sup>11</sup> It restores the offender to that *legal* condition in which he would have been had the crime not been committed.<sup>12</sup> It does not, however, affect rights acquired by the Government or ■ third party under judicial proceedings prior to the pardon nor does it enable the offender to claim compensation from the Government for what he has already suffered.<sup>13</sup> Nor does it, *ipso facto*, restore the offender to an office which he has forfeited by the offence<sup>14</sup>.

(ii) A *limited* pardon relieves the offender of some but not all the consequences of the guilt. In England, a pardon other than a 'free' pardon relieves from the penalty but not from the conviction.

(iii) A *conditional* pardon, on the other hand, imposes some condition, *e.g.*, good behaviour, for the pardon to be effective. But the condition may not extend beyond the term for which the offender was sentenced.

*Reprieve.*—*Reprieve* means a stay of execution of ■ sentence or of the enforcement of ■ penalty. In *England*, a reprieve is granted till the birth of the baby where ■ female prisoner under sentence of death is pregnant (also in the U.S.A.) and where a prisoner becomes insane after judgment. Under the *existing law in India*, Sec. 382 of the Cr. P. Code authorises the High Court to stay execution of ■ death sentence in the former case. Under the Constitution, the President and Governors shall also possess ■ power of reprieve to be exercised in *fit* cases.

*Respite.*—*Respite* means awarding a lesser sentence instead of the penalty prescribed in view of the fact that the accused has had no previous conviction ■ the like. In England, it is not available in the case of conviction of murder. But where ■ woman offender ■ pregnant, the sentence to be passed on her is one

(10) *Queen v. Allen*, (1862) 1 B. ■ S. 850.

(11) *Ex parte Garland*, (1866) 4 Wall. 633.

(12) *Hay v. Justices of London*, (1890) 24 Q.B.D. 561.

(13) *Knote v. U.S.*, (1877) 95 U.S. 149.

of penal servitude instead of death. This power is exercised by the Court. Under our Constitution, the Executive is also vested with this power.

*Remission.*—*Remission* reduces the *amount* of a sentence without changing its *character*, e.g., ■ sentence of imprisonment for one year may be remitted to six months. Under Sec. 401, Cr. P. Code, the Central and Provincial Governments already possess this power.

*Commutation.*—*Commutation* is a change to a lighter penalty of a *different form*. Secs. 54 and 55 of the Indian Penal Code deal with commutation of a sentence of death and transportation for life. But Sec. 402 of the Cr. P. Code is wider and says that each of the following sentences may be commuted for the sentence next following it: Death: transportation: rigorous imprisonment: simple imprisonment: fine.

*Pardon and Amnesty.*—The ‘pardoning power’ should be distinguished from ‘amnesty.’ While a pardon remits the punishment imposed by a Court upon an offender, amnesty overlooks the offence and absolves the offender from penalty. While pardon is addressed to ordinary crimes, or infractions of the peace of the State,—amnesty is generally confined to ‘political offences’ or offences against the sovereignty of the State, and is exercised in favour of classes or groups of people.<sup>14</sup> In short, amnesty is in the nature of forgiveness offered in advance of trial, to a group of people who have engaged in rebellion or like offences against the State itself. In the *United States*, though the power to pass an Act of Amnesty belongs to Congress, the President too, has sometimes declared amnesty by Proclamation,<sup>15</sup> by virtue of his power to grant ■ pardon before trial.

But *our* Constitution does not empower the Executive to grant a general amnesty. It is thus left to Parliament.

*‘Punishment’.*—For the different kinds of punishment under the Indian Penal Code, see Sec. 53 of that Code.

*‘Offence’.*—An ‘offence’ denotes a thing which is *punishable* either under the Indian Penal Code, or under any special or local law (Sec. 40, I.P.C.).

#### CLAUSE (3)

*Power of Governor or Rajpramukh in cases of sentence of death.*—This clause saves the powers of the Governor conferred by laws, such as Sec. 54 of the Indian Penal Code, Secs. 401-2 of the Criminal Procedure Code, to suspend, remit or commute a sentence of death. But the Governor shall have no power to ‘pardon’ a sentence of death. The power to grant ‘pardon’ in all cases of sentence of death is vested *exclusively* in the President.

**73.** (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

Extent of executive power of the Union.

(a) to the matters with respect to which Parliament has power to make laws ; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement :

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law

(14) *Burdick v. U.S.*, 236 U.S. 79.

(15) Ogg and Ray, Introduction to Ameri-

can Government, p. 368.

made by Parliament, extend in any State specified in Part A or Part B of the First Schedule to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 8 of the Government of India Act, 1935, provided—

“(1) Subject to the provisions of this Act, the executive authority of the Federation extends—

(a) to the matters with respect to which the Federal Legislature has power to make laws; (b) to the raising in British India on behalf of His Majesty of naval, military and air forces and to the governance of His Majesty's forces borne on the Indian establishment; (c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas:

Provided that—(i) the said authority does not, save as expressly provided in this Act, extend in any Province to matters with respect to which the Provincial Legislature has power to make laws; (ii) the said authority does not, save as expressly provided in this Act, extend in any Federated State save to matters with respect to which the Federal Legislature has power to make laws for that State, and the exercise thereof in each State shall be subject to such limitations, if any, as may be specified in the Instrument of Accession of the State; . . .”

#### INDIA

ART. 73: EXTENT OF EXECUTIVE POWER OF THE UNION.—(i) The Union shall have exclusive executive power for—

(a) the administration of laws made by Parliament under its exclusive powers; (b) the exercise of its treaty powers.

(ii) While executive authority in regard to matters in the Concurrent List shall be ordinarily left to the States, Parliament shall be entitled to provide that in exceptional cases the executive power of the Union shall also extend to these subjects.

Cl. (1): *Proviso: Execution of laws in the concurrent field.*—The Proviso lays down two propositions: Firstly, that the authority to execute laws relating to the concurrent field,—whether they were passed by the Central Legislature or by the State Legislatures, would ordinarily belong to the States in Parts A and B. But if in any particular case, Parliament thought that in passing any law relating to the concurrent field, the execution ought to be retained by the Centre, Parliament should have the power to do so.

While Sec. 126 (2) of the Government of India Act, 1935, merely authorised the Centre to give *directions* to the Provinces as to the carrying into execution therein of a Central law relating to a concurrent subject, the Constitution empowers the Union to take up the executive power from the State altogether, in any case it deems fit. The power of giving directions under the Act of 1935 was found inadequate and it was found that in some cases, the Provinces had practically rendered ineffective some Central legislation by not



complying with the directions issued by the Centre. For example, some Provinces objected or refused to appoint factory inspectors to supervise the operation of the Factory Acts and regulations.

The object of the present Proviso is to ensure that the legislation of the Centre in the concurrent sphere becomes effective, by empowering the Centre to take up the administration of its laws in that sphere, for example relating to the removal of untouchability or prevention of child marriage, or prevention of forced labour. While legislating on these subjects, it will be open to Parliament to reserve to itself the right to administer the Act by the Union Executive. The Proviso to Art. 162, *post*, again, lays down that the executive power of a State in matters relating to the concurrent List, shall be subject to the executive power of the Union as conferred by the Constitution or by any law of Parliament. [Under the Government of India Act, 1935 (*see* Proviso (i) to Sec. 8, *ante*), the Central Legislature had no such option to reserve the power of administration to the Centre while legislating in the concurrent sphere].

These Provisos are in accord with the view taken in Australia regarding the executive power of the Commonwealth and the States—

"Where the legislative power of the Commonwealth is exclusive, *e.g.*, in the case of defence, the executive power in relation to the subject of the grant inheres in the Commonwealth; but in respect of concurrent powers, the executive function remains with the States until the Commonwealth legislative power is exercised".<sup>16</sup>

'By this Constitution.'—Other provisions of this Constitution, which authorise the Union to exercise executive power over the concurrent [as well as over the exclusive State] sphere are—Art. 353 (*b*) [during Proclamation of Emergency]; Art. 356 (1) (*a*) [during Proclamation of failure of constitutional machinery in a State].

*Analogous Provision.*—Art. 162 provides the extent of the executive power of a State.

### Council of Ministers

#### GENERAL

POSITION AND FUNCTIONS OF THE CABINET OR COUNCIL OF MINISTERS UNDER THE PARLIAMENTARY SYSTEM.—It is through the institution of the Cabinet that the absolute monarch of England has been transformed into a constitutional ruler,—the *formal* head of the Executive.<sup>17</sup> In law, and in strict theory, the Crown is still the source of all authority, and the Cabinet, as such, is still unknown to the law.<sup>18</sup> But though unknown to the law, the Cabinet is the 'driving and steering force' in the English system of government to-day. The main principles upon which this system of responsible government rests, were evolved as a result of the Revolution of 1688, *viz.*—(1) The Sovereign is irresponsible, but (2) He must act through Ministers enjoying confidence of Parliament (*i.e.*, of the majority in the House of Commons), and must retain them only so long as that confidence is maintained. This latter principle rests entirely upon convention and there is no law to enjoin it.

The essential function of the Cabinet is to co-ordinate and guide the political action of the different branches of the government, and thus to create a consistent policy.<sup>19</sup> Hence *Bagehot* called it "a hyphen that joins, a buckle that fastens,

(16) Wynes, *Legislative and Executive Powers*, p. 321.

(17) Lowell, *Government of England*, Vol. I, p. 26.

(18) It is only in 1937, that Ministers were named, individually, in a statute (Ministers

of the Crown Act, 1937) for purposes of their salary. [Chalmers and Hood Phillips, p. 196; Wade and Phillips, pp. 134, 136; Keith, p. 148].

(19) Jennings, *Cabinet Government*, p. 1.

the executive and legislative together". It directs the *general policy* of the government and is collectively responsible to Parliament for that. Apart from this general function of co-ordination and leadership, it exercises actual *executive* and *legislative* functions. As the adviser of the Crown, the Cabinet exercises all the prerogative and statutory powers of the Crown and its individual members administer the various Departments of government. On the other hand, it possesses the exclusive right of initiating and conducting public bills in Parliament. The Cabinet, in fact, forms the pivot round which the whole political machine of England revolves.

"On the one hand, they are the king's ministers, exercising their powers in the king's name, and it is by them, and not by either house of parliament, or by any committee of either house, that the government of the country is carried on. On the other hand, they are members of the legislature, liable at any moment, so long as Parliament is sitting, to be called to account for their actions by the house to which they belong, and dependent for their tenure of office (technically on the king's pleasure), but practically on the good-will of the house of commons".<sup>20</sup>

In the words of the Parliamentary Committee on the Machinery of Government (1918) the main *functions* of a modern Cabinet are threefold—" (a) the final determination of the policy to be submitted to parliament; (b) the supreme control of the national *executive* in accordance with the policy prescribed by Parliament; and (c) the continuous *co-ordination* and delimitation of the interests of the several Departments."

Not only its existence, but the working of the Cabinet system, as a whole, rests on convention. As Gladstone observed—

"The Cabinet lives and acts simply by understanding, without a single line of written law or constitution to determine its relations to the monarch, or to Parliament, or to the nation; or the relations of its members to one another, or to their head."

MEANING OF 'MINISTERIAL RESPONSIBILITY' IN ENGLAND.—"Ministerial responsibility," says *Dicey*, "means two utterly different things."

(A) Ordinarily it means the responsibility of Ministers to lose their offices if they cannot retain the confidence of the House of Commons. The Ministers are *collectively* responsible to *Parliament* (and ultimately to the electorate), for the general policy of the administration, and this responsibility may be enforced by Parliament by direct vote of censure or want of confidence, or by defeating a Government measure in the House of Commons. The obligation of the cabinet to resign office when it loses confidence is however a rule of convention and neither House nor the two Houses together, possess any *legal* power to dismiss any of the King's Ministers. This aspect of ministerial responsibility may therefore be called *moral* or *political* responsibility.

(B) But the ministers are responsible in a stricter sense. Each Minister is *individually* responsible to the *law* for every act of the Crown in which he takes part. This is the *legal* responsibility of ministers which follows from two principles—(i) In order that an act of the Crown may be recognised as an expression of the Royal will it must be done through some Minister and all orders given by the Crown must be countersigned by him.<sup>21</sup> (ii) The Minister who thus takes part in giving expression to the Royal will, is legally responsible for it and for any tortious or criminal act done in pursuance thereof, and he cannot get rid of his liability by pleading that he acted in obedience to royal orders. Thus as *Dicey* observes, ■ Minister is not only morally but legally responsible for the legality of the act in which he takes part.

(20) Ilbert, *Parliament* (Home University Library).

(21) Chalmers and Hood Phillips, *Consti-*

tutional Law, p. 197; Wade and Phillips, pp. 60-61.

RELATION BETWEEN CABINET AND PARLIAMENT UNDER THE PARLIAMENTARY SYSTEM.—It has already been stated that in the Parliamentary or Cabinet system of Government of the English model, there is a blending of the legislative and executive functions and a relation of interdependence between the Cabinet and the Parliament<sup>21-a</sup> (contrary to the American system founded on the theory of Separation of Powers). This interdependence may be explained from both sides:

(A) *Control of Cabinet by Parliament*.—Parliamentary Government does not mean Government *by* Parliament, but Government *responsible to* Parliament. As *Ilbert*<sup>22</sup> observes:

“Parliament does not govern, and is not intended to govern. A strong executive government, tempered and controlled by constant, vigilant, and representative criticism is the ideal at which parliamentary institutions aim.”

What is done by Parliament is—(a) to secure that the Cabinet which exercises the executive authority, retains the confidence of the majority in the House of Commons; and (b) to control the action of the Ministers by means of questions and criticism.<sup>22-a</sup>

Information as to the conduct of the government may be obtained by the House of Commons in the following ways—

(i) Any member has a right to ask *questions* to any Minister about the administration of the department under his charge. “There is no more valuable safeguard against mal-administration, no more effective method of bringing the searchlight of criticism to bear on the action or inaction of the executive government and its subordinates” than these questions in the House.

(ii) Any member may also move for obtaining *returns for supplying information* on matters of public importance.

(iii) Information may be obtained by the House regarding the administration, by appointing *Parliamentary Committees* and royal commissions.

Apart from obtaining information, the House can actively criticise and discuss the administration in the following ways:—

(i) *Amendments to the King's speech*.—At the beginning of each session, amendments may be framed on the address in reply to the King's speech in such a way as to criticise the general policy of the Cabinet,

(ii) *Debate on vote for supply*.—At the debate on the grants of Supply (i.e., debates on the Budget), the action of each Minister and of his department may be discussed and criticised in connection with the grant with which he is concerned. Demands for supplementary estimates likewise gives opportunities for criticism.

(iii) *Vote of want of confidence*.—The leader of the opposition can at any moment bring a direct vote of want of confidence against the Cabinet.

But the English Parliament does not aim at the control of the daily administration. A primary assumption of the Parliamentary system of England is that public administration is a matter for experts and that the ordinary members of Parliament do not possess the requisite qualification for taking an active part in the highly complicated work of modern government. Parliament therefore chooses a Government and allows it to carry on the administration with the non-political services, subject to direction of and criticism by Parliament. In the words of *Lowell*:<sup>23</sup>

(21-a) See pp. 212-213, *ante*.

(22) Ilbert, *Parliament* (Home University Library).

(22-a) See also Jennings, *Parliament*,

1948, p. 6.

(23) Lowell, *Government of England*, Vol. I, Ch. XVIII, p. 327.



"If the Cabinet to-day legislates with the advice and consent of the House, it administers subject to its constant supervision and criticism."

In the words of Jennings,<sup>24</sup> the two fundamental principles are—

"(a) that the Government shall, so long as it can maintain a majority, be able to secure such legal powers as it considers necessary for administration; and (b) that minorities, however small, shall be able to criticise that administration."

The utility of this criticism is illustrated by the fact that even Governments backed by a strong majority have sometimes withdrawn important Bills, involving policy, which have met with criticism in the House of Commons,—though the Governments might have carried those Bills by sheer command over the majority party, if they so liked.<sup>24</sup>

(B) *Control of Parliament by Cabinet.*—We have seen how Parliament controls the Cabinet. But no less important in modern times is the control of Parliament itself by the Cabinet, though in form the Cabinet is practically a Committee of the House of Commons. As Keith<sup>25</sup> observes: "The position of the Cabinet towards Parliament has unquestionably come to assume a more or less dictatorial character."

(a) The growth of this dictatorial power is due to the strengthening of the party organisation. The members of the House of Commons and the business of the House itself are controlled by the 'whips' of the Government party, who are paid officials. They are the agents through whom the party machinery is used for ensuring discipline and solidarity amongst the party members. When thus backed by a strong majority, a modern Cabinet not only wields the supreme executive authority, but also supreme initiation and control over legislation.<sup>1</sup>

(b) Apart from party loyalty, the Cabinet possesses over its followers, and to some extent even over the Opposition, a powerful weapon in the possibility of securing a *dissolution* of Parliament.<sup>25</sup>

(c) The Cabinet commands the *time* and programme of the House of Commons and initiates all important legislation of a public nature.<sup>1</sup> Private members have little chance or scope for conducting a measure which is not backed by the Cabinet and so private members have lost much power and incentive even of criticism of Government measures. Hence,—

"To say that at present Cabinet legislates with the advice and consent of Parliament would hardly be an exaggeration."<sup>2</sup>

It is the responsibility of the Cabinet to initiate legislation as to conduct administration.<sup>1</sup>

#### POSITION OF PRIME MINISTER IN THE CABINET

*England.*—The Prime Minister is the leader of the Cabinet. He gains this position as the head of the party in majority in the House of Commons. When an existing Cabinet resigns, the King calls for the leader of the party then in majority in the Commons and asks him to form a new Cabinet, of which he becomes the Premier. The first function of the Prime Minister, thus, is the choice of colleagues or Ministers. Theoretically the position of the Prime

(24) Cf. Jennings, *Parliament*, 1948, pp. 8; 51; 131.

(25) Keith, *Introduction to British Constitutional Law*.

(1) Jennings, *Parliament*, 1948, pp. 7-9; 118; 123.

(2) Lowell, *Government of England*, Vol. I, p. 326.

Minister is only *primus inter pares* (Lord Morley) or 'the first among equals.' But in practice, all members of the Cabinet must refer to the Premier, and when any one of them disagrees with him he ought in strictness to resign. He has thus been described as "the keystone of the Cabinet arch" (Sir William Harcourt). He is, in fact, the working head of the State. He not only selects Ministers and assigns to them their offices,<sup>3</sup> but can compel any one of them to resign;<sup>4</sup> while the resignation of other ministers merely creates a vacancy, his resignation dissolves the Cabinet. He exercises a general supervision over all the departments and nothing of moment that relates to the general policy can be transacted without his advice.<sup>5</sup> The Premier stands between the Crown and the Cabinet. Though individual members have the right of access to the Crown on matters concerning their own departments, any important communication can be made only through the Prime Minister. The Prime Minister presides over the Cabinet, and summons its meetings. The actual position of the Prime Minister in relation to other members of the Cabinet would, no doubt, depend largely upon the personality of the Prime Minister, but he has a superior position by reason of his (i) chairmanship of the Cabinet; (ii) leadership of the House of Commons; (iii) leadership of the party in majority; (iv) power of patronage, granting honours, etc.; (v) being the channel of communication with the Crown on all important issues; (vi) power to advise dissolution of Parliament.

*Canada.*—As Riddell<sup>6</sup> observes, the Prime Minister of Canada is not as free as the Prime Minister of England. One of the reasons is that the Canadian Cabinet is always too large to function well as a 'thought-organization'. Another is that under the Canadian Constitution, it is the Cabinet and not the Senate which represents the federal aspect in the Central Government.

"Thus it happens that that the executive government specially placed in power to benefit the whole nation is generally a balancing of interests, which calls for political management of no mediocre order. A prime minister may find himself forced to choose a colleague because he is the sole supporter of his party elected in a province, although his claim to cabinet office is the uniqueness of ■ position due to local reasons or to local political organisation. A prime minister may find himself compelled to bring to the council chamber men endowed with neither political wisdom, nor national outlook, nor the capacity for them."

HOW CABINET DELIBERATIONS TAKE PLACE IN ENGLAND.—The entire proceedings of ■ Cabinet meeting are informal,<sup>7</sup> except that since 1917 the Cabinet has a secretariat to keep minutes of its proceedings,—which, however, are not meant for the public. There is no order of precedence at Cabinet meetings, nor any quorum. Except on unusual occasions, no vote is taken, and any Minister who cannot agree with the decision taken at the meeting must resign.<sup>8</sup> The advice tendered by the Cabinet through the Prime Minister must be formally unanimous, and the King has no right to enquire into Cabinet divisions. Sometimes the Prime Minister even ventures to advice the King against the adverse opinion of the Cabinet, but before doing that, the Prime Minister must be very sure of the strength of his personal leadership. Particular matters are referred to committees of the Cabinet, for the purpose of speedy and efficient disposal.

(3) Munro, Governments of Europe, pp. 108-9.  
 (4) Cf. Chamberlain forcing Eden & Duff Cooper to resign, in 1938—Keith, Constitutional Law, p. 152.  
 (5) Gladstone, quoted in Jennings, Cabinet Government, p. 141.  
 (6) Riddell, Some Aspects of the Theories and Workings of Constitutional Law, 1932, p. 84.  
 (7) Riddell, Some Aspects of the Theories and Workings of Constitutional Law, 1932, p. 109.  
 (8) Munro, Governments of Europe, p. 100.  
 (9) Cf. Jennings, Constitution of Ceylon, p. 84.

Council of Ministers so  
aid and advise President.

**74.** (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.

CL. (1).

#### OTHER CONSTITUTIONS

*U.S.A.*—In the Constitution of the United States, there is no provision for the President to act according to the advice of any other person or persons. Art. II, Sec. 2 (1), however, provides that the President—

“may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices.”

It is left to Congress to create executive departments and to define their functions, but the heads of the Departments are appointed by the President with the consent of the Senate. These heads of departments have come to be called in the United States to be the President's ‘Cabinet’ according to the English analogy, but, in fact, there is no analogy between the English and American Cabinets. For, the President's Cabinet has no seat in, and no responsibility to, the Legislature. They are mere administrative officers under the President and are removable by him at his will. Nor is he bound to accept their advice. Hence, as President Taft observed—

“The Cabinet is a mere creation of the President's will, it is an extra-statutory and extra-constitutional body. It exists only by custom. If the President desired to dispense with it, he could do so.”

Or, as President Lincoln once said—

“In a Cabinet meeting there are many arguments and opinions but only one vote—and that is the vote of the President”.

*England.*—As *Lowell*<sup>10</sup> has nicely put it, “Political liberty and romance in English history are both bound up with the shifting fortunes of the throne”. In the last stage of this political evolution, we find that all the plenitude of powers of the absolute monarch has passed into the hands of the Cabinet, speaking through the Prime Minister. The Crown must act on the advice of the Cabinet and must not act on any other advice.<sup>11</sup> This convention is enforced through the rule of practice that every public act of the Crown must be done upon the countersignature or responsibility of some Minister responsible to Parliament. The rule is so universal in its operation that it has been said that “there is not a moment in the King's life, from his accession to his demise, during which there is not some one responsible to Parliament for his public conduct.”<sup>12</sup>

So, the Crown has ceased to possess any direct political power. But he still possesses, in the words of *Bagehot*, “the right to be consulted, the right to warn, and the right to encourage.” According to the earlier theory of the Constitution the Ministers were the counsellors of the King. It was for them to advise and for him to decide. Now the position is just reversed, and the King is not usually consulted in matters of policy until the opinion of the Cabinet has taken shape.

(10) *Lowell*, Government of England, pp. 636-7.  
Vol. I, p. 16.

(11) *Halsbury*, Hailsham Ed., Vol. VI, England, 2nd Ed., Vol. I, p. 266.

(12) *Todd*, Parliamentary Government



Of course, he is informed and consulted regarding all affairs of the State before the *final step* is taken, and has ample opportunities of persuading his Ministers to abandon a policy of which he does not approve, but if, backed by a majority in Parliament, they insist upon their views, he must yield.<sup>13</sup> Again, it has been said that the opportunity for an exertion of royal influence is very narrow in domestic affairs and "that under ordinary circumstances the personal influence of the King in political matters is not likely to be very effectively asserted outside of *foreign affairs*. . . . and some other appointments to office."<sup>13</sup>

But though it is settled that the Crown can act only according to the advice of the Cabinet as tendered through the Prime Minister, there is a consensus of opinion that on two matters, the Crown has still left to himself some authority to act on his individual judgment, within a narrow margin, simply because the Prime Minister's advice is not available in such cases or that it is not possible to act on that advice consistently with the principle of ministerial responsibility (to Parliament) itself. These two matters arise in connection with—(i) the appointment of the Prime Minister himself; (ii) the Crown's right of dissolution of Parliament.

(i) As regards appointment of the Prime Minister,—no doubt, the Crown must invite the leader of the party in majority in the House of Commons to be the Prime Minister. But, supposing *no party has a clear majority* in the House. Will the Crown then be guided by the advice of the outgoing Prime Minister, who has lost the confidence of the Commons, in the matter of selecting his successor? In practice, the Crown has taken the advice of the outgoing Prime Minister in 1924, 1929 and 1935 (*vide* Keith);<sup>14</sup> and according to Chalmers and Hood Phillips, if the Crown *seeks* the advice of the retiring Prime Minister, he shall be bound to act according to that advice.<sup>15</sup> But Lowell, writing in 1912, described any *right* of a Prime Minister who has lost the confidence of the Commons, to nominate his successor as 'improper, absurd and grotesque.'<sup>16</sup> A recent example of the Crown not seeking such advice was in 1923, when George V did not invite Bonar Law to recommend his successor. In fact, there is no constitutional obligation upon the Crown to consult the outgoing Prime Minister, in the matter of finding out his successor.<sup>17</sup> So, when no party has a clear majority in the House of Commons, the King must then use his own judgment as to which leader he would summon, subject only to the condition that the person summoned must be able to command a majority, by some coalition or compromise with the other parties.

Whatever may be the position when the advice of the outgoing Prime Minister is available, certainly the Crown is left to exercise its discretion when such advice is not available owing to the *death* of a Prime Minister, and there is no acknowledged leader of the Opposition who can command a majority.<sup>18</sup>

(ii) The Crown has the prerogative to dissolve Parliament at any time. Since the growth of the Cabinet system, this prerogative has come to be exercised on the advice of the Prime Minister. When defeated on a 'major issue' in the House of Commons, a Prime Minister may, instead of resigning, request the Crown to dissolve Parliament, on the ground that the House no longer reflects the opinion of the Electorate.<sup>19</sup> Thus, as *Dicey* observes, 'dissolution' has

(13) Lowell, *Government of England*, (1912), Vol. I, p. 34.  
Vol. I, pp. 31, 43, 46.

(14) Keith, *Constitutional Law* (1939), p. 89.

(15) Chalmers & Hood Phillips, *Constitutional Law* (1946), p. 200.

(16) Lowell, *Government of England*

(17) Jennings, *Constitution of Ceylon*, p. 89.

(18) Lowell, *Government of England* (1912), Vol. I, p. 34; Chalmers & Hood Phillips, p. 200.

(19) For an interesting account of the

come to be a power at the hands of the Prime Minister,<sup>20</sup> "to appeal from the legal to the political sovereign". The question is whether the Crown may, constitutionally, refuse dissolution to a defeated Ministry.

In practice, the Crown has never refused such a request since 1784. Now, the fact that dissolution has never been refused since 1784 has led modern writers to hold that the Crown will no longer exercise any discretion in the matter. In *Anson's Law of the Constitution*,<sup>21</sup> we find the opinion that the Crown has no right to refuse if dissolution is *properly* asked for, *i.e.*, when there is reason to think that the House of Commons no longer reflects the opinion of the nation; but that the Crown may refuse it if it is *improperly* requested, *i.e.*, when it is requested ■ second time.<sup>22-23</sup> But this very rule has formed itself into a convention, *viz.*, that a defeated Ministry, at whose advice a dissolution has once been granted, should not ask for a dissolution again, finding themselves in a minority in the newly-elected House. And no such request has in fact been made by any Ministry in England. Again, the assenting of the Crown to grant a dissolution at the request of the Labour Prime Minister, in 1924, would demonstrate that the Crown would not take upon itself the task of exploring whether any other Ministry is capable of being formed (as has been done in the Dominions and in India under the Act of 1935), before acceding to the request to dissolve.<sup>24</sup>

It is in this state of affairs that *Keith*<sup>24</sup> observed (writing in 1939):

"The right of the Crown to refuse advice is sometimes asserted to exist in the case of requests for dissolution of Parliament and Queen Victoria seems to have held the view that the Crown could refuse. But the weight of authority as voiced, even in 1858, by Lord Aberdeen, is *wholly against* the power to refuse *one* dissolution to ■ Ministry. . . . A dissolution has thus come to have a very *different* sense from that which was held by Queen Victoria in the earlier part of her reign, when she regarded it as ■ appeal by the Crown to the country to reinforce the Ministry. It denotes ■ appeal from the verdict of the Commons to the political sovereign, the electorate, and in *no wise concerns the Crown*".<sup>25</sup>

*Canada.*—As the Preamble p. 28, *ante* shows, the Constitution of Canada is similar in principle to that of the United Kingdom. The system of Cabinet Government has thus been introduced in Canada through similar *conventions*, and there is the same divergence between theory and practice as in the Constitution of England.

Thus, Sec. 11 of the British North America Act says—

" . . . There shall be ■ Council to *aid and advise* in the Government of Canada to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be removed by the Governor-General".

According to the terms of the Constitution Act, the Privy Councillors are mere advisers of the Governor-General and there is no mention of their responsibility to the Legislature.

"But the fact is wholly different—the responsibility for the government of Canada rests upon ■ body of men not even mentioned in the legislation—the 'Cabinet' or 'Ministry'. The Privy Council does exist and has ■ its members all the present Ministry and the sur-

development of the power of dissolution, see Kohn, *Constitution of the Irish Free State*, pp. 292-3.

(20) Since 1918, it has been established in England that it is the Prime Minister who has the sole right to advise dissolution [Jennings, *Cabinet Government*, pp. 311-3]. In 1945, Mr. Churchill advised dissolution without consulting the Cabinet [Jennings, *Constitution of Ceylon*, p. 47].

(21) Anson, *Law and Custom of the*

*Constitution*, 5th Ed., 1922, pp. 325-330; Chalmers and Hood Phillips, p. 52.

(22-23) It is interesting to note that the Weimar Constitution of Germany (Art. 25) expressly limited the right of dissolution to 'once only for any ■ reason.'

(24) Keith, *Constitutional Law* (1939), pp. 161, 163; Wade ■ Phillips, *Constitutional Law*, p. 86.

(25) Keith, *Constitutional Law*, 1939, pp. 161, 163.

viving members of past Ministries; but it, as a whole, is *faineant*—as a whole, it has duties and performs no functions. The duties and functions assigned to the Privy Council are all performed by the 'Ministry' (the members of which, indeed, are Privy Councillors) . . . .<sup>1</sup>

As in England, the principle of responsible government prevails in Canada, and the Governor-General cannot exercise any of his functions except with the advice of the Cabinet. But in the matter of exercise of the right of dissolution (Sec. 50, British North America Act) the Canadian Governor-General seems to possess a larger discretion than the English Crown, for the English convention that the Crown should not refuse a request for dissolution for the first time, has not been established in Canada. The rule in Canada, on the other hand, is that the Governor-General or the Governor would not readily grant a dissolution without exploring the possibility of forming another Ministry.<sup>2</sup>

On this point, *Riddell*<sup>3</sup> observes—

"Sometimes a Ministry is defeated in a House of Commons thus showing lack of confidence of the House in it. The Ministry may resign or it may advise a General Election hoping to receive a favourable vote from the electorate. This is one of the few cases in which the Governor-General must exercise his judgment—he may accede to the request, or he may refuse. If he does refuse, the Ministry must resign, the Governor-General must call the leader of the dominant party to form a Ministry and relieve him of the responsibility for the refusal. Should the new Ministry be dissatisfied with the existing House, it may in its turn ask for a dissolution; and unless the Governor-General is prepared to take back the former Ministry and be guided by its advice, the request must be granted.

The actions of the Governor-General in granting or refusing a General Election are based on *well-established constitutional rules*. He must avoid becoming a party man, he must not engage in party politics or political intrigue, he must hold the scales even in respect of all political parties, he must be guided by a fair and candid consideration of the welfare of the people at large, he must not grant a dissolution simply to enable a political party to continue in office when there is no real and important question at issue between the parties."<sup>4</sup>

A recent example of refusal by the Governor-General to refuse dissolution was in 1926 when the Prime Minister, Mr. Mackenzie King had to resign upon the refusal of the Governor-General to accede to his request to dissolve the House. The refusal was, of course, not of moment in effect, for the leader of the Opposition (Mr. Meighen), who was called to form a Ministry, failed to secure a majority and so the Governor-General was obliged to dissolve the House.

*Australia*.—Sec. 62 of the Constitution Act says—

"There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth. . . ."

Sec. 63 says—

"The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council."

The Governor-General acts in all matters on the advice of ministers.<sup>5-4</sup>

But in Australia, as in Canada, there are instances of the Governor-General's refusing to dissolve the House of Representatives on the advice of a defeated Prime Minister.<sup>6</sup> Thus, in 1904, it was refused to Mr. Watson; in 1905, to Mr. Reid; and in 1909, to Mr. Fisher.<sup>6</sup> In all these cases, the refusal was

(1) Riddell, *The Canadian Constitution in Form and in Fact*, 1923, p. 20.

(2) Riddell, *The Canadian Constitution in Form and in Fact*, 1923, pp. 34-35.

(3-4) Nicholas, *Australian Constitution*, p. 49.

(5) The power of dissolution, under Sec. 57 of the Australian Constitution Act, to dissolve a disagreement between the two Houses, rests on different principles.

(6) Evatt, *The King and his Dominion Governors*, p. 50.



founded on the assumption that an alternative Government with majority in the House was possible.

*South Africa.*—The Canadian example regarding dissolution was followed when in 1939 the Governor-General refused a dissolution to Prime Minister General Hertzog (on his defeat in the Union Parliament upon the motion to remain neutral in the war) who was accordingly obliged to resign. The Governor-General then sent for General Smuts who was able to form a Government having majority in the House of Assembly,—so that the Governor-General's refusal to dissolve was justified by the result.

*Fourth French Republic.*—Arts. 32 and 38 of the French Constitution of 1946 provide—

"32. The President of the Republic shall preside over the Council of Ministers. He shall order the minutes of their meetings to be recorded and shall keep them in his possession."

"38. Every act of the President of the Republic must be countersigned by the President of the Council of Ministers and by a Minister."

Though the President of the French Republic, unlike the formal head of any other Parliamentary system, is given the right to preside over the Council of ministers, he has not the least discretion to act in his individual judgment in any matter, for every act of his can have legal validity only under a double counter-signature of the Prime Minister and another minister responsible to Parliament.

*Eire.*—Art. 13 (9)-(11) of the Constitution of Eire, 1937, says—

"(9) The powers and functions conferred on the President by this constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.

(10) Subject to this constitution, additional powers and functions may be conferred on the President by law.

(11) No power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of the Government."

Art. 13 (2) provides—

"The President may in his absolute discretion refuse to dissolve Dail Eireann on the advice of the Taoiseach who has ceased to retain the support of a majority in the Dail Eireann."

The Constitution of Eire, thus, requires the President to act on the advice of ministers on all matters, but at the same time gives him *absolute discretion* (contrary to the English rule) in the matter of refusing dissolution to a defeated Prime Minister. In this latter respect, he is freer than the Dominion Governor-Generals.

*Japan.*—The relevant Arts. of the Japanese Constitution of 1946 provide—

"Article III.—The advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of state, and the Cabinet shall be responsible therefor.

Article IV.—The Emperor shall perform only such acts in matters of state as are provided for in this Constitution. Never shall he have power related to government.

Article LXV.—Executive power shall be vested in the Cabinet.

Article LXVI.—The Cabinet shall consist of the Prime Minister who shall be its head, and other Ministers of State as provided for by law.

Article VII.—The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state, on behalf of the people. . . . Dissolution of the House of Representatives."

Hence, the Emperor has no power to perform any political act without ministerial advice. The Prime Minister shall be a person designated by the Diet (Legislature).

*Burma.*—Sec. 63 (1) of the Burmese Constitution provides—

“The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Union Government, save where it is provided by this Constitution that he shall act in his discretion or on the advice or nomination of or on receipt of any communication from any other person or body.”

There is no scope for the President's exercise of any individual judgment in the matter for selection of the Prime Minister, for Sec. 56 (1) follows the Irish precedent and provides that the Prime Minister shall be the person nominated by the Chamber of Deputies. In the matter of dissolution, however, the Burmese President shall have a discretion to refuse dissolution to a defeated prime minister. The Proviso to Sec. 57 says—

“Provided that, when the Prime Minister has ceased to retain the support of a majority in the Chamber, the President may refuse to prorogue or dissolve the Chamber on his advice and shall in that event forthwith call upon the Chamber to nominate a new Prime Minister:

Provided further that, if the Chamber fails to nominate a new Prime Minister within fifteen days, it shall be dissolved.”

*Ceylon.*—Sec. 4 (2) of the Ceylon (Constitution) Order in Council, 1946, says—

“All powers, authorities and functions vested in His Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty:

Provided that no act or omission on the part of the Governor-General shall be called in question in any Court of law or otherwise on the ground that the foregoing provisions of this sub-section have not been complied with.”

Sec. 46 (1), again, provides—

“(1) There shall be a Cabinet of Ministers who shall be appointed by the Governor-General and who shall be charged with the general direction and control of the government of the Island. . . .”

*Government of India Act, 1935.*—See Sec. 9 of that Act.

## INDIA

CL. (1): RELATION BETWEEN PRESIDENT AND COUNCIL OF MINISTERS.—Though the aim of Arts. 74-5 of *our* Constitution is to put into writing the principles of responsible government as it exists in England, it is to be noted that *all* the principles upon which Cabinet government rests have not been embodied therein, and even on some fundamental points, the framers of the Constitution have been obliged to leave the matter to convention and usage and the personal factor.

The object of the framers of the Constitution, as would appear from the Constituent Assembly Debates, is to make the President a constitutional and formal head of the executive like the English King and to make him act with the advice of the Council of Ministers. The mere fact that there is no provision in the Constitution making it obligatory upon the President to act only according to ministerial advice, or the use of the words ‘aid and advice’ are not to stand in the way of establishing the principle of responsible government, for even under a similar position in the British North America Act, the Governor-General has been transformed into a constitutional ruler as the English Crown [pp. 253-4, *ante*]. Of course, there are the words “with a constitution similar in

principle to that of the United Kingdom" in the Preamble of the Br. North America Act, which is not to be found in *our* Constitution. Again, there are some provisions in *our* Constitution which go against the English principles; (1) Firstly, instead of providing that the President shall be competent to act only upon the counter-signature of ■ Minister responsible to Parliament, Art. 77 (2) provides that the President himself shall make rules as to the mode in which his orders and instruments shall be authenticated.<sup>7</sup> (ii) Secondly, while under the English system, not only the choice of his colleagues but also the division of the offices or portfolios amongst them is a business of the Prime Minister,<sup>8</sup> Art. 77 (3) of our Constitution provides that it is the President who shall make rules in this respect. Of course, if he makes these rules or revises them under the advice of each new Prime Minister, this provision would not affect the position of the Prime Minister. (iii) In India, the Ministers shall have no *legal* responsibility for acts of the President [see under Art. 361, *post.*]

Let us now examine the sanctions by reason of which the President may be obliged to act in conformity with the advice of Ministers. Supposing, a President does an act against the advice of his Council of Ministers. Certainly, the latter will at once resign. The President will then be obliged to find out another Council of Ministers having a majority in the House of the People. If the outgoing Prime Minister has a solid majority in the House, this very fact will dissuade the President from taking that action. But in times of ministerial crisis and of weak cabinets, the President's position may be stronger.

The next thing to be noted is that though Art. 74 (1) of *our* Constitution lays down that "*there shall be* ■ Council of Ministers", so that the President cannot help doing without Ministers as soon as ■ Cabinet resigns, there is at the same time no provision in our Constitution, corresponding to Art. 28 (11) of the Constitution of Eire, that any Cabinet that resigns must carry on until their successors are appointed. There is therefore nothing to prevent the President from making *delay* in appointing another Council of Ministers, and in the interval, there is nothing to affect the validity of his acts, for they do not require the counter-signature of Ministers.

As regards the *choice of the Prime Minister*, there is practically no fetter upon the discretion of the President save that the person appointed must have the confidence of the House of the People [Art. 75 (3)]. But any person who is not ■ member of Parliament may remain a minister for 6 months [Art. 75 (5)] and the President has the power not to summon Parliament within 6 months from the date of its last sitting [Art. 85 (1)]. So, there is scope for the President to appoint any person as Prime Minister for some period less than 6 months even though such person may not command a majority in the House of the People for the time being.

Again, in the marginal cases mentioned at p. 252 *ante*, our President shall have some scope for the exercise of individual judgment in the matter of appointment of the Prime Minister. Of course, at the present moment, the chances of the growth of multiple parties having considerable strength are not obvious.

As regards the power of *refusing dissolution* to a Prime Minister, it may be expected that the President of India will follow the Dominion practice, rather than the convention established ■ England of late. Not being fettered by any constitutional provision requiring him to act in conformity with ministerial advice

(7) So far, the President's orders are being authenticated by a Secretary, as under the Government of India Act, 1935,—and not by a Minister.

(8) Lowell, Government of England, Vol. I, p. 57; Munro, Governments of Europe, p. 90.



on every matter, the President will be free to refuse ■ dissolution where it is *improperly* asked, or where to accede to the request to dissolve would amount of an abuse of that power. Thus, it would no doubt be refused when dissolution is sought by the same Prime Minister for the *second* time, ■ in England (see p. 253, *ante*). In other cases also, the President may consider whether it would be possible to form an alternative Council of Ministers,<sup>9</sup> without that Prime Minister who, personally, might have lost the support of his own colleagues and party.<sup>10</sup> It would, again, be an *improper* request for dissolution when it is made by a Government—

“not because its majority is slender or unreliable, nor because new issues would seem to require a new mandate from the electorate, but because it considered a given situation as opportune for obtaining ■ ■ ■ lease of life from the electorate which might not be accorded ■ readily if the existing Legislature were allowed to run out its normal course. A moment of national excitement after external victory or internal commotion may offer a welcome opportunity for drowning memories of administrative blunders and unpopular legislation in a wave of legitimist or revolutionary enthusiasm and securing a lengthy extension of the term of office of the party in power . . . . The very foundation of the system breaks down if the party in office has the power, by ■ unscrupulous use of the power of dissolution, to mislead and escape electoral judgment.”<sup>11</sup>

But, whatever be the attitude taken by the Indian President, he must remember that the position of the constitutional head is impartial and he must not take up the cause of any particular party. A Prime Minister, seeking dissolution, must also remember that the power of dissolution should not be “misused for party purposes”.<sup>12</sup> A proper case for an advice to dissolve arises, for example, when, owing to the emergence of new issues or the like, it is necessary to obtain a new mandate from the electorate,—the ultimate source of authority,—which may not be available from representatives who were elected upon different issues and under different circumstances.

THE POSITION OF INDIVIDUAL MINISTERS.—In England though individual Ministers have a right of access to the Sovereign ■ matters concerning their individual departments, the convention is settled that all important communications must be made only through the Prime Minister; even on minor matters, the communications made by a Minister individually, should be made known to the Prime Minister either before or after such communication.<sup>13</sup> It would not be constitutional for the King also to deal with individual Ministers behind the back of the Prime Minister.<sup>13</sup> In short, the Crown must not act in such ■ manner as to interfere with the collective responsibility of the Cabinet as ■ body to Parliament.<sup>13</sup>

The principle of collective responsibility is embodied in ■ our Constitution, in Art. 75 (3). The words ‘a Council of Ministers with the Prime Minister at the head to aid and advice the President’, read with the principle, shows that our Constitution seeks to follow the English convention, to lay down that the President is to act with the advice of the Council of Ministers as communicated through the Prime Minister, and not upon that of individual Ministers, at least in matters of importance. Of course, Art. 78 (c), post, suggests that an individual Minister may have access to the President on matters concerning his own department, but then, the President shall have the power of referring the question to the decision of the Council of Ministers through the Prime Minister [see further under Art. 78, *post*]. In short, all matters of *policy* shall be an affair of the Council of Ministers and not that of individual Ministers and if ■

(9) *Vide* Constituent Assembly Debates, State, pp. 294-5.  
Vol. VIII, p. 107.

(10) *Cf.* Jennings, *Constitution of Cey-* Vol. I, p. 34.  
lon, p. 50.

(11) Kohn, *Constitution of the Irish Free* 8.

(12) *Cf.* Lowell, *Government of England*.

(13) Keith, *Constitutional Law*, pp. 157-

individual Minister seeks to develop a policy without approval of the Council and place the same before the President, the Prime Minister may force him to resign.<sup>14</sup>

*'Aid and advise'*.—These words are to be found in Sec. 11 of the British North America Act; Art. 51 of the Irish Free State Constitution Act, 1922; Secs. 9 and 50 of the Government of India Act, 1935. The word 'advise' or 'advice' alone appears in Secs. 62-63 of the Australian Constitution Act, Secs. 12-13 of the Union of South Africa Act, 1909; Art. 13 (9) of the Constitution of Eire, 1937; Sec. 63 (1) of the Burmese Constitution, 1948. It should also be noted that though the expression 'aid and advise' is taken from the Government of India Act, 1935, nothing is taken out of the field of ministerial advice by authorising the President 'to act in his discretion' in any matter, as the Governor-General was authorised by Sec. 9 (1) of the Government of India Act, 1935.

*Analogous Provision*.—Art. 163 (1) makes similar provision in the case of the State Governor, but with the addition of a 'discretionary' clause.

## CL. (2)

## OTHER CONSTITUTIONS

*Burma*.—Sec. 63 (2) of the Burmese Constitution provides—

"The question whether any, and, if so, what advice, nomination or communication was tendered to or received by the President shall not be enquired into in any Court."

*Ceylon*.—See Proviso to Sec. 4 (2) of the Constitution Order in Council, quoted at p. 256, *ante*.

*Government of India Act, 1935*.—Sec. 10 (4) of that Act was—

"The question whether any, and if so, what advice was tendered by Ministers to the Governor-General shall not be enquired into in any Court."

## INDIA

CL. (2): JURISDICTION OF COURTS BARRED.—Since there is no constitutional obligation binding the President to act only in conformity with ministerial advice, and the relation between the President and the Council of Ministers is left to convention, there is no provision in the Constitution for invalidating any act of the President on the ground that it was not done in conformity with ministerial advice. Art. 361 (1), again, expressly provides that the President shall not be answerable to any Court for any act done or purported to be done by him in the performance of the duties of his office. Hence, it would be meaningless to bring the question of ministerial advice before the Courts.

This principle is, of course, in accord with the *English* doctrine 'King can do no wrong'. There the principle is so rigorously observed that the King's ~~name~~ cannot be referred to with reference to any public act not only in the Courts, but also within or without Parliament.<sup>15</sup> Not only is the relation between the Crown and the ministers confidential, the relation between the ministers *inter se* is also confidential and no member of the Cabinet can disclose Cabinet deliberations to anybody outside the Cabinet, without the Prime Minister's permission.<sup>16</sup> The only exception is that when a member of the Cabinet resigns owing to his disagreement with some Cabinet decision, he is allowed to explain in Parliament the causes of his resignation confining his explanation to his own point of view.<sup>17</sup> [See p. 263, *post*].

*Analogous Provision*.—Similar provision is made in Art. 163 (3), in connection with the State Governor and his Ministers.

(14) Cf. Jennings, *Constitution of Ceylon*, p. 82.

(15) Cf. Lowell, *Government of England*, Vol. I, p. 39.

(16) Keith, *Constitutional Law*, p. 154;

Lowell, *Government of England*, Vol. I, p. 65.

(17) Cf. Jennings, *Constitution of Ceylon*, p. 84.

**75.** (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such ■ Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

CL. (1).

#### OTHER CONSTITUTIONS •

*England.*—Owing to the fundamental principle of Cabinet Government that the Cabinet must have the confidence of the majority in the House of Commons, the choice of the Prime Minister by the Crown has become almost automatic, in normal circumstances, and the King must invite the most influential leader of the party or group commanding a majority in the House of Commons, to form a Ministry<sup>18</sup>. The Crown can no longer impose his personal wishes as against the majority in the House of Commons, in the choice of his ministers. So stated,—

“The party who command the majority in the House of Commons are entitled to have their leader placed in office with the right to select his colleagues.”<sup>19</sup>

This does not mean, however, that there is no scope for exercise of individual judgment by the Crown in the matter under any circumstances whatever. On the other hand, the appointment of the Prime Minister, as has been already seen (p. 252 *ante*), is one of the very few cases where the King has still left to him some degree of personal discretion, at least in a marginal sphere,<sup>20</sup> *e.g.*, when more than one leader enjoys the confidence of the majority and is capable of forming a Ministry.

The conventional rules which guide the selection of the Prime Minister in England may be thus summarised:

(i) Though normally the King takes the advice of the outgoing Prime Minister in the matter of his selection, he is not bound to invite such advice at all.<sup>20</sup> Such advice is not physically available where a new Cabinet has to be formed on account of the death of ■ Prime Minister.<sup>21</sup>

(ii) When a Cabinet tenders resignation on ground ■ of defeat in the House of Commons, the practice is that the King first consults the leader of the

(18) Chalmers and Hood Phillips, Constitutional Law, 1946, p. 34.

(19) Keith, Constitutional Law, 1939, p. 5.

(20) Wade & Phillips, Constitutional

Law 1946, p. 59; Chalmers and Hood Phillips, Constitutional Laws, p. 200.

(21) Chalmers & Hood Phillips, Constitutional Laws, pp. 34, 200.



Opposition.<sup>22-23</sup> In such a case, it is also the *duty* of the leader of the Opposition to form a Government, if asked to do so.<sup>24</sup>

(iii) The King is bound to invite the leader of the majority, if there is a recognised leader.<sup>23</sup> But if there is more than one leader who is able to command the support of the majority, the King may act on his individual judgment.<sup>25</sup>

(iv) In the case of plurality of leaders capable of commanding support of the majority, a Commoner will be preferred to a peer.<sup>25</sup>

(v) If no single party controls a majority in the House of Commons, the King must use his own judgment as to whom he should summon. He would then summon a leader who, in the King's estimate, is capable of controlling a majority by entering into a coalition or compromise with some other party.<sup>1</sup>

The first business of the Prime Minister, after he himself is appointed, is the selection of his colleagues. Of course, the appointment is formally made by the King, but a modern King is not expected to interfere with the Prime Minister's selection of Ministers. Owing to the rule of collective responsibility, the Prime Minister, however, has not got a free hand to act according to his personal preferences, and in order to make his Government strong and stable, he must make it as broadly representative as possible. In the matter of this selection, a Prime Minister may be said to be influenced by the following considerations:

(a) It is now an established convention that members of the Cabinet must be members of either House of Parliament.<sup>2</sup> By the Ministers of the Crown Act, 1937, the number of Ministers who may sit and vote in the House of Commons has been limited to a particular number, with the result that some of the Cabinet Ministers must be taken from the House of Lords.<sup>3</sup>

(b) He must see that various parts of the country are geographically represented in the Cabinet.

(c) He must try to recruit as much tactical skill as he can command, by taking in men who have served at previous Ministries or have been the most effective Parliamentary critics of the outgoing Ministry.

*Canada.*—The political party in the majority in the House of Commons selects a leader by some process, formal or informal, and that leader becomes Prime Minister; the Prime Minister selects the other ministers so as to form a body of men who can obtain the support and vote of a majority of the House of Commons. While, so far as any written law goes, it is open to the Governor-General to select anyone as Prime Minister, he must in fact select the person whom the majority of the House of Commons will follow, either the existing House of Commons or a House obtained by a new General Election. All Ministers are appointed "by the Governor-General by commission under the Great Seal", but "never by the personal selection of the Governor-General; he takes and can take no active part in such selection—such a course would be *unconstitutional* in the Canadian sense of the word."<sup>4</sup>

*Eire.*—Art. 13 (1) of the Constitution of 1937, says—

(22) Wade & Phillips, Constitutional Law, p. 59.

(23) Keith, Constitutional Law, p. 147.

(24) Jennings, Cabinet Government, pp. 41-6.

(25) Chalmers & Hood Phillips, p. 34, 300.

Wade & Phillips, p. 59.

(1) Munro, Governments of Europe, 1947, p. 85.

(2) Keith, Constitutional Law, p. 150.

(3) Wade & Phillips, Constitutional Law, pp. 81, 134.

(4) Riddell, The Canadian Constitution in Form and in Fact, 1923, p. 20.

"(1) 1. The President shall, on the nomination of Dail Eireann, appoint the *Taciseach*, that is, the head of the Government or Prime Minister. 2. The President shall, on the nomination of the *Taciseach* with the previous approval of Dail Eireann, appoint the other members of the Government. 3. The President shall, on the advice of the *Taciseach*, accept the resignation or terminate the appointment of any member of the Government."

Art. 28 (1)-(2), provide—

"(1) The Government shall consist of not less than seven and not more than fifteen members who shall be appointed by the President in accordance with the provisions of this constitution. (2) The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."

The Constitution of Eire leaves nothing to the discretion of the President in the appointment of the Prime Minister. He must be nominated by the lower House of the Legislature. The appointment of the nominee of the majority party is thus secured by a constitutional provision.

*Fourth French Republic.*—Art. 45 of the Constitution of 1946, says—

"At the opening of each legislative session, the President of the Republic, after the customary consultations, shall designate the President of the Council. The latter shall submit to the National Assembly the programme and policy of the Cabinet he intends to form. The President of the Council and the Ministers may not be formally appointed until the President of the Council receives a vote of confidence from the National Assembly by a roll call vote and by an absolute majority of the deputies. . . ."

Art. 46, provides—

"The President of the Council and the Ministers chosen by him shall be formally appointed by a decree of the President of the Republic."

This Constitution also requires a vote of the lower House of the Legislature for the appointment not only of the Prime Minister but also of other Ministers chosen by him.

*Japan.*—The relevant provisions of the Japanese Constitution of 1946, are—

"Article VI.—The Emperor shall appoint the Prime Minister as designated by the Diet.

"Article LXVII.—The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.

If the House of Representatives and the House of Councillors disagree and if a joint committee of both Houses, provided for by law, cannot reach an agreement, or the House of Councillors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the Diet.

"Article LXVIII.—The Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet.

The Prime Minister may remove the Ministers of State as he chooses."

*Burma.*—Sec. 56 of the Burmese Constitution, says—

"(1) The President shall, on the nomination of the Chamber of Deputies, appoint a Prime Minister who shall be the head of the Union Government. (2) The President shall, on the nomination of the Prime Minister, appoint other members of the Union Government. (3) The President shall, on the advice of the Prime Minister, accept the resignation or terminate the appointment of any member of the Union Government."

The mode of choice of the Prime Minister is similar to that in Eire (see above).

#### INDIA

CL. (1): APPOINTMENT OF PRIME MINISTER.—The clause is silent as to how the President shall choose the Prime Minister. The convention of Cabinet Government is that the head of the Executive will call upon the leader of the majority

party or ■ person capable of commanding majority in the Legislature, to be the Prime Minister and to form the Cabinet. Our Constitution does not expressly require the President to call upon the leader of the majority party, but the rule of responsibility in Cl. (3) of the present article will restrict the choice of the President as in England, and it may be expected that it is only in marginal cases (as shown at p. 260-1, *ante*) that there will be any for the President's individual judgment.

*'Other Ministers'.*—Our Constitution does not lay down the number of members the Council of Ministers<sup>4-a</sup> shall contain,—either the minimum or the maximum.<sup>4-b</sup> The size of the Cabinet is left to the requirements of the occasion ■ determined by the Prime Minister, as in England.

*Analogous Provision.*—The provisions of Art. 164 (1), relating to the State, are similar.

## CL. (2)

### OTHER CONSTITUTIONS

*England.*—Theoretically the Ministers are still the servants of the Crown and so responsible to him for their acts, and this responsibility may be enforced by the prerogative of veto, dissolution, or dismissal. But as regards the Ministers *collectively*, the King's power of dismissal may be said to be obsolete, the last instance being in 1783. Constitutional writers agree<sup>5</sup> that a dismissal of the Cabinet by the Crown, would now be an unconstitutional act, except<sup>6</sup> in the abnormal case of a Cabinet refusing to resign or to appeal to the electorate upon a vote of no confidence in the Commons.

As against *individual* Ministers for unconstitutional acts, the Crown's power may be used by the Prime Minister,—to get rid of unpopular colleagues,<sup>7</sup> without bringing about a fall of the entire Cabinet. This power of the Crown has thus passed into the hands of the Prime Minister, and has enhanced the control of the Prime Minister over his colleagues.<sup>8</sup>

*Australia.*—Sec. 62 of the Australian Constitution says—

(4-a) In *England*, the final development of the Cabinet system has led to a distinction between the 'Ministry' and the 'Cabinet'. The Cabinet is a smaller body, usually consisting of some two dozens of Ministers of Cabinet rank' who share the policy of the administration and include the heads of the major spheres of government, though all of these Ministers may not necessarily be the heads of Departments. But outside this smaller body, there are ■ number of 'Ministers without Cabinet rank,' including Parliamentary Secretaries, Under-Secretaries of State, Law Officers and the like, who form the Ministry, bound by the principle of collective responsibility and resign with the fall of the Government. They are the heads of the more important Departments, but these Ministers without Cabinet rank are not entitled to attend 'Cabinet' meetings unless specially invited to attend when something concerning that particular Department has to be decided by the Cabinet. Thus, in *England*, all heads of Departments who hold *political* appointments are not necessarily in the Cabinet, nor are all members of the Cabinet heads of Departments.

In *India*, the word 'Cabinet' is not used anywhere in the Constitution, and the expres-

sion 'Council of Ministers' is used both in relation to the Union and the States. But, so far as the Union is concerned, Prime Minister Nehru has, in fact, made distinction between Ministers of Cabinet rank and without Cabinet rank, by appointing, beside some 13 Cabinet Ministers, some 5 'Ministers of State' and 2 'Deputy Ministers'. These Ministers of State and Deputy Ministers are also members of the Council of Ministers within the meaning of arts. 74-5, but they cannot attend Cabinet meetings unless they are invited to attend, and they work under the direct control of the Prime Minister as regards the Departments or duties given over to them.

(4-b) S. 9 (1) of the Government of India Act, 1935, fixed the maximum at 10.

(5) Jennings, *Cabinet Government*, pp. 299-318; 436-43; Chalmers & Hood Phillips, *Constitutional Law*, p. 200.

(6) Cf. Keith, *Constitutional Law*, p. 162.

(7) Cf. Dismissal of Lord Palmerston in 1851, Lowell, *Government of England*, Vol. I, p. 56; Munro, *Governments of Europe*, p. 104.

(8) Jennings, *Constitution of Ceylon*, p. 100.



" . . . the members of the (Executive) Council shall hold office during his (Governor-General's) pleasure."

A Federal Minister was, in fact, removed under the above provision, for refusing to carry out the obligations of Cabinet usage.<sup>9</sup>

*Canada.*—The Members of the Canadian Cabinet or 'Privy Council'—

"may from time to time be removed by the Governor-General" (S. 11, B. N. A. Act).

*Ceylon.*—Sec. 49 (1) of the Ceylon (Constitution) Order in Council, 1946, provides—

"Every Minister . . . shall hold office during His Majesty's pleasure: Provided that any Minister . . . may at any time resign his office by writing under his hand addressed to the Governor-General."

*Burma.*—Secs. 56 (3), quoted at p. 262 *ante*. Secs. 117-8 further provide—

"117. (1) The Prime Minister may resign from office at any time by placing his resignation in the hands of the President. (2) Any other member of the Government may resign from office by placing his resignation in the hands of the Prime Minister for submission to the President and the resignation shall take effect upon its being accepted by the President under the next succeeding sub-section. (3) The President shall accept the resignation of a member of the Government, other than the Prime Minister, if so advised by the Prime Minister.

118. The Prime Minister may, at any time, for reasons which to him seem sufficient request a member of the Government to resign; should the member concerned fail to comply with the request, his appointment shall be terminated by the President if the Prime Minister so advised."

*Government of India Act, 1935.*—Sec. 10 (1) provided—

"The Governor-General's Ministers shall . . . hold office during his pleasure."

Sec. 51 (1) made similar provision as regards Provincial Ministers.

#### INDIA

CL. (2): PRESIDENT'S POWER OF DISMISSAL.—It is to be noted that while Cl. (3) refers to the 'Council of Ministers', Cl. (2) refers only to 'Ministers.' Hence, the President shall have no right to dismiss a Council of Ministers, as a body;<sup>10</sup> but under the present clause, the President shall have the power to dismiss the Ministers individually. According to English precedents, this power will be exercised by the President on the advice of the Prime Minister, to remove an undesirable Minister even though the latter may still command the support of the majority in the House of the People. In practice, a 'dismissal' is not necessary, for a Prime Minister's request to a colleague to resign, is regarded as an order.<sup>11</sup>

As Dr. Ambedkar explained in the Constituent Assembly, the normal mode of dismissal of a Minister or Ministry is by a vote of no confidence in the House of the People. But it may sometimes happen that even though a Minister's administration be corrupt, he may still command the confidence of the majority of the House. In such cases, the President is given the power to dismiss a corrupt or otherwise undesirable Minister, notwithstanding the fact that he is not thought undesirable by the majority in the House of the People.<sup>12</sup>

(9) Kerr, *Law of the Australian Constitution*, p. 218-n.

(10) Of course, he may compel a Council to resign by use of this power if the Prime Minister's advice to dissolve Parliament is turned down, and still he refuses to resign, upon a defeat in the House of the People.

(11) Jennings, *Constitution of Ceylon*, pp. 100, 196.

(12) It is to be noted that under the *Go-*

*vernment of India Act, 1935*, the Governor was not bound to act according to the advice of his Ministers regarding matters in which his special responsibilities were involved. He had, therefore, the right to dismiss Ministers, while having the confidence of the Legislature, if he considered that their policy was injurious to the public interests, affecting his special responsibilities.

*Analogous Provision.*—Similar provision is made in Art. 164 (1) as regards Ministers in the States.

CL. (3).

#### OTHER CONSTITUTIONS.

*England.*—Collective responsibility of the Cabinet to Parliament is a rule of conviction. It means that the Ministers are, as a body, responsible to Parliament for the policy of the administration. The principle cannot be better explained than in the words of Lord Morley—

"As a general rule every important piece of departmental policy is taken to commit the entire Cabinet, and its members stand or fall together. . . . The Cabinet is a unit—a unit ■ regards the sovereign, and ■ unit as regards the Legislature. Its views are laid before the Sovereign and before Parliament, as if they were the views of one man."

Lord Salisbury similarly said, in 1878—

"For all that passes in Cabinet every member who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues. . . . It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after ■ decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld."<sup>13</sup>

Collective responsibility does not mean that every member of the Cabinet must be present whenever ■ decision is taken; it means that when a decision has been taken by the Cabinet, every Cabinet Minister must vote for it in Parliament, and even defend it outside Parliament. An essential condition of Cabinet solidarity is the maintenance of strict secrecy of what passes at a Cabinet meeting, so that dissensions may not be brought to light.<sup>14</sup> The only exception is that a resigning Minister is allowed to make a personal explanation to the House without raising ■ debate.<sup>14-a</sup>

The normal convention that a Minister dissenting from the Cabinet decision on a matter of policy must resign was, of course, allowed to be violated during the Coalition Government of 1932, by allowing the Liberal members of the Cabinet to disagree to the fiscal policy of the majority of the Coalition Cabinet; but the exception, which was allowed under national crisis, proved unworkable, and the dissentient members had to resign.<sup>15</sup> This exception thus proves the generality of the normal convention. It is also an established convention that the resignation of the Prime Minister entails a retirement of the entire Cabinet, though, of course, there is no bar against any individual Minister being taken into the successor Cabinet.<sup>16</sup>

*Canada.*—While it is open to any Minister to resign at any time, yet so long as the Ministry lasts, there can be no expressed difference of opinion on any Government measure or action—there must be unanimity in the position taken in public—the Ministry must be one. Whenever ■ Minister disagrees with his

Thus, the Sind Premier Alla Bux was dismissed ■ ■ personal ground, *viz.*, that of renunciation of honour, by reason of which he lost the confidence of the Governor. Similarly, Premier Fazlul Huq of Bengal was forced to resign on 29th March, 1943, even though the Progressive Coalition Party had a majority in the Legislature. Again, the Punjab Minister Shaukat Hyat Khan ■ ■ dismissed on 26th April, 1944, for bad conduct.

(13) Cf. Wade ■ Phillips, *Constitutional Law*, p. 62.

(14) Keith, *Constitutional Law*, pp. 154, 156; Wade & Phillips, p. 62; Jennings, *Constitution of Ceylon*, p. 84.

(14-a) This exception is embodied in

R. 128 of the Rules of Procedure and Conduct of Business in our Parliament [Gaz. of India, Extraordinary, d. 14-2-50], which says—

"(1) A member who has resigned the office of Minister may with consent of the Speaker, make ■ personal statement in explanation of his resignation. (2) Such statement shall be made after questions and before the list of business for the day is entered upon. (3) There shall be no debate on such statement, but after it has been made, ■ minister may make a statement pertinent thereto."

(15) Chalmers & Hood Phillips, *Constitutional Law*, pp. 40, 197.

(16) Keith, *Constitutional Law*, p. 165.

brethren in a matter of governmental action he should resign; he cannot avoid his constitutional responsibility for every governmental action or measure taken while he is a Minister."

*Fourth French Republic.*—Art. 48 of the French Constitution of 1946 provides—

"The Ministers shall be collectively responsible to the National Assembly for the general policy of the Cabinet and individually responsible for their personal actions. They shall not be responsible to the Council of the Republic."

Art. 50 provides—

"Passage of a motion of censure by the National Assembly shall automatically result in the collective resignation of the Cabinet. The vote on such a motion cannot be taken until one full day after it has been made. It must be taken by a roll call. A motion of censure may be adopted only by an absolute majority of the Deputies in the Assembly."

The requirement of absolute majority is an innovation intended for avoiding frequent ministerial crises. The requirement of one day's interval is intended to avoid a fall on 'snap' or surprise votes. There is another innovation under the French Constitution, viz., provision for Government itself seeking confidence by a direct motion. Art. 49 provides—

"A question of confidence may not be put except after discussion by the Council of Ministers; it can be put only by the President of the Council. The vote on such question may not be taken until one full day after it has been put before the Assembly. It shall be taken by a roll call. The Cabinet may not be refused a vote of confidence except by an absolute majority of the Deputies in the Assembly. Refusal to give such a vote shall automatically result in the collective resignation of the Cabinet."

*Eire.*—Art. 28 (4) of the Constitution of Eire, 1937, says—

"(4) 1. The Government shall be responsible to Dail Eireann, 2. The Government shall meet and act as a collective authority, and shall be collectively responsible for the Department of State administered by the members of the Government."

Art. 28 (10), again, provides—

"(10) The Taoiseach shall resign from office upon his ceasing to retain the support of a majority in Dail Eireann unless on his advice the President dissolves Dail Eireann and on the reassembly of Dail Eireann after the dissolution the Taoiseach secures the support of a majority in Dail Eireann.

(11) 1° If the Taoiseach at any time resigns from office the other members of the Government shall be deemed also to have resigned from office, but the Taoiseach and the other members of the Government shall continue to carry out their duties until their successors shall have been appointed."

*Japan.*—The relevant Articles of the Japanese Constitution of 1946 provide—

*Article LXVI.*—The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

*Article LXIX.*—If the House of Representatives passes a no-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign *en masse*, unless the House of Representatives is dissolved within ten (10) days.

*Article LXX.*—When there is a vacancy in the post of Prime Minister or upon the convocation of the Diet after a general election, the Cabinet shall resign *en masse*.

*Article LXXI.*—In the cases mentioned in the two preceding articles the Cabinet shall continue its functions until the time when a new Prime Minister is appointed."

*Ceylon.*—Sec. 46 (1) of the Ceylon (Constitution) Order in Council, 1946, says—

"There shall be a Cabinet of Ministers . . . who shall be collectively responsible to Parliament."

*Burma.*—The relevant provisions of the Burmese Constitution, 1948, are—

"115. The Government shall be collectively responsible to the Chamber of Deputies.

119. The Prime Minister shall resign from office upon his ceasing to retain the support of a majority in the Chamber of Deputies unless on his advice the President dissolves the Parliament under Sec. 57 and on the re-assembly of the Parliament after the dissolution the Prime Minister secures the support of a majority in the Chamber of Deputies.



120. (1) If the Prime Minister at any time resigns from office, the other members of the Government shall be deemed also to have resigned from office, but the Prime Minister and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed. (2) The members of the Government in office at the date of dissolution of the Parliament shall continue to hold office until their successors shall have been appointed."

## INDIA

CL. (3): COLLECTIVE RESPONSIBILITY OF COUNCIL OF MINISTERS.—This clause provides for the collective responsibility of the Council of Ministers to Parliament. There is no provision for individual responsibility to Parliament under our Constitution.<sup>18</sup> In *England*, each minister is responsible to Parliament for the acts and efficiency of his own department, and Parliament may sometimes insist on the resignation of an individual minister, rather than the resignation of the entire Cabinet.<sup>19</sup> But, normally, a vote of censure on any one Department is regarded as a vote of censure on the entire Cabinet,<sup>20</sup> unless, of course, it is a question of *personal* unpopularity, misconduct or incompetence of that particular minister.<sup>21</sup>

In the latter case, the President's power of dismissal may be resorted to, under our Constitution.

WHEN A MINISTRY IS NOT BOUND TO RESIGN ON ADVERSE VOTE.—Sometimes, Government, while introducing a Bill, gives freedom to its own members to vote for or against the measure, because the measure is not one of *policy* to which the Government is pledged at the election. The defeat of such a measure does not lead to a resignation of the Ministry. The modern practice in England is towards a relaxation of the rigour of the old rule and the present rule may be stated to be that unless it is a question of policy, it is left to the Ministry itself whether they would consider themselves morally bound to resign upon their defeat on a motion.<sup>22</sup>

"When it (the Cabinet) is said to be responsible to Parliament, what is meant is the convention that when their *policy*—which, as we have seen, must be joint and unanimous—is condemned by the House of Commons, they must resign. Such condemnation may be expressed in two ways: either a measure of *substantial* importance, introduced or adopted by the Government, may be rejected, or a vote of censure may be carried against the Government. Resignation in the latter case is now invariable.

When a Government Bill is defeated, the modern tendency is to consider, before resigning, first whether the Bill is important or trivial, and secondly, whether the defeat registers a *considered judgment* of the Commons or is a mere accident. Where the measure is insignificant or, though important, is defeated on a 'snap' division, modern practice has to some extent relaxed the rigour of the old rule which required resignation to follow upon the defeat of any Government Bill whatever".<sup>22</sup>

(18) Thus, R. 127 of the Rules of Procedure and Conduct of Business in Parliament, 1950, refers to motion of no-confidence in the 'Council of Ministers' and not individual ministers. It says—

“(1) A motion expressing want of confidence in the Council of Ministers may be made subject to the following restrictions, namely:—

(a) leave to make the motion must be asked for after questions and before the list of business for the day is entered upon;

(b) the member asking for leave must, before the commencement of the sitting of the day, leave with the Secretary a written notice of the motion which he proposes to make.

(2) If the Speaker is of opinion that the motion is in order, he shall read the motion in the House and shall then those

members who are in favour of leave being granted to rise in their places, and if not less than thirty members rise accordingly, the Speaker shall intimate that leave is granted and that the motion will be taken on such day, not being more than ten days from the day on which leave is asked, he may appoint. If less than thirty members rise, the Speaker shall inform the member that he has not the leave of the House."

(19) See instances of such individual resignation at the instance of Parliament, at p. 155 of Keith, *Constitutional Law*, 1939.

(20) Lowell, *Government of England*, Vol. I, pp. 31, 73.

(21) Cf. Keith, *Constitutional Law*, p. 165.

(22) Chalmers & Hood Phillips, *Constitutional Law*, p. 198.

The fall of a Government may, however, be brought about by defeating an important Government Bill, involving a question of policy or by passing a resolution of censure or want of confidence.

*'Snap Vote'.*—A snap vote is a vote against some Government measure which is adverse to the Government only because of some misunderstanding or accidental absence of Government supporters. By such a vote "the Government is caught napping", and the confidence of the House against the Ministry is not understood to be in question by such a vote and the Ministry does not resign on such an adverse vote.<sup>23</sup>

Of course, if the opposition realises its strength upon a 'snap' vote, it will lose no time to bring a direct motion of censure so as to cause a fall of the Ministry. On the other hand, if the Government is sure of its success, it may itself bring a resolution of confidence.<sup>24</sup>

*Analogous Provision.*—Corresponding provision for collective responsibility of State Ministers is made in Art. 164 (2).

### CL. (5)

#### OTHER CONSTITUTIONS

*England.*—It has been settled by usage that every member of the Cabinet must be a member of either House of Parliament. There is, however, no rule of law<sup>25</sup> that a Minister at the very time of his appointment, be a member of Parliament, nor is there any definite time limit within which he is to become a member. So, sometimes a person is included in the Cabinet in the expectation that he will win a seat at the impending dissolution<sup>1</sup> or bye-election. A bye-election is sometimes created by inducing some member of the House of Commons to vacate his seat in order to make way for the newly appointed Minister.<sup>2</sup> The Minister may otherwise be created a peer and given a seat in the House of Lords.

*Australia.*—The third paragraph of Sec. 64 of the Australian Constitution Act says—

" . . . no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives."

*South Africa.*—Sec. 14 (1) of the South Africa Constitution Act makes a provision exactly similar to that in Sec. 64 of the Australian Constitution Act.

*Canada.*—There is no statutory prohibition against a non-member becoming a Minister. But by convention, he must, within a reasonable time, become a member of either House of Parliament, or resign.<sup>3</sup>

(23) A recent (29th March, 1950) example of the Government refusing to resign on an adverse vote is the refusal of Mr. Attlee to resign on the defeat of the Government on a motion to adjourn the House at the end of the debate on fuel and power (by 26 votes). Commenting that it was not a 'major occasion' and that the Government would not regard it as a vote of censure, Mr. Attlee said—"Having regard to the present composition of the House, there would always be the possibility that the Government would be defeated in a particular debate. The Government would have to be on the watch all the time because the Opposition could always direct an attack. Everything had been admirably arranged by the Opposition, and their "troops" had been more or less in am-

bush. Not many of them had been in the House early in the evening, but just before they decided to press for a vote large numbers turned up. Government members should have been present in full strength but they were not. The Opposition had scored a success".—[*Vide Statesman, Calcutta, 30—3—50*].

(24) Munro, *Governments of Europe*, p. 106.

(25) See an exception in Chalmers & Hood Phillips, p. 206.

(1) Lowell, *Government of England*, Vol. I, p. 61.

(2) Munro, *Governments of Europe*, 1947, p. 88.

(3) Riddell, *The Canadian Constitution in Form and in Fact*, 1923, pp. 22, 27.

*Eire.*—There is no scope for any provision corresponding to the present clause of our Constitution, in the Constitution of Eire, for Art. 28 (7) of that Constitution lays down that all ministers must be members of either Chamber of Legislature.

*Ceylon.*—Sec. 49 (2) of the Order in Council provides—

"A Minister . . . who for any period of four consecutive months is not a member of either Chamber shall, at the expiration of that period, cease to be a Minister . . . as the case may be."

*Burma.*—Sec. 116 of the Burmese Constitution, 1948, is similar to the present clause of our Constitution.

*Government of India Act, 1935.*—Sec. 10 (2) of the Act of 1935 was exactly similar to Art. 75 (5) of our Constitution.

#### INDIA.

*Object of Cl. (5): Membership of Parliament.*—This clause (taken from Sec. 10 (2) of the Government of India Act, 1935), provides that there is no bar to ■ person who is not ■ member of Parliament to become ■ Minister. But if he does not get a seat within 6 months from the date of his appointment as Minister, he shall cease to be a Minister. It enables an efficient man from outside the Parliament to enter into the Cabinet, and 6 months' time is given to enable him to get himself elected by the people from any constituency. Or, if he is an eminent man of art or science who is useful to the Government but is unwilling to take the trouble of facing an election, Government may nominate him to be ■ member of the Council of States, [Art. 80 (1) (a)], in any vacancy that may take place within the period of 6 months.

This provision also enables a Ministry to hold their office after the Legislature is dissolved until the next election is held and the successor Ministry comes to office.

*Analogous Provision.*—Similar provisions is made in Art. 164 (4), as regards Ministers in the States.

#### CL. (6)

*Salaries of Ministers.*—Under the *Government of India Act, 1935*, the Legislature might determine the salaries of ministers from time to time, but the salary of a minister could not be varied during his term of office [Sec. 10 (3), proviso]. There is no bar to such variation under the Constitution.

Again, under the Act of 1935, the salaries of Ministers were non-votable, being charged on the revenue of India [Sec. 78 (3) (c)]. But under this Constitution, the salaries of ministers are open to the vote of Parliament, not being included in the list in Art. 92 (3).

In fact, ministerial responsibility to Parliament could not have been effective, had they been made immune from Parliamentary cuts and reductions,—which is ■ useful means of expressing disapproval of any action or administration of the department in charge of ■ particular minister.<sup>4</sup>

*Analogous Provision.*—Art. 164 (5) makes similar provision as regards Ministers in the States.

#### *The Attorney-General for India*

Attorney-General for India.

**76.** (1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

(4) Lowell, *Government of England*, Vol. I, p. 347.



(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

#### OTHER CONSTITUTIONS

*England.*—The Attorney-General is the chief Law-officer of the Crown. The appointment is political and is generally conferred on a successful barrister being a supporter of the party in power. Consequently, the office changes with every change in the Government even though he is not always a member of the Cabinet. He receives a high salary, but is not allowed private practice. He represents the Crown in the Courts in all matters in which the rights of a public character come into question, and is, therefore, the representative and legal adviser of all public departments which have capacity to sue and be sued, as well as all departments which have no such capacity. He is a necessary party to the assertion of public rights even where the moving party is a private individual. The Attorney-General, representing the Crown, can be sued in equity for a declaration of right.<sup>5</sup>

The Attorney-General is the head of the English Bar and such has precedence over all King's counsel. But in the Courts, he is not entitled to any more authority than any other member of the Bar.<sup>6</sup> Almost invariably, he is a member of the House of Commons and has charge in the House of Commons legal measures and deals with legal questions on behalf of the Government. The Courts have no power to compel the Attorney-General to be examined as a witness.<sup>7</sup>

In relation to legal proceedings, the functions of the Attorney-General may be summarised as follows :

(i) He represents the Crown in legal proceedings. Admissions made by the Attorney-General bind the Crown to matters of fact, but not on matters of law.<sup>7</sup>

(ii) He prosecutes for the Crown in criminal and revenue cases.

(iii) The Attorney-General may stay a criminal prosecution, in his discretion, by *nolle prosequi*. It can be entered even after verdict.<sup>8-9</sup>

(iv) He advises the Government Departments on legal points ; and any Government Department may call upon the Attorney-General to advise it on legal questions and to represent it in any litigation in which they may be involved.

(v) His fiat is necessary for commencement of certain legal proceedings where the public are concerned, e. g., proceeding under the Coinage Offences Act, Incitement to Disaffection Act, Public Order Act, Official Secrets Act, etc., proceedings for revocation of a patent.

(vi) He may also intervene in legal proceedings where the Crown or the public are interested, e.g., in proceedings relating to the administration of charities, even though the mover is a private individual.<sup>10</sup>

(5) Halsbury, Hailsham Ed., Vol. VI, pp. 666-3.

(6) *A. G. v. Crossman*, (1866) L.R. Ex. 381.

(7) *A. G. v. Brown*, (1818) 1 Swan 265.  
(8-9) *R. v. Leatham*, (1861) 7 Jur. (N.S.) 574.  
(10) *London C. v. A. G.*, (1902)

(vii) He can apply for an injunction against misuse of trade union funds, under the Trade Disputes and Trade Unions Act, 1927.

*U.S.A.*—The Attorney-General is the chief legal officer of the Federal government and performs functions similar to those of the Attorney-General of England, such as prosecution, supervision of enforcement of federal laws, furnishing of legal advice to Government<sup>11</sup> agencies, departments and the President. He represents the United States in matters involving legal questions, and appears in the Supreme Court in cases of importance.<sup>12</sup>

*Burma.*—Secs. 126-7 of the Burmese Constitution, 1948, provide—

“126. (1) The President shall appoint ■ person, being ■■ advocate of the High Court, to be Attorney-General ■■ the nomination of the Prime Minister.

(2) It shall be the duty of the Attorney-General to give advice to the Government upon legal matters and to perform such other duties of ■ legal character, ■ may, from time to time, be assigned to him by the President.

127. (1) The Attorney-General may, at any time, resign from office by placing his resignation in the hands of the Prime Minister for submission to the President.

(2) The Prime Minister may, for reasons which to him seem sufficient, request the resignation of the Attorney-General.

(3) In the event of failure to comply with the request, the appointment of the Attorney-General shall be terminated by the President if the Prime Minister so advises.

(4) The Attorney-General shall resign from office upon the resignation of the Prime Minister but may continue to carry ■■ his duties until the successor to the Prime Minister shall have been appointed.

(5) Subject to the foregoing provisions of this Constitution, the office of the Attorney-General including the remuneration to be paid ■ the holder of the office, shall be regulated by law.”

*Government of India Act, 1935.*—Sec. 16 of the Act was ■■ follows :—

“(1) The Governor-General shall appoint ■ person being ■ a person qualified to be appointed ■ judge of the Federal Court, to be Advocate-General for the Federation.

(2) It shall be the duty of the Advocate-General to give advise to the Federal Government upon such legal matters, and to perform such other duties of a legal character, as ■ may be referred or assigned to him by the Governor-General, and in the performance of his duties he shall have right of audience in all courts in British India and in ■ case in which federal interests are concerned, in all courts in any Federated State.

(3) The Advocate-General shall hold office during the pleasure of the Governor-General, and shall receive such remuneration ■ the Governor-General may determine.

(4) In exercising his powers with respect to the ■ppointment and dismissal of the Advocate-General and with respect to the determination of his remuneration, the Governor-General shall exercise his individual judgment.”

## INDIA

*Source of Art. 76.*—This article corresponds to sec. 16 of the Government of India Act, 1935, changing the name ‘Advocate-General’ to ‘Attorney-General,’ and omitting sub-Sec. (4) which made the appointment and dismissal of the Advocate-General ■ matter of ‘individual judgment’ of the Governor-General.

*Cl. (2) : Duties of the Attorney-General.*—The President has, under the present clause, made the following rules as to the remuneration and duties of the Attorney-General:<sup>13</sup>

(11) Ferguson, *American System of Government*, p. 783.

(12) Beard, *American Government and Politics*, 1939, p. 194; Zink, *Government and Politics*

in the U.S.A., p. 430.

(13) Not. No. F. 43/50C, dated 26th January, 1950; *Gazette of India, Extraordinary*, dated 28th January, 1950, p. 737; S.C.J. (1950). Supp. 43.

"1. In these rules, 'Attorney-General' means the person appointed under clause (1) of article 76 of the Constitution to be the Attorney-General of India, and includes any person appointed to act as the Attorney-General of India during the absence ■ leave ■ deputation; of the permanent incumbent of the office.

2. (1) The Attorney-General shall, except during any period of absence on leave or deputation, be paid ■ retainer of rupees four thousand per month and ■ office allowance of rupees thirty-five per month.

(2) The services of a personal assistant and of a jemadar, office accommodation and telephones at his office and residence shall be provided free of costs by Government.

3. The Attorney-General will normally reside at New Delhi.

4. It shall be the duty of the Attorney-General—

(a) to advise the Government of India on such legal matters as are referred to him by the Government of India and to perform such other duties of ■ legal character ■ ■ assigned to him from time to time by the Government of India ;

(b) to appear on behalf of the Government of India in all cases (including suits, appeals and other proceedings) in the Supreme Court in which the Government of India is concerned ;

(c) to represent the Government of India in any reference made by the President to the Supreme Court under article 143 of the Constitution ; and

(d) to discharge the functions conferred on the Attorney-General by or under the Constitution or under any other law for the time being in force.

5. For the performance of the duties mentioned in paragraph 4, the Attorney-General shall not be paid any fees other than the retainer payable under paragraph 2 :

Provided that, if any costs are awarded or allowed to the Government of India in any such case, ■ is referred to in paragraph 4, such part of the costs as is recovered in respect of fees payable to the Attorney-General, shall be paid to the Attorney-General.

6. The Government of India may require the Attorney-General to appear in any High Court in any case in which the Government of India is concerned ; and ■ daily fee of sixty mohurs shall be payable to the Attorney-General for the days of his absence from headquarters in connection with such appearance, including the days of departure from, and arrival back at, headquarters.

7. Where the Attorney-General is required, otherwise than under paragraph 6, to leave headquarters in the performance of his official duties, travelling and other allowances on the scale admissible to a Judge of the Supreme Court on tour shall be paid to the Attorney-General for journeys necessarily performed in the course of those duties.

8. The Attorney-General shall not—

(a) advise or hold briefs against the Government of India ;

(b) advise or hold briefs in cases in which he is likely to be called upon to advise, or appear for, the Government of India ;

(c) defend accused persons in criminal prosecutions without the permission of the Government of India ; or

(d) accept appointment ■ ■ Director in any company without the permission of the Government of India."

It appears from rule 8, above, that private 'practice ■ not prohibited as in England,<sup>14</sup> but *our* Attorney-General is only prohibited to do any of the acts enumerated in rule 8, which are adverse to the interests of the Government of India. The Attorney-General and after him the Advocate-General of a State shall have precedence over all other Advocates. The Supreme Court has the right to issue<sup>15</sup> notice of any proceedings to the Attorney-General and the latter may also apply to be heard in any proceeding. Order XLI of the Supreme Court Rules, 1950, says—

"1. The Court may direct notice of any proceedings to be given to the Attorney-General for India or to the Advocate-General of any State, and the Attorney-General for India or the Advocate-General to whom such notice is given may appear and take such part in the proceedings as he may be advised.

(14) Wade and Phillips, Constitutional Law, P. 150.

(15) O. IV, r. 15, Supreme Court Rules, 1950



2. The Attorney-General for India or the Advocate-General of any State may apply to be heard in any proceedings before the Court, and the Court may, if in its opinion the justice of the case requires, permit the Attorney-General for India or the Advocate-General so applying to appear and be heard, subject to such terms as to costs or otherwise as the Court may think fit."

CL. (4) : *Tenure of the Attorney-General.*—The Attorney-General of India shall hold office during the pleasure of the President. Of course, the President shall act with the advice of his Cabinet. Nevertheless, this provision differs from the English practice, under which the office of the Attorney-General is regarded as a fully political one, and the office changes with each change in the Government. It may not necessarily be so under *our* Constitution.

*Analogous Provisions.*—Cl. (1) of the present Article is to be read with Art. 124 (3), *post*, which lays down the qualifications for being appointed a Judge of the Supreme Court.

Art. 165 makes parallel provisions in respect of the office of the Advocate-General for the State. But there is no provision in Art. 165, corresponding to cl. (3) of Art. 76.

*See also* Art. 88 which provides that the Attorney-General shall have a right of speaking in either House of Parliament, even though he is neither a member of the Cabinet nor of Parliament.

### *Conduct of Government Business*

Conduct of business of the Government of India.

**77.** (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Cls. (1) to (3) of Sec. 17 of that Act were in the same language as Cls. (1)-(3) of Art. 77 of *our* Constitution, substituting Governor-General for President, and taking out the discretionary sphere of the Governor-General from the purview of Cl. (3).

*Burma.*—Sec. 121 of the Burmese Constitution is the same as above.

### INDIA

*Scope of Art. 77 : Formal expression of Executive Action.*—As the *formal* head of the Executive, the President shall have no executive function to be discharged personally. But all executive action of the Government of India must be expressed to be taken in his name.

*Analogous Provision.*—Similar provision is made in Art. 299, *post*, ■ regards contracts made by the Government of India.

### CL. (2)

*Authentication of President's Orders, etc.*—Authentication is a mere formal matter of promulgation to the public of the orders and other instruments made and executed in the name of the President, that is to say, all executive action of the Government of India [Cl. (1)]. The authentication invests these orders and instruments with authenticity, so that the public may know that these ■ the ■ ■ ■ action of the Government of India.

*Effect of Authentication.*—The only mode of ascertaining whether an order or instrument is an order or instrument made by the Government of India is to see whether it is *expressed* in the name of the President and also *authenticated* in such manner as may be prescribed by rules to be made by the President. But once these two conditions are satisfied, it will not be open to anybody to challenge any order or action as not having been duly made. This, of course, refers to the *form* of the order, and has no reference to the *validity* of the order on point of its subject-matter as limited by Article 73 which defines the extent of the executive power of the Union.<sup>16</sup> See, further, under Art. 166, *post*.

## CL. (3)

## OTHER CONSTITUTIONS

*England.*—Not only the selection of colleagues, but also the distribution of portfolios amongst them, is a business of the Prime Minister ; the King has, under modern conditions, no voice in these matters.<sup>17</sup>

*Burma.*—Art. 121 (3) of the Burmese Constitution is similar to the present Clause of our Constitution.

## INDIA

CL. (3) : *Allocation of business among Ministers.*—This provision, together with Art. 78 (c), brings the President into close touch with the affairs of the Council of Ministers, even though our President has no right to preside over Cabinet meetings, as under the French Constitution,<sup>18</sup> or under sec. 9 (2) of the Government of India Act, 1935.

*Analogous Provision.*—Art. 166 makes the corresponding provisions in relation to the State Executive. See further, under that article.

Duties of Prime Minister as respects the furnishing of information to the President, etc.

**78.** It shall be the duty of the Prime Minister—

(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation ;

(b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for ; and

(c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

## OTHER CONSTITUTIONS

*England.*—Though the Crown no longer possesses any constitutional right<sup>19</sup> to take part in the Cabinet deliberations or to be present at its meetings, and the Crown is bound to act on the advice of the Cabinet,—the Cabinet being still in theory a body of advisers of the Crown, ■ bound to keep the Crown informed “ of any departures in policy, of the general march of political events, and in particular of the deliberations of the Cabinet, which may not be disclosed to anyone else.”<sup>20</sup> Since World War I, the British Cabinet has ■ Secretary to record all its deliberations. It is the duty of the Prime Minister, as the presiding officer of the Cabinet, to communicate to the Sovereign all resolutions of the Cabinet, together with the fullest information on all important points, and in time to enable him to come to a proper decision.<sup>21</sup>

(16) Cf. *King-Emperor v. Shibnath*, (1945) 2 M.L.J. 325 : (1945) F.L.J. 222 : 50 C.W.N. 25 (32) (P.C.).

(17) Munro, *Governments of Europe*, 1947, pp. 90-1.

(18) Art. 32 of the Fourth French Republic,

1946 ; see under Art. 78, below.

(19) This is another right which has become obsolete by disuse and convention (see Chalmers and Hood Phillips, p. 193 ; Keith, p. 156).

(20) Chalmers and Hood Phillips, p. 199.

(21) Keith, *Constitutional Law*, p. 157.

*Fourth French Republic.*—Art. 32 of the French Constitution of 1946 provides—

“The President of the Republic shall preside over the Council of Ministers . . . .”

*Burma.*—Sec. 124 of the Burmese Constitution, 1948, says—

“The Prime Minister shall keep the President generally informed on all matters of domestic and international policy.”

#### INDIA

*CLS. (a)-(b): President's right of information.*—These two clauses embody the rules of the English system governing the relation between the Crown and the Cabinet. It shall be the duty of the Prime Minister, as the head of the Cabinet, to communicate to the President, not only all decisions of the Cabinet but also any other information that the President may himself call for, relating to administration as well as legislation. Like the English king, the Indian President shall have no right to sit in Cabinet meetings, but he shall have ■ right to be informed of everything relating to public affairs, so that he may exert his influence, ■ the impartial head of the Executive, upon the Council of Ministers.

*CL. (c): President's control over individual Ministers.*—This appears to be a safeguard intended to ensure the collective responsibility and solidarity of the Council of Ministers. Under the complicated conditions of modern government, it is not possible for every matter relating to the different departments to be discussed and determined in Cabinet meetings.

In *England*, each individual Minister normally carries on the business of some Department or branch of the administration and makes decisions relating thereto ; but ■■ matters of *policy*,<sup>22</sup> he has to refer to the Cabinet through the Prime Minister, who exercises ■ general supervision over the work of all Departments. As Gladstone explained—

“The nicest of all adjustments involved in the working of the British Government is that which determines without formally defining the internal relations of the Cabinet. On the one hand, while each Minister is an adviser of the Crown the Cabinet is a unity, and none of its members can advise as ■ individual without or in opposition, actual or presumed, to his colleagues. On the other hand, the business of the State is a hundred-fold too great in volume to allow of the actual passing of the whole under the view of the collected Ministry. It is, therefore, ■ prime office of *discretion for each Minister* to settle what are the departmental acts in which he can *presume* the concurrence of his colleagues, and in what more delicate or weighty or peculiar cases he must positively ascertain it.”<sup>23</sup>

The individual Minister is obliged to refer matters of moment to Cabinet decision by reason of (a) the rule that important communications to the Crown can be made only through the Prime Minister ; (b) the supervision of the Prime Minister, to secure the working of ■ unified policy through the different Departments. On this latter point, Gladstone said—

“In a perfectly organised administration, such for example was that of Sir Robert Peel in 1841-6, nothing of great importance is matured, or would even be projected, in any Department without his personal cognizance ; and any weighty business would commonly go to him before being submitted to the Cabinet.”<sup>24</sup>

The whole thing, however, rests on convention and usage.

Our Constitution seeks to ensure collective deliberation by a more positive device. It empowers the President to intervene if he finds that an individual Minister has taken ■ decision regarding his Department which is of such importance that it should have been placed before the collective decision of the Council of Ministers. So, even though an individual Minister shall have the liberty of placing his own decision regarding his Department to the President, the latter shall have the power to refer them to the consideration of the Council, so that no important executive action may be taken by the President on the advice of a single Minister. As Dr. Ambedkar explained in the Constituent Assembly this provision seeks to follow the practice that existed on the eve of the commencement of the Constitution. Weekly summaries prepared by each Ministry containing the decisions taken by it used to be sent to the Cabinet ■ well as to the Governor-General. If, the Governor-General, on seeing the weekly summaries, found that the Ministry

(22) Lowell, Government of England, Vol. I, p. 74.

(23) Quoted in Jennings, Cabinet Government.



had taken a decision on a particular subject which he thought was not good, the Governor-General might place that matter for a re-consideration by the Cabinet.

*Analogous Provision.*—The provisions of Art. 167 as regards the Council of Ministers of ■ State are exactly similar to those of the present article.

## CHAPTER II.—PARLIAMENT.

### General

**79.** There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.

Constitution of Parliament.

### OTHER CONSTITUTIONS

*U. S. A.*—Under the Presidential system of the United States, the President is not a member of the Legislature, even though he possesses some legislative powers such as that of veto, sending messages. Art. I, Sec. 1 says—

“All legislative powers herein granted shall be vested in ■ Congress of the United States, which shall consist of a Senate and House of Representatives.”

*England.*—The Crown is a ‘constituent part’ of Parliament which goes by the name ‘King-in-Parliament’.

At the present day, the King has the following prerogatives in reference to Parliament:

(i) Summoning, proroguing and dissolving Parliament; appointing time and place of its meeting, directing commencement of its proceedings.

(ii) Speech from the Throne, *i.e.*, the speech at the opening of each session.

(iii) Assent to legislation.

Subject to the Parliament Acts of 1911 and 1949, an ‘Act’ of Parliament can be made *only* with the concurrence of the three sections of Parliament, *viz.*, the King and the two Houses.<sup>24</sup>

*Australia.*—Sec. 1 of the Australian Constitution Act says—

“The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Representatives, and which is hereinafter called ‘the Parliament,’ or ‘the Parliament of the Commonwealth’.”

*Canada.*—Sec. 17 of the Br. North America Act, is—

“There shall be one Parliament for Canada, consisting of the Queen an Upper House styled ‘the Senate’ and the House of Commons.”

*South Africa.*—Sec. 19 of the Union of South Africa Act provides—

“The legislative power of the Union shall be vested in the Parliament of the Union, herein called ‘Parliament,’ which shall consist of the King<sup>25</sup>, a Senate and a House of Assembly.”

*Eire.*—Art. 15 (1) of the Constitution of Eire, 1937, provides—

“(1) 1° The National Parliament shall be called and known, and is in this constitution generally referred to, as ‘the Oireachtas.’ 2° The Oireachtas shall consist of the President and two Houses, *viz.*, ■ House of Representatives to be called “Dail Eireann” and ■ Senate to be called ‘Seanad Eireann’.”

*Fourth French Republic.*—Art. 5 of the Constitution of 1946 provides—

“The Parliament shall be composed of the National Assembly and the Council of the Republic.”

Though France adopts the Parliamentary system, it does not make the President a component part of the Legislature and the President has no power to veto or to suspend the promulgation of laws passed by the Parliament.

*Japan.*—The relevant provisions of the Japanese Constitution of 1946 are—

*Article XLI.*—The Diet shall be the highest organ of state power, and shall be the sole law-making authority of the State.

*Article XLII.*—The Diet shall consist of two houses, namely, the House of Representatives and the House of Councillors.”

(24) May, Parliamentary Practice, p. 2; Keith, Constitutional Law, p. 42.

(25) Under the Royal Executive Functions

and Seals Act, 1934, all powers of the King now exercised by the Governor-General with the advice of the Executive Council.

*Burma.*—Sec. 65 of the Constitution of Burma says—

“The legislative power of the Union shall be vested in the Parliament which shall consist of the President, ■ Chamber of Deputies and ■ Chamber of Nationalities and which is in this Constitution called ‘the Parliament’ or ‘the Union Parliament’.”

*Ceylon.*—Sec. 7 of the Ceylon (Constitution) Order in Council, 1946, provides—

“There shall be ■ Parliament of the Island which shall consist of His Majesty, and two Chambers to be known respectively as the Senate and the House of Representatives.”

#### INDIA

*Scope of Art. 79: Constitution of Parliament.*—Departing from the American precedent and following the English, the Indian Constitution makes the President ■ member of the Legislature<sup>1</sup>. The Parliament of the Union, thus, is a composite body consisting of the President and the two Houses.<sup>1-a</sup> Consequently, a ‘law of Parliament’ means a law passed by the two Houses, followed by the assent of the President<sup>1-b</sup>, subject of course to the provisions regarding Money Bills, in Art. 109.

Resolutions of either House of Parliament are not equivalent to laws made by Parliament<sup>2</sup>, nor can they preclude the Courts<sup>3</sup> from examining into the legality of acts done under the authority of such resolutions<sup>3</sup>.

*Analogous Provision.*—Compare Constitution of State Legislature in Art. 168.

Composition of the Council of States.

**80.** (1) The Council of States shall consist of—

(a) twelve members to be nominated by the President in accordance with the provisions of clause (3); and

(b) not more than two hundred and thirty-eight representatives of the States.

(2) The allocation of seats in the Council of States to be filled by representatives of the States shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.

(3) The members to be nominated by the President under sub-clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely :—

Literature, science, art and social service.

(4) The representatives of each State specified in Part A or Part B of the First Schedule in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The ■ representatives of the States specified in Part C of the First Schedule in the Council of States shall be chosen in such manner ■ Parliament may by law prescribe.

#### OTHER CONSTITUTIONS

*U. S. A.*—Originally, members of the Senate used to be elected, indirectly, by the State Legislatures [Art. I, Sec. 3 (1)]. But the above provision has been superseded by the 17th Amendment to the Constitution (1913) which provides that—

(1) See List of the legislative powers of the President under the Constitution of India, at pp. 219, ante.

(1-a) See Art. 979, post, as to the Provisional Parliament which consists of one House only.

(1-b) Cf. ■ parte *Rashleigh*, (1875) ■ Ch.

D. 9 (12); *Umayachal v. Lakshmi*, A.I.R. 1945 F.C. 25 (31).

(2) *Stockdale v. Hansard*, (1839) 9 A. & ■. 1.

(3) *Jatindra v. Province of Bihar*, (1949) F.L.J. (F.C.) 225 (249).

"the Senate of the United States shall be composed of two Senators from each State, elected by the people thereof."

Hence, members of the Senate are now chosen by direct election of the people, two Senators being elected from each State, *equally*. There are thus 96 members in the American Senate (the States being 48 in number). The American Senate represents the federal principle of the Constitution, by providing equality of representation of the States in this Chamber, irrespective of their size or population. But at the same time, members of the American Senate are delegates not of the State governments, but of the people, voting by States. This fact of direct election, together with its extraordinary powers, makes the American Senate the most effective second Chamber in the world.<sup>4</sup>

It has got certain exceptional powers which are not possessed by many other second Chambers :

(a) It has got equal powers with the other Chamber (the House of Representatives) in ordinary legislation.

(b) In respect of money bills, its powers are also equal except as to initiation. But it is free to amend or reject any money bill.

(c) Its consent is necessary for appointments made by the President.

(d) It has the power to try impeachments.

(e) Its consent is necessary for the making of treaties by the President. The reality of the power of the Senate in this respect is illustrated by the fact that so far the American Senate has refused its assent to over 60 treaties proposed by the President. A climax was reached when at the end of World War I, President Wilson signed the Peace Treaties and the Covenant of the League of Nations on behalf of the United States, but the Senate refused to ratify any of these treaties and covenants and thus nullified the mighty work of the President so far as the United States was concerned. It is this which leads *Laski*<sup>5</sup> to observe—

"No legislative assembly of the world rivals the Senate of the United States in its influence in the International sphere."

The other factors that contribute towards the strength and prestige of the American Senate are (i) It is a small and compact body, compared with the British House of Lords. (ii) It affords a better opportunity for hearing to individual members than the House of Representatives. (iii) Absence of responsibility of the Executive to the Lower House (such as exists under the Parliamentary system) accounts, in part, for the failure of the House of Representatives to dominate the Senate. (iv) The personnel of the Senate is superior to that of the House of Representatives. Thus, in the 80th Congress, while over 1/3 of the members of the House of Representatives had never before held any public office,—in the Senate the number of such members did not exceed 1/8.

*England.*—The English House of Lords is now the only second Chamber amongst the known Constitutions of the world which contains a major hereditary element. It consists of over 760 temporal and 26 spiritual Lords. The majority of the former category are hereditary peers<sup>6</sup>. Not only because of its hereditary composition, but also because of its inferior powers in comparison with the House of Commons, that the English House of Lords has come to occupy a subordinate position in the English polity; and Parliamentary sovereignty, which is the primary characteristic of the English political system, has come to mean the supremacy of the lower House. This predominance is no doubt primarily due to the nature of the Cabinet system itself. For, the Cabinet represents the majority in the lower House and is responsible only to that House. As *Bagehot* pointed out,—the legislative function of Parliament, *i.e.*, the mere making of laws, is less significant under the British system than the power of determining, maintaining and rejecting the Ministry.

(4) According to Sir Henry Maine, "It is the one thoroughly successful institution which has been established since the tide of modern democracy began to run."

(5) *Laski*, American Presidency, p. 172.

(6) See Composition in any text-book on English Constitutional Law.



As regards legislative powers, the Parliament Act, 1911, practically deprived the House of Lords of any power over 'Money Bills' (having no power to amend a Money Bill, and no power to prevent its being an Act of Parliament beyond a month from the date when it is sent from the House of Commons). As regards other Bills, the House of Lords had, under the Act of 1911, only a suspensory veto, i.e., the power to effect a delay in the passing of such a Bill, not exceeding two years and one month from the first second reading of the Bill in the House of Commons. In other words, if a Bill was passed by the Commons and rejected by the Lords in *three* successive sessions, the Bill being presented to the House of Lords at least one month before the end of each such session, and two years had elapsed from the date of the second reading of the Bill in the House of Commons during the first of those sessions and the date on which it passed the House of Commons in the third of such sessions, the Bill might be presented to the Crown and become an Act of Parliament with the Royal assent, over the head of the Lords.

Now, this period of suspensive veto has been further reduced by the Parliament Act of 1949,<sup>7</sup> to *two* sessions and a period of *one year and one month* only dating from the second reading of the Bill in the Commons in the first session. So, though the House of Lords can discuss and amend Bills other than Money Bills, they shall no longer be able to prevent the enactment of any such Bill for more than 2 years and one month since its second reading in the House of Commons in the first of two successive sessions. It is curious to note that the Parliament Act, 1949, itself, has thus been enacted over the head of the House of Lords and against its refusal to pass the Bill. The Royal assent was given to this Bill by a special Royal Commission.

But though the period has been limited, and ultimately the will of the popular House must have its way, the House of Lords may still prove its utility as a revising Chamber to point out the defects of hasty legislation. This is illustrated by the fact that the Attlee Government has accepted, in the House of Lords, not less than 230 amendments to the Bill nationalising transport, 360 amendments to the Bill controlling limited liability companies and similar amendments in regard to the Town and Country Planning Bill, and so on. Similarly, in 1947, the House of Lords rejected a Commons motion to suspend the death penalty and forced the Government to issue a Royal Commission to investigate the means of limiting death penalty in Britain.<sup>8</sup>

From the point of personnel, the House of Lords does not fail in comparison with the House of Commons<sup>9</sup>, and owing to the larger freedom of debate, the utility of the House of Lords as a criticising and revising body is still acknowledged notwithstanding the curtailment of its powers. In the words of Jennings<sup>10</sup>—

"Legislation is not the sole or even the more important function of the House of Lords. That House is rather an assembly for the debate of the less technical and, in the party sense, less 'political' issues of Government. Because the fate of the Government does not depend on its votes and because of the preponderance of one party, the House of Lords can debate in a less obviously partisan manner the principles of foreign and imperial policy; . . . and because the peers have no constituents to placate, no meetings to address, and, often, no speeches to make, they can devote more time to the less spectacular but often useful technical functions of legislative control."

**Australia.**—Like the American Senate, the Australian Senate represents the federal principle. There were, until 1948,<sup>11</sup> 36 Senators, six being elected for each State, *directly* by the electors. They are elected for six years, half their number retiring every three years. The Australian Senate, however, differs from the American Senate on the following points: (i) No power exists in the United States Constitution to dissolve its Senate; but the Australian Senate may be dissolved by the Governor-General to prevent a deadlock between the two Houses (Sec. 57).

(7) See (1950) 5 D.L.R. Jour. 11.

(8) See (1949) 1 D.L.R. Jour. 22.

(9) Munro, *Governments of Europe*, 1947, p. 153.

(10) Jennings, *Parliament*, 1948, p. 4.

(11) After the next election, the number of Senators shall be 60,—6 from each State, and the membership of House of Representatives shall be 120 (Nicholas, *Australian Constitution*, 1948, p. 53).

- (ii) Owing to this power of dissolution, the Australian Senate cannot have ■ continuity of life which characterises the American Senate, notwithstanding the partial retirement of members. For, if the Governor-General dissolves the Senate to remove a deadlock between the two Chambers, a wholly new Senate would be elected.
- (iii) The Australian Senate has failed to draw to it people of that calibre and experience of which the American Senate can be proud.

Nevertheless, the Australian Senate is regarded by some<sup>12</sup> as the most powerful second Chamber in the British Dominions inasmuch as—(a) It possesses equal power with the House of Representatives in respect of legislation save as regards Money Bills ; (ii) even as regards Money Bills, it has the power of rejection, and by the exercise of this power, it may force ■ dissolution of both Chambers (Sec. 57).

*Canada.*—The Canadian Senate is a *nominated* second Chamber, consisting of 96 members, nominated by the Governor-General (acting on the advice of his Cabinet), for life, the nomination being distributed amongst the Provinces according to a certain ratio<sup>13</sup> (not equally as in the U. S. A.). Owing to the looseness of the Canadian federation, equality of State representation in the second Chamber is not maintained in Canada : while each of the original three Provinces has 24 members while the number of members from other Provinces varies, down to ■ minimum of four. [See pp. 29-30, *ante*.]

The Canadian Senate does not possess either the glamour of an aristocratic and hereditary chamber (such as the House of Lords) or the strength of an elected assembly (Australia) or the utility of ■ Senate representing the federal as opposed to the national idea (as in the U. S. A.). It is a nominated body composed of members who are so rewarded for service to some party organisation. Although Senators are appointed to represent the Provinces, they are spokesmen neither of the Provincial governments or of the electorates, for they are appointed by the Governor-General for life, that is to say, by the Dominion Cabinet as ■ reward for partisanship.

"The Senate is the one *conspicuous failure* of the Canadian Constitution. The failure springs from the unchanging partisanship of the appointees ; the Senate has been called the Ministry's 'pocket-borough' . . . . For some thirty years the public have scarcely been aware of the Senate's existence, for its proceedings are rarely reported in the Press. . . . Its primary use is to provide ■ dignified seclusion for retired politicians who have deserved well of their party leader."<sup>14</sup>

The political insignificance of the Senate, however, seems to be inexplicable on the face of the Constitution itself ; for, there is formal equality of powers in the Constitution for the two Chambers. Though Money Bills must originate in the House of Commons, all bills including Money Bills, require passage by both Chambers, before presentation to the Governor-General. Further, there is no provision in the Constitution for resolving a deadlock between the two Chambers. In spite of this formal equality, the inferiority and inefficiency of the Canadian Senate is due to two facts—

(a) The principle of Cabinet responsibility which has been introduced outside the letters of the Constitution, rests on the English convention that the Cabinet is responsible to the lower Chamber alone. The Canadian Senate has, therefore, no means of control over the government. Usually, not more than one Minister *without portfolio* is taken from the Senate.

(b) Secondly, the very mode of appointment of the Senators tends to the inferiority of the Senate ; the Senators are conscious of this inferiority and they have no initiative to attempt to exert their full legal authority. Except proposing ■ few minor amendments, the Canadian Senate has never effectively delayed any constitutional or social reform<sup>14</sup>.

(12) Cf. Strong, *Modern Political Constitutions* (1949), p. 205.

(13) Keir, *Constitutional Law*, p. 501.

(14) Clokie, *Canadian Government and Politics*, p. 120.

An illuminating estimate of the position of the Canadian Senate is given by Strong<sup>16</sup>—

“The Senate in Canada attempts the impossible. The Constitution tried to model the Senate on the House of Lords, adopting the plan of nomination for life in place of the hereditary principle. At the same time, it wished to do what it could not do consistently with the system of choice by the central power, namely to maintain the federal idea. This can only be done on the basis of equality among the States framing the federation, each choosing its own Senators . . . . These cross purposes have had their effect on the prestige of the Senate in Canada, which has neither the *power* which attaches to an elective second Chamber nor the *usefulness* of an upper House which properly enshrines the federal idea.”

*South Africa.*—The South African Senate is an example of a partially elected Second Chamber. It consists of forty members of whom (a) 8 are nominated by the Governor-General in Council; and (b) the rest are elected by the members of the Provincial Councils and of the Union House of Assembly, acting together, on the principle of transferable vote,—eight from each of the Provinces.

The mode of composition of the Senate maintains the unitarianism of the South African polity. The nomination of non-elected members is in the hands of the central authority, while the election of the remaining members also is largely under the control of the Centre owing to the fact that members of the Union House of Assembly votes with the Provincial Councils at the election.

The Senate has ■ considerable position in South African politics owing to— (i) the mode of its composition, and (ii) the right of ministers to address the Senate even though they are members of lower Chamber.

*Fourth French Republic.*—Art. 6 of the Constitution of 1946 provides that the number of members of the ‘Council of the Republic’ shall be not less than 250, nor more than 320. The Council shall be elected by the communal and departmental bodies by universal, indirect suffrage. The National Assembly may also elect not more than one-sixth of the total number of members of the Council of the Republic, by proportional representation.

This Second Chamber of the Fourth Republic has been said to be ‘a weak successor’ of the powerful Senate of the Third Republic.<sup>17</sup> For, it is elected by a complicated system of indirect election, has no control over the Cabinet and only ■ suspensory veto upon legislation.

*Eire.*—Art. 18 of the Constitution of 1937 provides—

“(1) Seanad Eireann shall be composed of sixty members, of whom eleven shall be nominated members and forty-nine shall be elected members.

(2) A person to be eligible for membership of Seanad Eireann must be eligible to become ■ member of Dail Eireann.

(3) The nominated members of Seanad Eireann shall be nominated by the Taoiseach with their prior consent.

(4) The elected members of Seanad Eireann shall be elected as follows:—(i) Three shall be elected by the National University of Ireland. (ii) Three shall be elected by the University of Dublin. (iii) Forty-three shall be elected from panels of candidates constituted as hereinafter provided.

(5) Every election of the elected members of Seanad Eireann shall be held on the system of proportional representation by means of the single transferable vote, and by secret postal ballot.

(6) The members of Seanad Eireann to be elected by the Universities shall be elected on a franchise and in the manner to be provided by law.

(7) 1° Before each general election of the members of Seanad Eireann to be elected from panels of candidates, five panels of candidates shall be formed in the manner provided by law containing respectively the ■ of persons having knowledge and practical experience of the following interests, and services, namely:—

(i) National language and culture, literature, art, education and such professional interests as may be defined by law for the purpose of this panel. (ii) Agriculture and allied interests and fisheries. (iii) Labour, whether organised or unorganised. (iv) Industry and commerce, including

(16) Strong, *Modern Political Constitutions* (1949), pp. 194-5.

(17) Roucek, *Governments and Politics abroad* p. 110.



banking, finance, accountancy, engineering and architecture. (v) Public administration and social services, including voluntary social activities.

2° Not more than eleven and, subject to the provisions of article 19 hereof, not less than five members of Seanad Éireann shall be elected from any one panel.

(8) A general election for Seanad Éireann shall take place not later than 90 days after a dissolution of Dail Éireann, and the first meeting of Seanad Éireann after the general election shall take place on a day to be fixed by the President on the advice of the Taoiseach.

(9) Every member of Seanad Éireann shall, unless he previously dies, resigns, or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Éireann next held after his election or nomination.

(10) 1° Subject to the foregoing provisions of this article elections of the elected members of Seanad Éireann shall be regulated by law. 2° Casual vacancies in the number of the nominated members of Seanad Éireann shall be filled by nomination by the Taoiseach with the prior consent of persons so nominated. 3° Casual vacancies in the number of the elected members of Seanad Éireann shall be filled in the manner provided by law."

The Senate of Eire, thus, is a partially elected and partially nominated body,—the election, again, being on the basis of functional representation. The Irish Senate, like the English House of Lords, has a subordinate position in law-making. As regards money Bills, its powers are similar to those of the House of Lords. As regards *other* Bills, the Dail may override Senatorial opposition and the Senate's power to interpose delay is limited to 3 months only (Art. 23). But it has the extraordinary power of requesting the President to submit a Bill to a referendum of the people if it can get the support of 1/3 of the members of the Dail to that proposal (Art. 27).

*Japan.*—The Japanese Constitution provides an example of both Chambers being similarly composed. Art. XLIII says—

"Both Houses shall consist of elected members, representative of all the people. The number of the members of each House shall be fixed by law."

*Ceylon.*—Sec. 8 (1) of the (Constitution) Order in Council, 1946, provides—

"(1) The Senate shall consist of thirty Senators of whom fifteen (hereinafter referred to as 'elected Senators') shall be elected by the House of Representatives and fifteen (hereinafter referred to as 'appointed Senators') shall be appointed by the Governor-General."

Sec. 9 says—

"(1) After the first election under Sec. 17 of this Order . . . . ., the House of Representatives shall, before proceeding to any other business, elect fifteen Senators; and thereafter, as soon as may be after the occurrence of a vacancy among the elected Senators, the House of Representatives shall elect a person to fill such vacancy. (2) The election of Senators shall, whenever such election is contested, be according to the principle of proportional representation, each voter having one transferable vote . . . . ."

The powers of the Senate of Ceylon in legislation are analogous to those of the House of Lords under the Parliament Act, 1949 (Secs. 33-34 of the Order in Council). Hence, it will have no co-ordinate authority with the House of Representatives and no utility than to interpose some delay upon hasty legislation. But the provision (Sec. 48) that not less than 2 ministers must be members of the Senate and be *responsible* to that body for the action of the entire ministry, enhances the prestige of the Senate. Further, under the system of nomination, it is expected to draw eminent and experienced men.

*Burma.*—Sec. 87 of the Burmese Constitution provides—

"There shall be one hundred and twenty-five seats in the Chamber of Nationalities as allocated in the Second Schedule to this Constitution".

The Second Schedule is as follows—

"Of the 125 seats in the Chamber of Nationalities—

(a) twenty-five seats shall be filled by representatives from the Shan State; (b) twelve seats shall be filled by representatives from the Kachin State; (c) eight seats shall be filled by representatives from the Special Division of the Chins; (d) three seats shall be filled by representatives from the Karenni State; (e) twenty-four seats shall be filled by representatives of Karens; (f) fifty-three seats shall be filled by representatives from the remaining territories of the Union of Burma."

## INDIA

ART. 80 : COMPOSITION OF THE COUNCIL OF STATES.—The framers of *our* Constitution have combined certain features of the Constitution of Eire (nomination and representation of experience and services) and of South Africa (indirect election by State Assemblies), in providing for the composition of the Upper Chamber of the Union Parliament. The principle of partial nomination is intended to secure for distinguished persons a place in the Upper Chamber. Election of the major portion of the members by the State Assemblies is intended to give a federal character to this House. But the American principle of equality of State representation is not followed, for the number of representatives of the States to our Council of States varies (*vide* Sch. IV, *post*) from 1 (e.g., Bhopal) to 31 (Uttar Pradesh).

This heterogenous composition is open to criticism from different stand-points. Thus, while indirect election may lead to corruption,<sup>18</sup> nomination may be said to militate against the symmetry of the Constitution which adopts the system of representative democracy.

*Analogous Provision.*—Compare composition of the Legislative Council of a State in Art. 171.

**81.** (1) (a) Subject to the provisions of clause (2) and of articles 82 and 331, the House of the People shall consist of not more than five hundred members directly elected by the voters in the States.

Composition of the House of the People.

(b) For the purpose of sub-clause (a), the States shall be divided, grouped or formed into territorial constituencies and the number of members to be allotted to each such constituency shall be so determined as to ensure that there shall be not less than one member for every 750,000 of the population and not more than one member for every 500,000 of the population.

(c) The ratio between the number of members allotted to each territorial constituency and the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published shall, so far as practicable, be the same throughout the territory of India.

(2) The representation in the House of the People of the territories comprised within the territory of India but not included within any State shall be such as Parliament may by law provide.

(3) Upon the completion of each census, the representation of the several territorial constituencies in the House of the People shall be re-adjusted by such authority, in such manner and with effect from such date as Parliament may by law determine :

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.

(18) Laski, *Grammar of Politics*, p. 330.

## OTHER CONSTITUTIONS

CL. (1) : *U. S. A.*—Art. 1, Sec. 2 (1) of the Constitution provides—

“The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.”

The 14th Amendment (1868) further provides—

“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . . .”

The number of votes in each State is determined by federal census (Art. 1, Sec. 2 (3)). The Constitution does not fix the number of members of the House but leaves it to the determination of Congress, subject to two limitations, *viz.*, that each State must have one member and that the total shall not exceed one for every 30,000 inhabitants [(Art. 1, Sec. 2 (3))]. At present the House of Representatives has 435 members, elected by the people, directly, by single member territorial constituencies. Each member represents about 275,000 of the people.

*England.*—The House of Commons at present consists of 640 members, elected by single-member territorial constituencies of England, Scotland, Wales and Northern Ireland. There are, however, 18 constituencies which return two members each, and there are 12 University constituencies which are not territorial. Some redistribution of the constituencies has been effected by the Representation of the People Act, 1945, but the suggestion of introducing Proportional representation for the House of Commons has so far been resisted, except in the case of contested elections of University constituencies returning two or more members, where the system of proportional representation by the single transferable vote is adopted.<sup>19</sup> Each member represents about 75,000 of the people.

*Canada.*—The House of Commons is elected by the people of the Provinces in proportion to population, with provision for decennial adjustments (Secs. 37, 51-52), subject to the condition that—

“a Province shall always be entitled to a number of members in the House of Commons not less than the number of Senators representing such Province” (Sec. 51-A).

The membership was 245 in 1939.

*Australia.*—The House of Representatives is elected by the people voting, directly, in the States in proportion to the population of each State. \* The number of representatives to be elected in each State is ascertained by fixing ■ quota, *i.e.*, by dividing the population of the Commonwealth by twice the number of Senators, and then dividing the population of the State by the quota so ascertained, subject to the right of every original State to ■ minimum number of five members.<sup>20</sup> (Secs. 24-27). The number of members of the House was until 1948,—72 ; it will be 120 after the next election.

*Eire.*—Art. 16 (2) of the Constitution of 1937 provides—

“(2) (i) Dail Eireann shall be composed of members who represent constituencies determined by law.

(ii) The number of members shall from time to time be fixed by law, but the total number of members of Dial Eireann shall not be fixed at less than one member for each 30,000 of the population, or at more than one member for each 20,000 of the population.

(iii) The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as it is practicable, be the same throughout the country.

(iv) The Oireachas shall revise the constituencies at least once in every 12 years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of Dail Eireann sitting when such revision is made.

(v) The members shall be elected on the system of proportional representation by means of the single transferable vote.

(19) Keith, Constitutional Law, p. 65.

(20) Nicholas, Australian Constitution, 1948, p. 54.



(vi) No law shall be enacted whereby the number of members to be returned for any constituency shall be less than three."

The Constitution of Eire makes the innovation of electing the popular House by Proportional representation,—the movement for which has not yet succeeded in England or America.

*Ceylon.*—Sec. 11 of the Constitution Order in Council, 1946, provides—

"(1) Subject to the provisions of Sec. 74 of this Order, the House of Representatives shall consist of the members elected by the electors of the several districts constituted in accordance with the provisions of this Order, and the members, if any, appointed by the Governor-General under Sub-sec. (2) of this section.

(2) Where after any general election the Governor-General is satisfied that any important interest in the Island is not represented, he may appoint any persons not exceeding six in number, to be members of the House of Representatives.

(3) When the seat of a member appointed under this section falls vacant the Governor-General may appoint a person to fill the vacancy . . . . ."

Sec. 74 says—

"Notwithstanding anything in sec. 11 of this Order, the first House of Representatives shall consist of 101 members, 95 of whom shall be elected in accordance with the law in force relating to the election of members of Parliament, and 6 of whom shall be appointed by the Governor-General."

The House of Representatives of Ceylon shall thus have a small nominated body to represent 'any important interest' as the Governor-General may deem fit, and the rest of the members shall be directly elected by the people in territorial Constituencies.

*Burma.*—Sec. 83 (1)-(3) of the Burmese Constitution provide—

"(1) The Chamber of Deputies shall be composed of members who represent constituencies determined by law. Provision shall, however, be made to reserve such number of seats as may be proportionate to the population of Karens to be filled by their representatives.

(2) The number of members of this Chamber shall be, as nearly as practicable, twice the number of members of the Chamber of Nationalities. The number of members shall from time to time be fixed by law but the total number of the members of the Chamber of Deputies shall not be fixed at less than one member for each 1,00,000 of the population or at more than one member for each 30,000 of the population.

(3) The ratio between the number of members to be elected at any time for a constituency and the population of that constituency, as ascertained at the last preceding census, shall, so far as practicable, be the same for all constituencies throughout the Union, except in the case of the constituencies of the Special Division of the Chins (referred to in Part V of Chapter IX) and the Karenni State, in respect of which the ratio may be higher."

#### INDIA

CL. (1) : *Allocation of seats.*—The meaning of the several sub-clauses may be best explained with reference to the provisions of the Representation of the People Act, 1950, according to which the election of the first House of the People shall take place,—on the basis of the present population of each State as on March 1, 1950, estimated in consultation with the Census Commissioner for India<sup>20-a</sup>.

The total number of seats in the House of the People shall be 496<sup>20-b</sup>. Allocation has been made amongst the States on the basis of one seat for every 7,20,000 of the estimated population, as follows—

<i>States in Part A.</i>			<i>States in Part B.</i>			<i>States in Part C.</i>		
1	Assam	.. 12	1	Hyderabad	.. 25	1	Ajmer	.. 2
■	Bihar	.. 55	■	Jammu and Kashmir.	6	2	Bhopal	.. ■
3	Bombay	.. 45	3	Madhya Bharat	.. 11	3	Bilaspur	.. 1
4	Madhya Pradesh..	29	4	Mysore	.. 11	4	Coorg	.. 2
5	Madras	.. 75	5	Patiala and East Punjab States Union.	5	5	Delhi	.. 4

(<sup>20-a</sup>) (1) The population of the several states on 1-3-50, as ascertained by the Census Commissioner is as follows—Assam 8.51m, Bihar 39. 42 m, Bombay 32. 68m, Madhya Pradesh 20. 91 m, Madras 54. 29m, Orissa 14. 41m. Punjab 12. 61m, Uttar Pradesh 61.62m, West Bengal 24.52m, Hyderabad 17. 69m, Jammu and Kashmir 4. 37m, Madhya Bharat 7. 87m, Mysore 8. 06m, Patiala and East Punjab States 3.32m,

Rajasthan 14.69m, Saurashtra 3. 9m, Travancore and Cochin 8.58m, Ajmer 0.73m, Bhopal 0.85m, Bilaspur 0.19m, Coorg 0.17m, Delhi 1.51m, Himachal Pradesh 1. 08m, Cutch 0.55m, Manipur 0.5m, Tripura 0.58m, and Vindhya Pradesh 3.88m.

(<sup>20-b</sup>) Besides the nominated members of the Anglo-Indian community, if any, under Art. 331, *post*.

<i>States in Part A.</i> <i>contd.</i>		<i>States in Part B.</i> <i>contd.</i>		<i>States in Part C.</i> <i>contd.</i>	
6 Orissa	.. 20	6 Rajasthan	.. 20	6 Himachal Pradesh.	3
7 Punjab	.. 18	7 Saurashtra	.. 6	7 Kutch	.. 2
■ Uttar Pradesh	.. 86	8 Travancore-Cochin	.. 12	8 Manipur	.. 2
9 West Bengal	.. 34			9 Tripura	.. 2
				10 Vindhya Pradesh.	6

#### ANDAMAN AND NICOBAR ISLAND

The seats allotted to the State of Jammu and Kashmir and the Andaman and Nicobar Islands shall be filled by nomination by the President<sup>21</sup>. All the other seats in the House of the People will be filled by direct election.<sup>21-a</sup>

<sup>1</sup> *Voters in the States.*—This means the entire adult population excepting those that are disqualified under the Constitution or under any law (*see* Art. 326, *post*). It is the people of India who will elect the House of the People but they will vote by States, as explained above.

*Special Provision for Kashmir.*—Though the State of Jammu and Kashmir is included in the list of States in Part B in Sch. VII, it is only the provisions of Art. I, that apply to Jammu and Kashmir of their own force [Art. 370 (1) (c)]. The application of the other provisions of the Constitution to their State will depend upon the decision of the President in consultation with the representatives of Jammu and Kashmir. Hence, the provisions of Cls. (b) and (c) of Art. 81 (1) ■■■ not applied to this State and the number of seats allotted to this State (six) has been fixed by the Representation of the People Act, 1950, independently of the standard figure according to population which has been adopted in the case of the other States, under Art. 81 (1) (b). The reason for this differentiation has been thus explained by Dr. Ambedkar—

“Kashmir is part of India in “an attenuated manner.” The only Article in the Constitution that applied to Kashmir provides that “It is part of the territory of India.” The application of other Articles is dependent upon the President who might, in consultation with the representatives of Kashmir, apply them with such modifications as he might determine.”

#### INDIA

Cl. (2) : *Representation of territories other than States.*—This Clause relates to the territories in Part D of the First Schedule and any other territory that may be hereafter acquired. Parliament has already provided for *nomination* of one representative of the Andaman and Nicobar Islands, to the House of the People [see s. 4 (1) of the Representation of the People Act, 1950.]

#### Clause (3).

#### OTHER CONSTITUTIONS

*U. S. A.*—Art. I, Sec. 2 (3) of the Constitution provides for an enumeration or census at the interval of every ten years, in such manner ■ Congress may by law direct. At the end of each enumeration, Congress is expected to make a new apportionment of representatives amongst the States. But this function of Congress, *viz.*, delimitation of constituencies and redistribution, has been held to be political, and, hence, non-justiciable. Courts cannot compel Congress to perform it.<sup>22</sup> Owing to such census and redistribution, the memberships of representatives has come up to 435 from 65.<sup>23</sup>

*Canada.*—Sec. 51 of the British North America Act provides—

“On the completion of the Census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial Census, the representation of the four Provinces shall be readjusted

(21) See under Art. 82, *post*; [s. 4 (1), Representation of the People Act, 1950.]

(21-a) See Art. 330, *post*, for reservation of seats for Scheduled Castes and Tribes.

(22) *Colegrove v. Greane*, (1945) 328 U.S. 549; *Pacific Tel. Co. v. Oregon*, (1912) 223 U.S. 118.

(23) Beard, *American Government and Politics*, 1939, p. 74.

by such Authority, in such manner, and for such time, as the Parliament of Canada from time to time provides. . . . ."

As already stated (p. 284, *ante*), the Canadian House of Commons has no fixed number of membership (Sec. 52). The size of the House fluctuates with variations in the changes in population in the various provinces, there being ■ readjustment and redistribution after each decennial census. While the principles upon which the apportionment is to be made are laid down by the Constitution Act (Secs. 51-51-A), the actual subdivision of the Provinces into constituencies is left to the Canadian Parliament, with power to increase the number of members of the House of Commons if required (Sec. 52).

*South Africa.*—Sec. 34 of the Union of South Africa Act provides for readjustment of representation according to ■ quinquennial census until 1951, and, thereafter, according to ■ decennial census.

*Eire.*—Art. 16 (2) (iv) (quoted, at p. 284, *ante*) provides for similar readjustments.

*Burma.*—The provision in Sec. 83 (4) of the Burmese Constitution is similar to that of Cl. (3) of Art. 81 of *our* Constitution.

#### INDIA

Cl. (3) : *Readjustment and Redistribution of Constituencies.*—Under *our* Constitution, while the Council of States shall have a fixed number of members, in the case of the House of the People, only the maximum is fixed. Subject to this, and subject to the principles laid down in Cl. (1) (b) - (c), the power of readjustment of the constituencies and their representation, upon the completion of each decennial census, is given to Parliament. The Proviso lays down that the representation shall be readjusted, not immediately after publication of the results of the census, but upon the dissolution of the then existing House.

*Analogous Provisions.*—The legislative power in this respect is provided by Art. 327 and Entry 72 of List I of Sch. VII. Art. 329 (a) expressly provides, following American case-law<sup>24</sup> that any law made by Parliament in this respect shall not be open to question in the Courts.

Compare composition of the Legislative Assembly of a State in Art. 170, *post*.

**82.** Notwithstanding anything in clause (1) of Article 81, Parliament may by law provide for the representation in the House of the People of any State specified in Part C of the First Schedule or of any territories comprised within the territory of India but not included within any State on a basis or in a manner other than that provided in that clause.

Special provision as to representation of States in Part C and territories other than States.

#### INDIA

*Scope of Art. 82 : Provision for other than direct election.*—Though the House of the People is to be a directly elected body under Art. 81 (1) (a)—the present Article lays down that in the ■ of any State in Part C or of any territory of India outside the States, Parliament may provide for ■ representation to the House by any mode other than direct election. Thus, s. 4 (1) of the Representation of the People Act, 1950, has provided that the seats allotted to the Andaman and Nicobar Islands, shall be filled by nomination by the President. So, by reason of Art. 82, the House of the People will consist of ■ other than directly elected members.

(24) ■ p. 286, *ante*.



“*On a basis or in a manner.*”—Not only the manner of representation (*i.e.* election or nomination) but also the *basis* of representation may be different in the case of such States and territories. So Parliament may provide that the population basis specified in Art. 81 (1) (b) shall not apply in their case. Thus, each of the States in Part C has been given one seat or more notwithstanding the fact that their population is less than the standard figure of 720,000 [see p. 285, *ante*]. Again, Delhi has been given 3 seats in view of its bigger population and importance.

**83.** (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House :

Provided that the said period may, while ■ Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

#### OTHER CONSTITUTIONS.

**CL. (1) : U. S. A.**—Members of the Senate are elected for a term of six years (17th Amendment). 1/3 of the Senators retire at the end of every two years, and in their place there is an election of 1/3 of the Senators every second year. This system was introduced by dividing the Senators into three classes after the first election held after inauguration of the Constitution, of which the first class was to retire at the end of the second year and so on [Sec. 3 (2) Art. 1], and that system is continuing since then.

**Australia.**—Sec. 13 of the Australian Constitution Act, ■ amended in 1907, provides how members of the Senate shall retire by rotation :

“As soon as may be after the Senate first meets and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, ■ nearly equal in number as practicable ; and the places of the senators of the first class shall become vacant at the expiration of 3 years and the places of those of the second class at the expiration of 6 years, from the beginning of their term of service ; and afterwards the places of senators shall become vacant at the expiration of 6 years from the beginning of their term of service.

The election to fill vacant places shall be made within one year before the places are to become vacant.”

**Ceylon.**—Sec. 8 (2) - (4) of the Ceylon (Constitution) Order in Council, 1946, provides—

“(2) The Senate shall be a permanent body and the term of office of ■ Senator shall not be affected, and the seat of a Senator shall not become vacant, by reason of a dissolution of Parliament. (3) One-third of the Senators shall retire every second year. (4) Subject to the provisions of sec. 73 of this Order, the term of office of a Senator shall be six years from the date ■ of his election or appointment . . . . .”

Sec. 73 says—

“For the purpose of securing that one-third of the Senators shall retire every second year, ■ the first meeting of the Senate under this Order, the Senate shall by lot divide the Senators into three classes, each class consisting of five elected Senators and five appointed Senators, and the term of office of the Senators of the first class shall terminate at the expiry of a period of two years, the ■

of office of the Senators of the second class shall terminate at the expiry of four years, and the term of office of the Senators of the third class shall terminate at the expiry of six years, from the date of election or appointment as the case may be. For the purposes of this section, appointed Senators shall be deemed to have been appointed on the day on which elected Senators are elected."

*Burma.*—Sec. 88 (1) of the Burmese Constitution says—

"(1) A dissolution of the Chamber of Deputies shall operate also as a dissolution of the Chamber of Nationalities."

This is a novel feature of the Burmese Constitution, *viz.*, that the duration of the second Chamber will follow that of the lower Chamber.

*Government of India Act, 1935.*—Sec. 18 (4) of the Act provided—

"The Council of State shall be a permanent body not subject to dissolution, but as near as may be one-third of the members thereof shall retire in every third year in accordance with the provisions in that behalf contained in the first Schedule."

### INDIA

CL. (1) : *Periodical retirement of members of Council of States.*—The provision for periodical retirement of a portion of the members of the Upper Chamber follows the American model. The merit of this plan is to prevent it from being turned into a stale body and to have into it a continual flow of fresh talents. The retirement of some of the members according to this provision would not cause the continuing Chamber to be a different Chamber in the eye of law.<sup>25</sup>

The mode of retirement will be provided by Parliament by law.

### OTHER CONSTITUTIONS

CL. (2) *U.S.A.*—In the United States, the lower Chamber, the House of Representatives, has a term of two years fixed by the Constitution and election is held every second year. The executive or any other authority cannot dissolve the House of Representatives earlier. Nor extend its two-year term, for a day. There must be a Congressional election every second year, whether in war or peace.<sup>1</sup>

The period of two years is regarded by many as too short to formulate a programme.<sup>2</sup>

*England.*—Under the Parliament Act, 1911, the duration of Parliament is limited to 5 years, so that there must be an election of the House of Commons once in 5 years. The Executive, however, possesses the power to dissolve it earlier [see under Art. 85 (2), *post*]. On the other hand, the 5 year term can be extended by an Act of Parliament itself (without any limit), and such Acts, prolonging its own life, were passed by Parliament during World Wars I and II.<sup>3</sup> [e.g., the Parliament that was dissolved in 1945, had been elected in 1935].

*Australia.*—Sec. 28 of the Constitution Act says—

"Every House of Representatives shall continue for 3 years from the first meeting of the House, and no longer but may be sooner dissolved by the Governor-General."

The Australian Constitution prohibits extension of the duration of the House of Representatives.

*Burma.*—Sec. 85 of the Burmese Constitution says—

"Every Chamber of Deputies shall continue for four years from the first meeting of the Chamber : Provided that the Chambers of Parliament may by resolution passed by not less than two-thirds of the members present and voting at a joint sitting extend the said period from year to year in the event of a grave emergency declared by Proclamation under section 94.:

Provided further that the Chamber of Deputies may be dissolved by the President at any time as provided by sec. 57."

(25). Cf. *Umayal v. Lakshmi* A.I.R. 1945 (F.C.) 25 (39).

(1) Even in the midst of World War II, America had her elections.

(2) *Vide* West, *American Government*, 1946, p. 85.

(3) Keith, *Constitutional Law*, p. 52 | Chalmers and Hood Phillips, p. 50.

*Government of India Act, 1935.*—Sec. 18 (5) of the Government of India Act, 1935, provided—

“Every Federal Assembly, unless sooner dissolved, shall continue for five years from the date appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly.”

Following the Australian Constitution, the Government of India Act, 1935, debarred the duration of the Federal Assembly to be extended, even though there was provision for extension by the Governor-General under the Act of 1919 [Sec. 63-D (1) (b)] and also in the transitional provisions [Sch. IX, Sec. 63-D (1) (b), Government of India Act, 1935].

#### INDIA.

Cl. (2) : *Duration of House of the People.*—This Cl. follows the English precedent by laying down a normal term (5 years) for the lower House, subject to earlier dissolution (Art. 85 (2) (c)) by the President, as may be necessary.

The Proviso also engrafts the English rule of Parliamentary competence to extend the above term, but subject to the following conditions : (i) The extension may be made by an Act of Parliament only while a Proclamation of Emergency (Art. 352), made by the President is in operation. In normal times, Parliament shall have no power to extend its own life. (ii) Each Act of extension shall not provide for more than 1 year's extension. (iii) There shall be no further extension beyond 6 months after the Proclamation has ceased to operate. But, apart from this, there is no limit to the maximum period of extension, so that if a War takes place, there may not be any election while it continues.

‘Year’, ‘Month’.—As to the meaning of these words, see Sec. 3, General Clauses Act (X) of 1897.

*Analogous Provision.*—Compare duration of the State Legislature, in Art. 172, the provisions of which are similar.

**84.** A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

Qualification for membership of Parliament.

(a) is a citizen of India :

(b) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age ; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

#### OTHER CONSTITUTIONS

CLAUSES (a)—(b) *U. S. A.*—Art. I, Sec. 2 (2) of the Constitution says—

“No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.”

*England.*—In England, anyone who is qualified to be a voter may become a member of the House of Commons, unless he is disqualified by any Act of Parliament. As to such disqualifications, see under Art. 102, *post*.<sup>4</sup>

*Eire.*—Art. 16 of the Constitution of Eire, 1937, provides—

(1) 1° Every citizen without distinction of sex who has reached the age of 21 years, and who is not placed under disability or incapacity by this constitution or by law, shall be eligible for membership of Dail Eireann.

(4)<sup>1</sup> See also Chalmers and Hood Phillips, pp. 70-72.



2° Every citizen without distinction of sex who has reached the age of 21 years, who is not disqualified by law and complies with the provisions of the law relating to the election of members of Dail Eireann, shall have the right to vote at an election for members of Dail Eireann.

3° No law shall be enacted placing any citizen under disability or incapacity for membership of Dail Eireann on the ground of sex or disqualifying any citizen from voting at an election for members of Dail Eireann on that ground.

4° No voter may exercise more than one vote at an election for Dail Eireann and the voting shall be by secret ballot."

*Ceylon.*—Sec. 12 of the Ceylon (Constitution) Order in Council, 1946, says—

"Subject to the provisions of this Constitution, a person who is qualified to be an elector shall be qualified to be elected or appointed to either Chamber."

*Burma.*—Sec. 76 of the Burmese Constitution provides—

"(1) Every citizen, who has completed the age of twenty-one years and who is not placed under any disability or incapacity by this Constitution or by law, shall be eligible for membership of the Parliament.

(2) Every citizen, who has completed the age of eighteen years and who is not disqualified by law and complies with the provisions of the law regulating elections to the Parliament, shall have the right to vote at any election to the Parliament.

(3) There shall be no property qualification for membership of the Parliament or for the right to vote at elections to the Parliament.

(4) No law shall be enacted or continued placing any citizen under disability or incapacity for membership of the Parliament on the ground of sex, race or religion or disqualifying any citizen from voting at elections to the Parliament on any such ground :

Provided that notwithstanding anything contained in section 21 (3), members of any religious order may by law be debarred from voting at any such elections or from being a member of either Chamber of Parliament."

#### INDIA

*Cl. (b) : Age qualification.*—By raising the age-limit for membership of Parliament over that required for being a voter (21 years, under Art. 327, *post*), *our* Constitution departs from the general rule that a person qualified to be a voter is also qualified to stand as a candidate for election.

#### CL. (c) :

#### OTHER CONSTITUTIONS

*U. S. A.*—Though the Constitution [Art. I, Sec. 2 (2)] lays down the qualifications for membership of Congress and there is no provision for requiring additional qualifications by legislation, it has been conceded in practice that each House has the power, by resolution, to refuse admission to undesirable persons, even though they may possess the constitutional qualifications—*e.g.*, on the ground of insanity, leprosy, criminality.<sup>5</sup>

#### INDIA

*Cl. (c) : Additional qualification by legislation.*—The general rule is that a person who is qualified to be an elector is qualified to be a candidate for election to Parliament [*Cf.* Sec. 12 of the Ceylon (Constitution) Order in Council, 1946 ; Sec. 34 (i) of the Australian Constitution Act]. But the present Clause of *our* Constitution engrafts an innovation, by empowering Parliament to lay down additional qualifications for being a member of either House of Parliament, *e.g.*, some standard of knowledge or experience.<sup>6</sup>

**85.** (1) The Houses of Parliament shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

Sessions of Parliament,  
prorogation and dissolution.

(5) Beard, *American Government and Politics*, 1939, pp. 79, 83.

(6) *Vide* Constituent Assembly Debates, Vol. VIII, p. 94.

(2) Subject to the provisions of clause (1), the President may from time to time—

- (a) summon the Houses or either House to meet at such time and place as he thinks fit ;
- (b) prorogue the Houses ;
- (c) dissolve the House of the People.

CL. (1) :

#### OTHER CONSTITUTIONS

*U. S. A.*—Art. I, Sec. 4 (2) provides—

“ The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.”

No law has yet been passed, modifying the above provision.

*England.*—A Statute of 1330 in the reign of Edward III enacted that “ a Parliament shall be holden every year once, and more if need be.” This statute was not however followed in practice and the Triennial Act of 1641 enacted that “ the sitting and holding of Parliament shall not be intermitted or discontinued above three years or most ”. The Bill of Rights, 1688, declared that Parliament ought to be held ‘ frequently ’. The annual meeting of Parliament, however, has been secured not by the provision of any statute, but by the fact that the Army Act, Finance Act and many other important Acts are annual, and unless these are re-enacted within a year, the Government of the country would come to a deadlock.<sup>7-8</sup>

The Crown’s prerogative to call Parliament at any time has thus come to be regulated by convention.

In practice, Parliament has a continuous session for the whole year, intervened by holidays for Christmas, Easter and the like. It sits for about 200 days in the year.

*Australia.*—Sec. 6 of the Australian Constitution Act provides—

“ There shall be a session of the Parliament once at least in every year so that 12 months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.”

*Canada and South Africa.*—Sec. 20 of the British North America Act and Sec. 22 of the Union of South Africa Act are the same as Sec. 6 of the Australian Constitution, quoted above.

*Eire.*—Art. 15 (7) of the Constitution of 1937 says—

“ The Oireachtas shall hold at least one session every year.”

*Burma.*—Sec. 66 of the Burmese Constitution says—

“ There shall be a session of the Parliament once at least in every year so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.”

*Ceylon.*—Sec. 15 (2) of the Ceylon (Constitution) Order in Council, 1946, says—

“ Parliament shall be summoned to meet once at least in every year.”

*Government of India Act, 1935.*—Sec. 19 (1) of the Act of 1935 was similar to Art. 85 (1) of our Constitution save that it required a minimum of one session during the year while the Constitution requires two sessions. In practice, however, the Central Legislature had two sessions under the Act of 1935,—the Budget Session, held in February, and the legislative session usually held in autumn.

(7) Keith, Constitutional Law, pp. 4, 47.

(8) Chalmers and Hood Phillips, Constitu-

tional Law, p. 50.

## INDIA

*Scope of Art. 85 : Summoning of the Houses.*—Though the marginal note to the article refers to 'sessions of *Parliament*, prorogation and dissolution,' the article refers to the summoning, and prorogation of the *Houses*<sup>9</sup> of Parliament and the dissolution of the 'House of the People'. This implies that Parliament, as referred to in Art. 79 will be regarded as a permanent institution, though there may be changes in the *Houses*. The Parliament of India will never be dissolved, though one of its Houses may be. This is a departure from the English precedent, for in *England*, it is 'Parliament' that is dissolved even though the House of Lords is ■ hereditary body. So, when Parliament is dissolved, there is no House of Lords, until the next Parliament is summoned.<sup>10</sup>

*Cl. (1) : A minimum of two sessions during the year.*—Our Constitution introduces an innovation by guaranteeing ■ minimum of two sessions of Parliament during the year. Of course, this is following the actual practice in England.

## CL. (2) :

## OTHER CONSTITUTIONS

*U. S. A.*—The President has no power of summoning ordinary sessions of Congress, since the opening date for Congressional sessions is fixed by the Constitution itself [Art. I, sec. 4 (2), p. 292, *ante*],—subject to legislation ordinary sessions of the Legislature are thus independent of the will and the Executive. But the President is given the power—(a) to convene *special* sessions of Congress on 'extraordinary occasions';<sup>10-a</sup> and (b) 'in case of disagreement between them (the two Houses) with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.'\* (Art. II, sec. 3). The latter power, however, has never been used so far. The President has no power to prorogue the Congress. This is a business of the two Houses themselves [Article I, Sec. 5 (4)]. Nor does the American President possess any power to dissolve the House of Representatives. That House, in fact, cannot be dissolved at all *before* the constitutional term of 2 years [Art. I, sec. 2 (1).]

*England.*—It has already been explained (see pp. 252, 276, *ante*), that the powers of summoning, prorogation and dissolution are royal prerogatives,<sup>11</sup> exercised on ministerial advice.

*Australia.*—Sec. 5 of the Commonwealth of Australia Constitution Act provides—

"The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives."

*Canada.*—Sec. 38 of the British North America Act says—

"The Governor-General shall from time to time, in the Queen's name by instrument under the Great Seal of Canada, summon and call together the House of Commons."

The power of dissolution is provided by Sec. 50.

*South Africa.*—Sec. 20 of the Union of South Africa Act provides—

"The Governor-General may appoint such times for holding the session of Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue Parliament, and may in like manner dissolve the Senate and the House of Assembly simultaneously, or the House of Assembly alone ; provided that the Senate shall not be dissolved within ■ period of 10 years after the establishment of the Union, and provided further that the dissolution of the Senate shall not affect any senators nominated by the Governor-General in Council."

*Eire.*—Art. 13 (2) of the Constitution of 1937 says—

"1° Dail Eireann shall be summoned and dissolved by the President on the advice of the Taoiseach.  
2° The President may in his absolute discretion refuse to dissolve Dail Eireann on the advice of a

(9) Contrast section 15 (1) of the Ceylon Constitution Order, 1946, and Jennings, *Constitution of Ceylon*, pp. 44, 142. The language of ■ Constitution ■ more exact, since even the 'Senate of Ceylon' is ■ permanent Upper Chamber, not subject to dissolution, ■ our Council of States

is.

(10) Cf. Jennings, *Constitution of Ceylon*, p. 45.  
(10-a) See Beard, *American Government and Politics*, 1939, p. 90.

(11) Lowell, *Government of England*, Vol. I, pp. 245-6.



Taoiseach who has ceased to retain the support of a majority in Dail Eireann. 3° The President may at any time, after consultation with the Council of State, convene a meeting of either or both of the Houses of the Oireachtas."

*Ceylon.*—Sec. 15 (1) of the Ceylon Constitution Order in Council, 1946, says—

"The Governor-General may, from time to time, by Proclamation summon, prorogue or dissolve Parliament . . . . ."

The terms adjourn, prorogue, etc., are defined in sec. 3 (1) of the Order thus :

" 'Adjourn' with its grammatical variations and cognate expressions means terminate a sitting of the Senate or the House of Representatives, as the case may be ;

'dissolve' with its grammatical variations and cognate expressions means terminate the continuance of Parliament ;

'prorogue' with its grammatical variations and cognate expressions means bring a session of Parliament to an end ;

'session' means the meetings of Parliament commencing when Parliament first meets after being constituted under this Order, or after its prorogation or dissolution at any time, and terminating, when Parliament is prorogued or is dissolved without having been prorogued ;

'sitting' means a period during which the Senate or the House of Representatives, as the case may be, is sitting continuously without adjournment, and includes any period during which the Senate or the House of Representatives is in Committee."

*Burma.*—Sec. 57 of the Burmese Constitution says—

"The Chamber of Deputies shall be summoned, prorogued or dissolved by the President on the advice of the Prime Minister :

Provided that, when the Prime Minister has ceased to retain the support of a majority in the Chamber, the President may refuse to prorogue or dissolve the Chamber on his advice and shall in that event forthwith call upon the Chamber to nominate a new Prime Minister :

Provided further that, if the Chamber fails to nominate a new Prime Minister within fifteen days, it shall be dissolved."

*Government of India Act, 1935.*—Sec. 19 of the Government of India Act was as follows—

"(1) The Chambers of the Federal Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this section, the Governor-General may in his discretion from time to time—

(a) summon the Chambers or either Chamber to meet at such time and place as he thinks fit ; (b) prorogue the Chambers ; (c) dissolve the Federal Assembly . . . . ."

Under this Act, the act of summoning, etc., of the Legislature was to be performed by the Governor-General 'in his discretion', and was not within ministerial control.

## INDIA

*Scope of Cl. (2) : President's power of summoning, etc.*—Like the British Crown, the President would possess the power to summon, prorogue or dissolve the lower House on the advice of the Prime Minister.<sup>12</sup> The power to *summon* Parliament at any time is, however, subject to the conditions imposed by Cl. (1). The President shall also have the power to *summon* a joint sitting of both Houses of Parliament, in case of a deadlock between them [Article 108 (1)].

*Adjournment, Prorogation, dissolution.*—*Prorogation* means the termination of a session ; an adjournment is an interruption in the course of one and the same session.

"A session", again, "is the period of time between the meeting of a Parliament, whether after a prorogation or dissolution, and its prorogation . . . . . The period between the prorogation of Parliament and its re-assembly in a new session is termed 'recess' "<sup>13</sup>."

Within a session, there are a number of daily 'sittings' separated by *adjournments*, which postpone the further consideration of business for a specified time,—hours,

(12) As to how far the President shall be free to refuse the Prime Minister's advice as to 'dissolution', [see pp. 257-8, *ante*.]  
(13) May, *Parliamentary Practice*.

days or weeks. Prorogation terminates the session itself and, in *England*, the effect of prorogation is at once to suspend all business of Parliament for that session, and all proceedings pending at that time, except impeachment, are quashed by prorogation. Every bill must therefore be renewed in the next session after prorogation, as if the Bill had never been introduced before.<sup>14</sup>

It is to be noted that 'adjournment' is not included in Art. 85 (2). The reason is that even in *England*, where the Crown has the prerogative as regards summoning, prorogation and dissolution,—adjournment has come to be a matter solely in the power of each House of Parliament (*May*). So, while the Indian President shall have the power to summon, prorogue or dissolve,—the power to adjourn from day to day, would belong to the two Houses exclusively. Under the meeting of Parliaments Acts, 1797 and 1870,<sup>15</sup> the English Crown has the power to order resumption of business when both Houses stand adjourned for more than 14 days. The President of India has no such power to interfere with the power of the Houses to adjourn at or for any time within a session.

*Dissolution*, on the other hand, means the end of the life of the lower House itself, and calls for a fresh election. It may take place either by the expiry of the constitutional term of the House (e.g., 5 years in the case of *our* House of the People); or, by the exercise of the power of dissolution by the head of the Executive at any time earlier than the fixed term. Of course, the latter power belongs to the Executive only under the Cabinet form of Government. As already explained, it is a powerful weapon at the hands of the Prime Minister to bind down his recalcitrant supporters by the threat of the risk and expenses of a fresh election; and, at the same time, it places at the hand of the Cabinet the means of obtaining the verdict of the people themselves when they consider that the adverse vote of the House do not reflect the views of the people themselves [see pp. 250, 252, *ante*].

Courts are bound to take judicial notice of the beginnings and ends of prorogations and sessions of Parliament.<sup>16</sup>

*Analogous Provision.*—Cl. (2) of the present article has to be read with Cls. (3)-(5) of Art. 107 as to the effects of 'prorogation' and 'dissolution'.

Right of President to address  
and send messages to  
Houses.

**86.** (1) The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.

(2) The President may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

CL. (1):

#### OTHER CONSTITUTIONS

*England.*—No doubt, the Crown has the legal right to attend Parliament at any time and to require the attendance of members of Parliament for hearing him. But with the growth of constitutional government, the Crown has ceased to visit Parliament or to address it except on ceremonial occasions.<sup>17</sup> It is interesting to note that Charles II visited the House of Lords to rebuke them, in 1671. But the Crown has ceased to visit Parliament for participating in its deliberations or to give them any directions, since the time of Queen Anne.

(14) As to the effects of prorogation and dissolution under *our* Constitution, see under art. 107, *post*.

(15) Chalmers and Hood Phillips, *Constitutional Law*, p. 52; Keith, *Constitutional Law*,

p. 53.

(16) *R. v. Wilde* (1671) 1 Lev. 296; Craies, *Statute Law*, 52.

(17) For example, for delivering the 'Speech from the Throne' (see under Art. 87, *below*), for

*U. S. A.*—Some Presidents have used the constitutional right to give information to Congress [Art. II, sec. 3], to address the Houses orally,—though usually the practice is to send written messages.<sup>18</sup>

*Burma and Eire.*—See under Cl. (2), below.

*Government of India Act, 1935.*—Sec. 20 of the Act provided—

“(1) The Governor-General may in his discretion address either Chamber of the Federal Legislature or both Chambers assembled together, and for that purpose require the attendance of members.”

#### INDIA

*Cl. (1) : President's right of address.*—While Art. 87 (1) makes it obligatory upon the President to make the ‘opening address’ to Parliament, the present clause enables him to address Parliament (either House or both Houses together) at any time and for any purpose, e.g., at the time of prorogation.

*No debate on address under this clause*—R. 17 of the Rules of Procedure and Conduct of Business in Parliament, 1950, provides:—

“No time shall be allotted for the discussion of the matters referred to, in the President's Address under Art. 86 (1) of the Constitution : Provided that the contents of the address may be referred to in any debate in Parliament.”

#### CL. (2) :

#### OTHER CONSTITUTIONS

*U. S. A.*—The *American President* possesses the power to inform, and send messages to, the Congress, though he has no right to attend or to address them. Art. II, section 3 says—

“He (the President) shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient . . . . .”

This provision may seem to be rather anomalous, since the American President is no part of the Legislature, and cannot have any legislative functions, owing to the rigid application of the doctrine of Separation of Powers. But the very operation of that Theory necessitates such a provision for communication between the Executive and the Legislature. By the nature of things, the Executive must have more extensive sources of information in regard to domestic and foreign affairs than the Legislature can be expected to possess. Since the American Executive is not represented in the Legislature through responsible Ministers, there is no possibility for Congress to have the benefit of the experience and information of the Executive on matters of national importance. Through the messages, Congress may also have the wishes of the leader of the nation, though they are *not bound* to act upon such messages. The messages, in short, are an instrument of co-ordination between the Executive and the Legislature, which would have been entirely lacking, without them, in the American Constitution. They are used not only for the purpose of announcing policies, but also for suggesting legislation. They have a great public importance and are widely read and discussed.<sup>18</sup>

*England.*—On this point, we have a divergence between law and practice, in the *English Constitution*. In law and theory, there is nothing to bar the Crown to send any messages to Parliament, when he possesses the legal right to personally attend and address them. But since the time of George III, this power also has come to be in disuse except for purely formal purposes. Thus, on purely formal occasions, such as a request for supply or an intimation of permission to deal with a matter of prerogative or royal property, the Crown communicates by message ; otherwise the indulgence of the House concerned is necessary and any statement must be one of fact,—not to influence the House's judgment. Even an allusion to the King's personal wishes in debate is forbidden.<sup>19</sup> The Crown has no longer

opening or proroguing the session (Chalmers and Hood Phillips, p. 52.) Even this function is sometimes performed by the Lord Chancellor as his deputy.

(18) Beard, *American Government and Politics*, 1939, p. 166.

(19) Keith, *Constitutional Law*, p. 53.



any constitutional right either to influence the deliberations of Parliament or to interfere with them. Sometimes ■ royal message is sent through ■ Minister to announce a sudden emergency, necessitating the calling out of reserve in force.<sup>20</sup>

*Fourth French Republic.*—Art. 37 of the French Constitution of 1946 says—

“The President of the Republic shall communicate with the Parliament by means of messages addressed to the National Assembly.”

*Eire.*—Art. 13 (7) of the Constitution of 1937 says—

“1° The President may, after consultation with the Council of State communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance. 2° The President may, after consultation with the Council of State address a message to the nation at any time on any such matter. 3° Every such message or address must, however, have received the approval of the Government.”

*Burma.*—Art. 61 (1) of the Burmese Constitution, 1948, says—

“The President may communicate with the Parliament by message or address on any matter of national or public importance.”

*Government of India Act, 1935.*—Sec. 20 (2) of the Act provided—

“(2) The Governor-General may in his discretion send messages to either Chamber of the Federal Legislature, whether with respect to a Bill then pending in the Legislature or otherwise, and ■ Chamber to whom any message is so sent shall with all convenient dispatch consider any matter which they are required by the message to take into consideration.”

#### INDIA

*Scope of Cl. (2) : President's right to send messages to Parliament.*—Though our Constitution has adopted the Parliamentary system of government to the exclusion of the Presidential system of the *American* type, and though royal messages, except on formal matters have practically become obsolete in *England*, our Constitution, nevertheless gives the President the right to address and to send messages to Parliament, at any time<sup>20-a</sup>.

It is to be noted that no provision corresponding to that in Art. 13 (7) of the Constitution of Eire has been engrafted in our Constitution, to require that the President's address or message must have the approval of the Cabinet. Nevertheless, it may be expected that unless the President ventures to interfere with the constitutional responsibility of the Council of Ministers to Parliament, he would not give any address or message except on ministerial advice.

The power given by the present clause is very wide; it provides that the message may relate to a pending Bill or to any other matter.

*Procedure in the House on receipt of the message.*—R. 13 of the Rules of Procedure and Conduct of Business in Parliament, 1950, empowers the Speaker to give directions as to the procedure to be followed on receipt of ■ message under Art. 86 (2).

*Communications between President and Parliament.*—Rr. 146-7 of the Rules of Procedure and Conduct of Business in Parliament, 1950, may be noticed in this connection :

“146. Communications from the President to Parliament shall be made to the speaker by written message signed by the President or, if the President is absent from the place of meeting his message shall be conveyed to the Speaker through ■ Minister.

147. Communications from Parliament to the President shall be made—(1) by formal address, after motion made and carried in the House, and (2) through the Speaker.”

*Analogous Provision.*—In case of a deadlock between the two Houses, the President may notify his intention to summon a joint sitting, by ■ message [Art. 108 (1)]. Instead of assenting to ■ Bill, the President may return a Bill to the Houses with a message requesting its reconsideration [Art. 111, Proviso].

(20) Chalmers and Hood Phillips, *Constitutional Law*, p. 115.

(20-a) See my article on the 'President of India' in (1949) F.L.J. ■ pp. 117-8 (Journal).

Special address by the President at the commencement of every session.

**87.** (1) At the commencement of every session the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address and for the precedence of such discussion over other business of the House.

#### OTHER CONSTITUTIONS

*England.*—Not only is Parliament summoned by the Crown,—neither House can proceed with any business until the Crown has declared to the House the causes of summons. He does this by a speech at the commencement of each session, which he delivers either in person or by commission. The Speech from the Throne is now used for political purposes, by the Cabinet to announce ministerial policies and the speech is usually written by the Prime Minister.

“The speech deals in outline with the general political outlook, the legislative measures to be introduced during the session, and in a portion addressed to the Commons alone, calls attention to the requirements of the Crown for supplies to carry on the government of the country.”<sup>21</sup>

After the King's speech is delivered or read, an address is presented by the House in the form of a resolution thanking the Crown for his most gracious speech. Thereafter *amendments* are moved to the address by way of additions thereto. Amendments to the Speech are also used for political purposes. Usually it is the members of the Opposition who move these amendments, but even members of the majority party who are disgruntled may sometimes move such amendments so as to raise a debate on matters of general policy or administration which are of general interest and importance, and the debate on them sometimes extends over several days.<sup>22</sup> The occasion is very rarely used to bring about a fall of the Government.<sup>22</sup>

*U. S. A.*—There is no specific provision enjoining or empowering the President to address Congress at the opening session. But there is nothing to bar the President's sending or reading a message at the opening session, declaring policies.<sup>23</sup>

#### INDIA

*Scope of Art. 87 : The Opening Address.*—The power conferred upon the President by the present article corresponds to the ‘Speech from the Throne’ in *England*. Though there was no precedent for any such speech under the Government of India Act, 1935, the opening address delivered by President Rajendra Prasad in the first session of the Indian Parliament immediately after the commencement of the Constitution shows that this power of the President will be utilised by the ministry and for similar purposes as in England.<sup>24</sup> The President's speech will be the first authoritative pronouncement of the policy of the Government, both domestic and foreign. It will contain a comprehensive review of the achievements of the Government in the past year and a survey of the problems, particularly economic and financial, before the country.

#### CL. (2) :

*Rules of Procedure.*—Rules 11—16 of the Rules of Procedure and Conduct of Business in Parliament, 1950, provide—

“11. The Speaker, in consultation with the Leader of the House, shall allot time for the discussion of the matters referred to in the President's Address under Art. 87 (1) of the Constitution.

12. On such day or days or part of any day, Parliament shall be at liberty to discuss the matters referred to in such Address on a motion of thanks moved by a member, which shall be seconded by another member.

(21) Keith, *Constitutional Law*, p. 50.

(22) Lowell, *Government of England*, Vol. I,

pp. 307 : 330.

(23) Beard, *American Government and Poli-*

*tics*, 1939, p. 165.

(24) *Vide also Constituent Assembly Debates*, Vol. VIII, p. 110.

13. Amendments may be moved to such motion of thanks in such form as may be considered appropriate by the speaker.

14. (1) Notwithstanding that a day has been allotted for discussion on the President's Address,—

(a) A motion or motions for leave to introduce a Bill or Bills may be made and a Bill or Bills may be introduced on such day, and

(b) Other business of a formal character may be transacted on such day before the House Commences or continues the discussion on the Address.

(2) The discussion on the Address may be postponed in favour of Government Bill or other Government business on a motion being made that the discussion on the Address be adjourned to a subsequent day to be appointed by the Speaker. The Speaker shall forthwith put the question, no amendment or debate being allowed.

(3) The discussion on the Address shall be interrupted in the course of a sitting by an adjournment motion under rule 48.

15. The Prime Minister or any other Minister, whether he has previously taken part in the discussion or not, shall on behalf of the Government have a general right of explaining the position of the Government at the end of the discussion and the Speaker may enquire how much time will be required for the speech so that he may fix the hour by which the discussion shall conclude.

16. The speaker may, if he thinks fit, prescribe, after taking the sense of the House, a time limit for speeches."

**88.** Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, any joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.

Rights of Ministers and Attorney-General as respects Houses.

#### OTHER CONSTITUTIONS

*England.*—A minister has the right to address the Chamber of which he is a member; and though he may visit the other Chamber when matters relating to his own Department are under discussion, he has no right to speak in that House. Again, a minister who is not for the time being a member of Parliament has no right to speak in either House.<sup>25</sup>

*Eire.*—Art. 28 (8) of the Constitution of 1937 provides—

"Every member of the Government shall have the right to be heard in each House of the Oireachtas."

This is a departure from the English precedent and enables a Minister to address a Chamber of which he is not a member.

*South Africa.*—Sec. 52 of the South African Constitution Act provides—

"A member of either House of Parliament shall be incapable of being chosen or of sitting as a member of the other House: Provided that every Minister of State who is a member of either House of Parliament shall have the right to sit and speak in the Senate and the House of Assembly, but shall vote only in the House of which he is a member."

*Fourth French Republic.*—Art. 53 of the Constitution of 1946, provides—

"The Ministers shall have access to the two Chambers and to their Committees. They must be heard when they request it."

So, a minister who is a member of one Chamber may also speak in the other Chamber and even a minister who is not a member of the Legislature at all may speak in either Chamber.

*Burma.*—Sec. 79 of the Burmese Constitution is identical with Art. 88 of our Constitution.

#### INDIA

*Art. 88 : Right of Ministers and Attorney-General to speak in either House or Committee<sup>25-a</sup>.*—Every House of Parliament being an autonomous body, would not allow

(25) Lowell, Government of England, Vol. I, p. 61.

(25-a) Committees in Parliament, of

two kinds, (a) select Committees or Committees appointed by the House for particular purposes, e.g., Select Committees for considering



any person who is not a member of that House, either to participate in its proceedings or to vote [Cf. Art. 100 (1) ; 104]. The present article engrafts an exception to that general rule. It enables every Minister as well as the Attorney-General to speak in either House of Parliament or any of its Committees, or at a joint sitting of both Houses, though he might not be a member of that particular House or of any House at all. But he would have a right to vote only if he is a member of that House of Parliament in which the voting takes place.

Now, Art. 75 (5) provides that a person who is not a member of either House of Parliament, may remain a Minister for a period of six months. Again, the Attorney-General would be a nominated person [Art. 76 (1)] and would not be a member of Parliament. It would be a disadvantage for the Legislature if such a Minister or the Attorney-General is debarred from placing his information or point of view before either House when some matter under his charge is being discussed in the House. Further, since a Bill requires passage by both Chambers, it would be difficult for the Government to pilot a Bill, if the Minister-in-charge is not allowed to speak in the lower House simply because he is a member of the Upper House, and conversely. It is to meet these difficulties, that the present article has been adopted. But the right to vote is confined to membership [Art. 100 (1), post]. This provision seems to be an improvement upon the English precedent (see above) and follows the French and Irish precedents.

### Officers of Parliament

The Chairman and Deputy Chairman of the Council of States.

**89.** (1) The Vice-President of India shall be *ex-officio* Chairman of the Council of States.

(2) The Council of States shall, as soon as may be, choose a member of the Council to be Deputy Chairman thereof and, so often as the office of Deputy Chairman becomes vacant, the Council shall choose another member to be Deputy Chairman thereof.

*Art. 89 : Chairman of the Council of States.*—This Article follows Art. I, sec. 3 (4) of the Constitution of the United States of America, and provides that the Council of States shall have an *ex officio* Chairman [while the Chairman or Speaker of the House of the People shall be an elected member of that House],—viz. the Vice-President of India. But when the Vice-President is unable to act as Chairman, his functions will be performed by the Deputy Chairman, who is an elected member of the Council of States [Arts. 89 (2) ; 91 (1)].

Vacation and resignation of, and removal from, the office of Deputy Chairman.

**90.** A member holding office as Deputy Chairman of the Council of States—

(a) shall vacate his office if he ceases to be a member of the Council ;

(b) may at any time, by writing under his hand addressed to the Chairman, resign his office ; and

(c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

the clauses of particular Bills ; (b) Standing Committees, i.e., Committees appointed by the House at the commencement of Parliament or from time to time, the members of which hold

office until another Committee is appointed, e.g., —Committee of Privileges, Committee on Petitions, Committee on Public Accounts, Committee on Estimates.

**91.** (1) While the office of Chairman is vacant, or during any period when the Vice-President is acting as or discharging the functions of, President, the duties of the office shall be performed by the Deputy Chairman, or, if the office of Deputy Chairman is also vacant, by such member of the Council of States as the President may appoint for the purpose.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman.

(2) During the absence of the Chairman from any sitting of the Council of States, the Deputy Chairman, or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

**92.** (1) At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 91 shall apply in relation to every such sitting as they apply in relation to ■ sitting from which the Chairman, or, as the case may be, the Deputy Chairman, is absent.

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Council of States while any resolution for the removal of the Vice-President from his office is under consideration in the Council, but, notwithstanding anything in article 100, shall not be entitled to vote at all on such resolution or on any other matter during such proceedings.

*Art. 92 : Chairmanship when resolution for removal under consideration.*—It would be anomalous if the Vice-President were to preside over the Council of States when a resolution for his own removal [Art. 67, Prov. (b)] is being considered by the Council. At such ■ sitting, the Vice-President shall have a right to be present, to speak in or otherwise take part in the proceedings, but he shall neither act ■ Chairman nor have a vote. At such a sitting, the Deputy Chairman shall preside over the Council, as if the Chairman was absent. Similar is the provision as regards a sitting for consideration of removal of Deputy Chairman.

*Analogous Provision.*—See Art. 96, relating to the Speaker and Deputy Speaker of the House of the People. See also Arts. 181, 185.

**93.** The House of the People shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often ■ the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to be Speaker or Deputy Speaker, as the case may be.

The Speaker and Deputy Speaker of the House of the People.

## OTHER CONSTITUTIONS

*England.*—The Speaker of the House of Commons, is elected from amongst its members at the commencement<sup>1</sup> of each Parliament and his office lasts for the life of that Parliament.

In practice, however, once elected, a speaker is re-elected by each successive Parliament irrespective of its party composition<sup>2</sup>; so that the election of a new Speaker takes place only if a Speaker dies or fails to be returned in a new Parliament.

He is the mouthpiece through whom the Commons communicate with the Sovereign and he represents the House on all occasions. The substantial part of his duties now is to preside over the proceedings of the House, to preserve order and to rule upon points of order. He issues warrants of commitment and enforces obedience to the orders of the House. He has under the Parliament Act, 1911, the power of certifying whether a particular bill is a Money bill or not, and his decision is final on that point.

As the presiding officer of the House and the guardian of its privileges, the Speaker has the following powers, *inter alia*, which may be said to be autocratic : (a) He decides whether a motion to closure debate may be put or whether it is an infringement of the rights of the Opposition. (ii) He can refuse to entertain a dilatory motion if he considers it to be an abuse of the rules of the House. (iii) He can stop irrelevance or repetition in speech. (iv) He can name a member for suspension, for disregard of his authority. (v) He can exclude strangers from the House.<sup>3</sup>

The Speaker's decisions are printed in the Official Report and the Journals of the House, have the force of precedents and are followed by each successive Speaker until the Rules or Standing Orders are themselves changed. The Speaker's rulings thus constitute the 'practice' of the House, while the Standing Orders govern the 'procedure'.<sup>4</sup>

The Speaker maintains order in the House in the following ways—(i) By calling members to order ; (ii) By ordering them to withdraw for the sitting; (iii) By 'naming' them to the House, *i.e.*, for considering whether a named member should be suspended ; (iv) In case of grave disorder, the Speaker can adjourn the House without question put, or suspend the sitting for any time he thinks fit.

The position of the Speaker of the House of Commons is one of strict impartiality or neutrality. He resigns from his party<sup>5</sup> and discards his party colours as soon as he takes the Chair. He is the spokesman and representative of the dignity of the House and the guardian of its privileges. As the presiding officer, he must act with the impartiality of an umpire or judge, free from any personal or party bias. It is this impartiality which upholds the finality of his decisions. From the Speaker's rulings on points of order there is no appeal and any expression of disagreement with it by a member would constitute contempt of the Chair. Even the House cannot directly override a Speaker's decision, though the House may at any time change its own rules by a majority vote<sup>6</sup>. Sometimes the Speaker himself refers a question to the judgment of the House ; but if he makes a decision on his own responsibility, its authority cannot be questioned.

"If a member raises a point of order the Speaker gives his decision ; he may permit questions to elucidate it and suggestions which may enable the member to keep within the rules but he allows no discussion."<sup>7</sup>

The neutrality of the Speaker's position is maintained by the operation of several rules—(i) Owing to the practice of being re-elected so long as he desires, once elected, the Speaker has not got to seek favours of the Government or the

(1) Keith, Constitutional Law, p. 48.

(2) Jennings, Parliament, 1948, p. 57.

(3) See, further under Art. 105 (3), *post*.

(4) Jennings, Parliament, 1948, p. 61.

(5) Jennings, Parliament, 1948, p. 56.

(6) An action of the Speaker may, however, be discussed by the House on a substantive motion, brought at a different time.



party in power. (ii) He has an official residence, and a liberal salary, charged on the Consolidated Fund (so that his emoluments are not dependent on the vote of the House). He also gets a pension and a peerage when he retires. (iii) He does not speak in any debate<sup>7</sup>, nor vote except in case of a tie (of this see further, under Art. 100 (1), *post*).

*U. S. A.*—Differing from the English practice, the Speaker of the House of Representatives is a party man, chosen by a caucus of the majority party. He has similar power to recognize or refuse to recognize those who desire to speak on a measure, but in all this, he is influenced by his party bias.<sup>8</sup>

*Ceylon.*—See sec. 17 of the Ceylon (Constitution) Order in Council, 1946.

*Burma.*—Sec. 67 (1) of the Burmese Constitution is identical with Art. 93 of our Constitution, substituting 'Chamber of Deputies' for 'House of the People.'

*Government of India Act, 1935.*—Sec. 22 (5) of that Act contained similar provision.

#### INDIA

*Art. 93 : Speaker of the House of the People.*—The position of the Speaker under our Constitution is sought to be made as impartial and independent as in England, by the following provisions—(i) His salary and allowances are 'charged' on the Consolidated Fund (Art. 112 (3) (b)). (ii) He can be removed only by a resolution of a special majority of the House itself [Art. 94 (c)]. (iii) He has no vote except in the case of a tie [Art. 100 (1)].

*Procedure for election of Speaker and Deputy Speaker.*—See rules 5—6 of the Rules of Procedure and Conduct of Business in Parliament, 1950.<sup>8-a</sup>

*Functions of the Speaker under the Rules of the Provisional Parliament.*—The following is a summary of the more important powers of the Speaker, under the Rules of Procedure and Conduct of Business in Parliament, 1950—

(i) He allots, in consultation with Leader of the House, time for discussion of matters referred to in Art. 87 (1), and prescribes the form in which amendments may be moved to the motion of thanks to the Address. He may also prescribe a time-limit for speeches on the Address under Art. 87 (1).

(ii) He determines order of business in the House in consultation with Leader of the House.

(iii) He decides admissibility of 'questions' and has the power of disallowing questions which are calculated to obstruct procedure in Parliament.

(iv) The Speaker's consent is necessary to make a motion for adjournment to discuss a matter 'of urgent public importance', and he prescribes the time-limit for speeches on such motion.

(v) No motion to introduce a Bill is necessary, if the speaker directs publication in the Gazette.

(vi) He appoints Chairmen of Select Committees from amongst members of the respective Committees.

(vii) His consent is necessary for moving a motion for adjournment of debate on a Bill.

(viii) He decides admissibility of a 'resolution'.

(ix) He may prescribe a time limit for speeches on the Budget and take all steps necessary for timely completion of all financial business.

(x) Communication between President and Parliament and *vice versa* shall take place through the Speaker.

(xi) He decides a member's right to speak and order of speeches and speeches shall be addressed to the Speaker, and questions to other members must be asked through Speaker.

(xii) Whenever the speaker rises, others must take seat and must not leave while the Speaker addresses the House.

(xiii) The Speaker decides all points of order and his decision is final,

(7) Lowell, Government of England, Vol. I, p. 262.

(8) Beard, American Government and Politics, 1939, p. 102; Burdick, American Constitution, p. 160.

(8-a) Gazette of India, Extraordinary, 14-2-50.

(9) Keith, Constitutional Law, p. 99, Morrison, Parliament, 1934, pp. 53-4.

(xiv) The speaker preserves order in the House and has all powers necessary for that purpose.

(xv) He puts questions to vote and announces results and his announcement is final.

(xvi) He may direct any member guilty of disorderly conduct to withdraw, and name a member for suspension who disregards the authority of the chair and persists in obstructing business of the House.

(xvii) He may adjourn or suspend business in case of grave disorder.

(xviii) He may regulate admission of strangers and ask them to withdraw at any time.

*Analogous Provision.*—Cf. Art. 178, relating to the Legislative Assembly of a State.

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

**94.** A member holding office as Speaker or Deputy Speaker of the House of the People—

(a) shall vacate his office if he ceases to be a member of the House of the People ;

(b) may at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office ; and

(c) may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House :

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution :

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution.

#### OTHER CONSTITUTIONS

*Burma.*—Sec. 67 (2) of the Burmese Constitution is in the same language as Art. 94 of our Constitution, substituting 'Chamber of Deputies' for 'House of the People'. Further, under the Burmese Constitution, the resignation of the Speaker or Deputy President is to be addressed to the President of the Union.

*Government of India Act, 1935.*—See sec. 22 (2) and (5) of that Act .

#### INDIA

*Analogous Provision.*—Excepting the second Proviso, this Article is identical with Art. 90, above. Note that under either article, a majority of all the then members of the House (as distinguished from the ordinary majority of members voting) will be required for removal.

The provisions of Art. 179, relating to the Speaker or Deputy Speaker of a State Legislative Assembly are similar to those of the present article.

**95.** (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.

(2) During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as Speaker.

CL. (2) : *Temporary Chairman*.—R. 7 of the Rules of Procedure and Conduct of Business in Parliament, 1950<sup>9-a</sup> provides—

“(1) At the commencement of Parliament or from time to time as the case may be, the Speaker shall nominate from amongst the members of Parliament a panel of not more than six Chairmen any one of whom may preside over Parliament in the absence of the Speaker and Deputy Speaker, when so requested by the Speaker, or in his absence, by the Deputy Speaker.

(2) A Chairman nominated under sub-rule (1) shall hold office until a new panel of Chairmen is nominated.”

**96.** (1) At any sitting of the House of the People, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 95 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker, or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the House of the People while any resolution for his removal from office is under consideration in the House and shall, notwithstanding anything in article 100, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

*Analogous Provision*.—Cl. (1) of Art. 96 is similar to Cl. (1) of Art. 92, but Cl. (2) differs. While the Chairman of the Council of States shall have no vote when a resolution for his removal is being considered by the Council,—the Speaker shall have a right to vote in the first instance upon such refusal, but not in case of equality of votes. Cf. also Art. 181, relating to the Legislative Assembly of a State.

**97.** There shall be paid to the Chairman and the Deputy Chairman of the Council of States, and to the Speaker and the Deputy Speaker of the House of the People, such salaries and allowances ■ may be respectively fixed by Parliament by law and, until provision in that behalf is so made, such salaries and allowances ■ are specified in the Second Schedule.

Salaries and allowances of the Chairman and Deputy Chairman and the Speaker and Deputy Speaker.

**98.** (1) Each House of Parliament shall have a separate secretarial staff :

Secretariat of Parliament.



Provided that nothing in this clause shall be construed as preventing the creation of posts common to both Houses of Parliament.

(2) Parliament may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of either House of Parliament.

(3) Until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People or the Council of States, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

### *Conduct of Business*

**99.** Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, on oath or affirmation according to the form set out for the purpose in the Third Schedule.

Oath or affirmation by members.

**100.** (1) Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker.

Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) Either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until Parliament by law otherwise provides, the quorum to constitute a meeting of either House of Parliament shall be one-tenth of the total number of members of the House.

(4) If at any time during a meeting of a House there is no quorum, it shall be the duty of the Chairman or Speaker, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

CL. (1)

### **OTHER CONSTITUTIONS**

*England.*—All questions in the House of Commons are decided by a majority of votes of the members present and voting. The Speaker puts the questions and declares the result of a division. Usually, he ascertains the result by the voices. But if the Speaker's statement is challenged, he directs the lobby to be

cleared, and again puts the question; if his statement is again challenged, he directs the locking of the doors and directs the members to the 'ayes' and 'noes' lobbies. But before doing that, he may ask the persons challenging his decision to rise and then give his final decision instead of directing a counting in the division lobbies.<sup>9-b</sup>

Prior to 1906, refusal to vote might lead to suspension. But now, a member of Parliament is under no obligation to vote on any particular question.

It has been already stated (p. 300, *ante*), that owing to the impartial position of the Speaker, he never votes on any question except in the case of a 'tie' or equality of votes. Again, even when he thus votes in case of a tie, he bases his vote, "not upon his personal opinion of the merits of the measure, but upon the probable intention of the House as shown by its previous action, or upon some constitutional principle,"<sup>10</sup> for which he may take information from the clerk of the House. For instance, the Speaker would, by tradition, vote in such a way as to secure further discussion on the subject.<sup>11</sup>

In England, the position of the Chairman of the House of Lords,—the Lord Chancellor differs from that of the Speaker of the House of Commons.

The Lord Chancellor performs, in the House of Lords the functions assigned in the House of Commons to the Speaker, but has not the same powers for maintaining order and controlling the course of debates.

"He does not even decide which peer shall speak but if more than one rise at once, and refuse to give way, the question who shall have the floor is decided by the House itself. Order in debate, also, is enforced not by him but by the Lords themselves . . . . . In short, his functions are limited to formal proceedings, and even in these he can be overruled by the House." (*Lowell*).

The rules of the House of Lords are so liberal that any peer may initiate a debate on a matter of public importance almost at any time.

In addressing the House, the Lord Chancellor has precedence by courtesy, but though he has an ordinary vote if a peer, he has no casting vote like that of the Speaker. In practice he is always made a peer, but this is not a legal necessity. If a peer, he can of course, as such, take part in debate; but otherwise not.

*Canada*.—Sec. 36 of the British North America Act says—

"Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative."

So, the Speaker of the Senate has an ordinary vote but no casting vote; in case of a tie, the motion will be lost.

Sec. 49, on the other hand, provides—

"Questions arising in the House of Commons shall be decided by a majority of voices other than that of the Speaker, and when the voices are equal, but not otherwise, the Speaker shall have a vote."

So, the Speaker of the House of Commons has a casting vote but no ordinary vote.

*Australia*.—Secs. 23 and 40 of the Australian Constitution Act exactly correspond to secs. 36 and 49 of the British North America Act, respectively.

*South Africa*.—In South Africa, the Speaker's casting vote decides in a case of tie, in both Houses [Secs. 31 and 50]. Otherwise the Speaker has no vote.

*Ceylon*.—Sec. 18 of the Ceylon (Constitution) Order in Council, 1946, is in the same language as Cl. (1) of Art. 100 of our Constitution. Under the Constitution of Ceylon, the only case in which a special majority [ $\frac{2}{3}$  of the total number of members of the House of Representatives] is required, is amendment of the Constitution [Sec. 29 (4), Proviso.]

(9-b) Keith, *Constitutional Law*, p. 99, Morrison, *Parliament*, 1934, pp. 53-4.

(10) Lowell, *Government of England*, Vol. I, p. 262; see also Munro, *Governments of Europe*, 1947, p. 197.

(11) The latest instance of the Speaker's exercise of the casting vote was on May 1, 1950, when the Speaker saved the Attlee Government

from defeat by casting his vote against the motion to reduce the estimate of supplies for the Minister of Transport, alleging discrimination against road transportation services which had not been nationalised. The preceding instance was in 1939. [*Statesman*, Calcutta, 3-5-50, p. 5].

*Burma.*—Sec. 69 (1) of the Burmese Constitution exactly corresponds to Art. 100 (1) of our Constitution.

*Japan.*—Art. LVI of the Japanese Constitution says—

“All matters shall be decided, in each House, by a majority of those present except as elsewhere provided in the Constitution. In case of a tie, the presiding officer shall decide the issue.”

*Government of India Act, 1935.*—Sec. 23 (1) of that Act was exactly similar to Art. 100 (1) of our Constitution.

## INDIA

*Cl. (1) : Decision by majority of votes.*—This clause lays down that except in the cases otherwise provided by the Constitution, all questions at any sitting of either House or at any joint sitting, shall be determined by a majority of votes of the members *present* and *voting* on the question.

The constitutional provisions that require a special majority are : Arts. 61 (2) (b) ; 61 (4) ; 90 (c) ; 94 (c) ; 108 (4) ; 124 (4) ; 218 ; 249 (1) ; 368.

*How a question is determined.*—R. 170 of the Rules of Procedure and Conduct of Business in Parliament lays down the procedure how the majority vote upon a question shall be determined by the Speaker :

“(1) On the conclusion of a debate, the Speaker shall put the question and invite those who are in favour of the motion to say ‘Aye’ and those against the motion to say ‘No’.

(2) The Speaker shall then say : “I think the Ayes (or the Noes, as the case may be) have it”. If the opinion of the Speaker as to the decision of a question is not challenged, he shall say twice : ‘The Ayes (or the Noes, as the case may be) have it’ and the question before the House shall be determined accordingly.

(3) If the opinion of the Speaker as to the decision of a question is challenged, he may, if he thinks fit, ask the members who are for ‘Aye’ and those for ‘No’ respectively to rise in their places and, on a count being taken, he may declare the determination of the House. In such a case, the names of the voters shall not be recorded.

(4) (a) If the opinion of the Speaker as to the decision of a question is challenged and he does not adopt the course provided for in sub-rule (3) above, he shall order a ‘Division’ to be held. (b) After the lapse of two minutes, he shall put the question a second time and declare whether in his opinion the ‘Ayes’ or the ‘Noes’ have it. (c) If the opinion so declared is again challenged, he shall direct the ‘Ayes’ to go into the right Lobby and the ‘Noes’ into the Left Lobby. In the ‘Ayes’ or ‘Noes’ Lobby as the case may be, each member shall call out his Division number and the Division Clerk, while marking off his number on the Division List, shall simultaneously call out the name of the Member. (d) After voting in the Lobbies is completed, the Division Clerks shall hand over the Division Lists to the Secretary, who shall count the votes and present the totals of ‘Ayes’ and ‘Noes’ to the Speaker. (e) The result of a Division shall be announced by the Speaker and shall not be challenged. (f) A member who is unable to go to the Division Lobby owing to sickness or infirmity may, with the permission of the Speaker, have his vote recorded either at his seat or in the Members’ Lobby. (g) If a member finds that he has voted by mistake in the wrong Lobby, he may be allowed to correct his mistake provided he brings it to the notice of the Speaker before the result of the division is announced. (h) When the Division Clerks have brought the Division Lists to the Secretary’s table, a member who has not up to that time recorded his vote but who then wishes to have his vote recorded may do so with the permission of the Speaker.”

*Speaker and Chairman’s casting vote.*—Our Constitution places the Presiding Officers of both Houses on the same footing, by denying the right to vote to both of them and enjoining both to exercise a casting vote in case of a tie.

*Analogous Provision.*—The provisions of Art. 189 (1), regarding the Houses of the State Legislature, are identical.

## CL. (2)

### OTHER CONSTITUTIONS

*Ceylon.*—Sec. 19 of the Ceylon (Constitution) Order in Council, 1946, is identical with Cl. (2) of Art. 100 of our Constitution.

*Burma.*—Sec. 69 (3) of the Burmese Constitution is also identical.

*Government of India Act, 1935.*—So was sec. 23 (2) of the Act of 1935.



## CLS. (3-4)

## OTHER CONSTITUTIONS

*England.*—A. 40 members (*i.e.*, about 7 per cent. of the membership) form the quorum in the House of Commons. If it is brought to the notice of the Speaker that 40 members are not present in the House, the Speaker orders for the withdrawal of strangers and allows 2 minutes' time for the members from other parts of the building to assemble. The members are then counted twice, and if the number present is still found to be less than 40 the House adjourns till the next sitting day.<sup>12</sup> In practice, a member would not draw the attention of the Speaker to absence of quorum, except for purposes of obstruction;<sup>13</sup> and the Speaker allows business to be done without a quorum unless some member asks for a count or unless there are less than 40 members voting at a division<sup>14</sup>. There is no adjournment for want of quorum when the business before the House is a message from the Crown.

B. In the House of Lords, on the other hand, only three members constitute a quorum for business other than legislation, while a quorum of 30 members is necessary for passing Bills.

*U. S. A.*—Art. I, Sec. 5 (1) of the Constitution says—

“A majority of each House shall constitute a quorum to do business.”

The Constitution leaves to each House to determine how the presence of a quorum shall be determined [Art. I, sec. 5 (2)]. In practice it is determined from the journal kept by the Clerk of the House.

*Australia.*—Sec. 39 of the Australian Constitution Act provides—

“Until the Parliament otherwise provides, the presence of at least one-third of the whole number of members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.”

Sec. 22 makes similar provision for quorum in the Senate.

*Canada.*—Sec. 48 of the British North America Act provides—

“The presence of at least 20 members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers and for that purpose the Speaker shall be reckoned as a member.”

Sec. 35 makes similar provision in the case of the Senate,—the quorum in that case being 15 Senators.

*South Africa.*—Secs. 30 and 49 of the South African Constitution Act makes similar provisions for its Senate and House of Assembly, the quorum being 12 and 30 members, respectively.

*Ceylon.*—Sec. 20 of the Ceylon (Constitution) Order in Council, 1946, provides—

“If at any time during a meeting of either Chamber the attention of the person presiding is drawn to the fact that there are, in the case of a meeting of the Senate, fewer than six Senators present, or, in the case of a meeting of the House of Representatives, fewer than twenty members present, the person presiding shall, subject to any Standing Order of the Chamber, adjourn the sitting without question put.”

*Japan.*—Art. LVI of the Japanese Constitution says—

“Business cannot be transacted in either House unless at least one-third of the total membership is present.”

*Burma.*—Sec. 69 (2) of the Burmese Constitution provides—

“The number of members necessary to constitute the quorum of either Chamber for the exercise of its powers shall be determined by its rules.”

*Government of India Act, 1935.*—Sec. 23 (3) of the Act of 1935 was—

(12) *Chalmers & Hood Phillips*, p. 116; May, p. 172.  
Parliamentary Practice, 13th Ed. pp. 223-4.

(13) Cf. *Jennings, Constitution of Ceylon*,

(14) *Jennings, Parliament*, 1948, p. 75.

"If at any time during a meeting of a Chamber less than one-sixth of the total number of members of the Chamber are present, it shall be the duty of the President or Speaker or person acting as such either to adjourn the Chamber, or to suspend the meeting until at least one-sixth of the members are present."

#### INDIA

*Cls. (3)—(4) : Absence of Quorum.*—While under the Constitution of Ceylon (following England), the Speaker has no duty<sup>15</sup> of ascertaining whether there is absence of quorum at any time, and the House may continue sitting unless the Speaker's attention is drawn to that fact by some member,—it seems that under our Constitution, the Speaker shall have a duty to ascertain that fact *suo motu*, if any doubt arises in his mind. But instead of adjourning, he shall have the power to suspend the business of the House for any length of time in order to allow members to assemble.

It is to be noted, however, that if any business is in fact transacted when there was no quorum, its validity would not be open to attack on that ground [Art. 122 (1), *post*].

*Analogous Provision.*—*Cf.* Art. 189 (3)—(4), relating to the State Legislature.

#### *Disqualifications of members*

**101.** (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

Vacation of seats.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State specified in Part A or Part B of the First Schedule, and if a person is chosen a member both of Parliament and of a House of the Legislature of such a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 102, or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker as the case may be, his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant :

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

(15) *Cf.* Jennings, *Constitution of Ceylon*, p. 171 ; Munro, *Governments of Europe*, 1947, p. 194.

## CL. (1)

## OTHER CONSTITUTIONS

*England.*—Double membership is avoided by the rule that none but a peer may sit in the House of Lords. On the other hand, a peer is disqualified to be elected to the House of Commons and if ■ sitting member of the House of Commons be made ■ peer, the House may declare his seat vacant.<sup>16</sup>

*Australia.*—Sec. 43 says of the Australian Constitution Act says—

“A member of either house of Parliament shall be incapable of being chosen or of sitting as a member of the other House.”

*South Africa.*—Sec. 52 of the South African Constitution Act is the same ■ sec. 43 of the Australian Constitution.

*Canada.*—The prohibition is one-sided. Sec. 39 of the British North America Act says—

“A senator shall not be capable of being elected or of sitting or voting as a member of the House of Commons.”

*Eire.*—Art. 15 (14) of the Constitution of Eire, 1937, provides—

“No person may be at the same time a member of both Houses of the Oireachtas, and, if any person who is already a member of either House becomes ■ member of the other House, he shall forthwith be deemed to have vacated his first seat.”

*Japan.*—Art. XLVIII of the Japanese Constitution says—

“No person shall be permitted to be a member of both Houses simultaneously.”

*Fourth French Republic.*—Art. 24 of the French Constitution of 1946 is similar to Art. XLVIII of the Japanese Constitution, quoted above.

*Ceylon.*—Sec. 13 (1) of the Ceylon (Constitution) Order in Council, 1946, provides—

“A senator shall be disqualified for being elected or appointed or for sitting or voting as a member of the House of Representatives.”

Sec. 24 (1) (c) provides—

“The seat of a member of Parliament shall become vacant—if he is elected or appointed a member of the Senate.”

So, under the Constitution of Ceylon, a senator cannot be ■ member of the House of Representatives at all. On the other hand, a member of the House of Representatives can become ■ senator, but he would thereby vacate his seat in the House of Representatives, automatically.

*Burma.*—Sec. 73 (1) of the Burmese Constitution is similar to Art. 15 (14) of the Constitution of Eire, quoted above.

*Government of India Act, 1935.*—Cf. Sec. 25 (1) of that Act.

## INDIA

Cl. (1) : *Double Membership in Parliament.*—It is left to Parliament to provide by law in which House a person shall vacate his seat in case he is chosen ■ member of both Houses.

Cl. (2) : *Simultaneous membership of Parliament and State Legislature.*—While Cl. (1) prohibits simultaneous membership of both Houses of Parliament, Cl. (2) prohibits simultaneous membership of ■ House of Parliament and of ■ State Legislature. While the question of vacation of ■■■ of the seats in the former ■■■ is left to be determined by law made by Parliament,—in the latter case it is to be determined by rules made by the President. The President has already made the Prohibition of Simultaneous Membership Rules, 1950.<sup>17</sup>

*Rules made by President.*—Under Arts. 101 (2) and 190 (2), the President has made the following rules :<sup>17</sup>

“1. These rules may be called the Prohibition of Simultaneous Membership Rules, 1950.

(16) Keith, Constitutional Law, p. 61 n.

(17) Note No. F. 46/50-C, *Gazette of India*,

26-1-50, *Extraordinary*, p. 678 : (1950) S.C.J. Supp. 57.



2. The period at the expiration of which the seat in Parliament of a person who is chosen a member both of Parliament and of a House of the Legislature of a State specified in Part A or Part II of the First Schedule to the Constitution of India (hereinafter referred to as "the Constitution") shall become vacant, unless he has previously resigned his seat in the Legislature of such State, shall be fourteen days from the date of publication in the Gazette of India or in the Official Gazette of the State, whichever is later, of the declaration that he has been so chosen :

Provided that in the case where a person who is a member of a House of the Legislature of any such State has been chosen to fill any seat in Parliament under the provisions of clause (3) of article 379 of the Constitution and the declaration that he has been so chosen has been published in the Gazette of India on any date earlier than the twenty-sixth day of January, 1950, the said period shall be the period expiring on the tenth day of February, 1950.

3. The period at the expiration of which the seat of a person who is chosen a member of the Legislatures of two or more States specified in the First Schedule to the Constitution in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States, shall be ten days from the later or, as the case may be, the latest of the dates of publication in the Official Gazettes of such States of the declarations that he has been so chosen."

### CL. (3)

#### OTHER CONSTITUTIONS

*England.*—By an ancient custom, a member of the House of Commons is not permitted to resign ; but if a member insists on being relieved of his seat, he applies to the Chancellor of the Exchequer to be appointed steward of the Chiltern Hundreds, which is a sinecure ' office of profit ' within the meaning of the Placemen Act of 1705. As soon as the appointment is made, the member loses his seat. He thereafter resigns the office of steward and thus keeps the office open for some other member who may desire to vacate his seat.

*U. S. A.*—A member of the House of Representatives may resign his seat by handing over to the Speaker his written resignation.

*Ceylon.*—See sec. 24 (1) of the Ceylon (Constitution) Order in Council, 1946.

*Burma.*—Sec. 73 (2) of the Burmese Constitution corresponds to Cl. (3) of Art. 101 of our Constitution.

*Government of India Act, 1935.*—Sec. 25 (2) of the Act of 1935 was also similar.

### CL. (4)

#### OTHER CONSTITUTIONS

*Ceylon.*—Sec. 24 (1) (e) of the Ceylon (Constitution) Order in Council, 1946 says—

" The seat of a member of Parliament shall become vacant—if, without the leave of the House of Representatives first obtained, he absents himself from the sittings of the House during a continuous period of three months."

*Burma.*—Sec. 73 (3) of the Burmese Constitution is in the same language as Art. 101 (4) of our Constitution, substituting only ' thirty days ' in place of sixty days.

*Government of India Act, 1935.*—Cl. (4) of Art. 101 of our Constitution is taken *verbatim* from Sec. 25 (3) of the Government of India Act, 1935.

#### INDIA

*Cl. (4) : Vacation by absence.*—A member does not automatically vacate his seat in either House by absence for any length of time. But if a member remains absent for a continuous period of 60 days (excluding periods of prorogation or adjournment over 4 days consecutively), the House may declare his seat vacant, by a resolution. It is not obligatory upon the House to pass such a resolution.

**102. (1)** A person shall be disqualified for being chosen, as, and for being a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder ;

Disqualifications for membership.

(b) if he is of unsound mind and stands so declared by ■ competent Court ;

(c) if he is an undischarged insolvent ;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State ;

(e) if he is so disqualified by or under any law made by Parlia-  
ment.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

#### OTHER CONSTITUTIONS

*England.*—Various disqualifications for membership of the House of Commons have been imposed by different statutes.<sup>18</sup> Those at present disqualified include aliens, bankrupts, felons, infants, Judges, persons guilty of corrupt or illegal practices at Parliamentary elections, holders of offices of profit under the Crown and holders of pensions at the pleasure of the Crown, except those who are excepted by statute. The net result of the different statutes relating to holders of office of profit is that, generally speaking, all civil servants as distinguished from the *political heads* of departments are excluded from membership.

*Ceylon.*—*Vide* Sec. 13 of the Ceylon (Constitution) Order in Council, 1946.

*Burma.*—Cls. (i), (ii), (iii) and (iv) of sec. 74 (1) of the Burmese Constitution correspond to sub-Cls. (d), (c), (b) and (a) of Art. 102 (1) of *our* Constitution. Besides, there are additional grounds of disqualification in Cls. (v)-(vii) of sec. 74 (1) of the Burmese Constitution. These are—

“ Any person who—

(v) whether before or after the commencement of this Constitution, has been convicted or has, in proceedings for questioning the validity or regularity of an election, been found to have been guilty of an offence or corrupt or illegal practice relating to elections which has been declared by ■ Act of the Legislature of Burma or of the Parliament to be ■ offence or practice entailing disqualification for membership of the Legislature or of the Parliament, unless such period has elapsed ■ may be specified in that behalf in the provisions of that Act ; or

(vi) whether before or after the commencement of this Constitution, has been convicted, in any of the territories included within the Union, of any other offence, and has, in either case, been sentenced to transportation or to imprisonment for not less than two years, unless ■ period of five years or such less period ■ the President may, in his discretion, allow in any particular case, has elapsed since his release ; or

(vii) having been nominated ■ ■ candidate for the Parliament or having acted as an election agent of any person so nominated, has failed to lodge a return of the election expenses within the time and in the manner required by any Order made under this Constitution or by any Act of the Parliament, unless five years have elapsed from the date by which the return ought to have been lodged, or the President, in his discretion, has removed the disqualification ;

shall be disqualified for being chosen as and for being ■ member of either Chamber.”

*Government of India Act, 1935.*—*Cf.* Sec. 26 of that Act.

#### INDIA

*Cl. (1) : Disqualifications for membership.*—While Art. 84 lays down the positive qualifications required for standing as a candidate for membership of either House of Parliament, the present Article lays down the negative qualifications. Any person who comes within any of the sub-clauses of the present article will not be fit to be ■ candidate for membership ; further, if a sitting member of Parliament incurs any of the disqualifications mentioned in these sub-clauses, his seat will become automatically vacant [Art. 101 (3) (a)]. Additional grounds of disqualification may be imposed by law of Parliament, under sub-cl. (e).

(18) See complete list in *Chalmers & Hood Constitutional Law*, pp. 61-3.  
*Phillips, Constitutional Law*, pp. 70-2; *Keith,*

*Sub-Cl. (a) : 'Office of profit.'*—This expression occurs in the following Arts.—58 (2) ; 59 (2) ; 64 ; 66 (4) ; 102 (1) (a) ; 191 (1) (a).

Actual making of profit by the incumbent is not necessary to make an office an "office of profit"; it is enough if the holder of the office may *reasonably* be expected to make a profit out of it.<sup>19</sup> But the disqualification does not relate to the holding of an office to which no salary is attached nor is there any other profit by way of "fee, allowance, reward, commodities, emoluments, perquisites or other *advantages* whatsoever"<sup>20</sup>. 'Profit' is thus used in a wide sense, and is not confined to mere pecuniary gain. On the other hand, the real question being whether remuneration of any kind is *attached* to the office, a voluntary renunciation of salary would not make the office other than one of profit.<sup>21</sup>

It is hardly necessary to point out that in order to be an 'office of profit' it must first be an 'office' which means an 'employment' with 'fees and emoluments thereunto belonging' (*Blackstone*). Hence, only holders of employments under the Government are disqualified by our Constitution. Holders of or persons enjoying benefit under contracts with the Government are not disqualified by *our* Constitution, as are, by the Constitution of Ceylon,<sup>22</sup> or in England.<sup>23</sup>

*Legislation by Parliament.*—Under the present clause, Parliament has enacted the Parliament (Prevention of Disqualification) Act (XIX), 1950, declaring the following offices as not constituting disqualification for membership of Parliament—Office of a Minister of State, or ■ Deputy Minister or ■ Parliamentary Secretary or a Parliamentary Under-Secretary. The exemption and Parliamentary Secretaries from the disqualification is obviously founded on the theory of Parliamentary Government.<sup>24</sup>

Together with these we are to read Cl. (2) of the present Article of the Constitution which exempts Ministers of the Union and States from the disqualification.

*Sub-Cl. (d).*—It is to be noted that this Sub-Cl. is wider than the provisions of Art. 9, p. 42, *ante*. Not only acquisition of citizenship of a foreign State but even 'acknowledgment of allegiance or adherence to' a foreign state are disqualifications for membership of Parliament. It is the President who, under Art. 103 (1), will interpret the meaning of these expressions in disputed cases.

**103.** (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of article 102, the question shall be referred for the decision of the President and his decision shall be final.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

#### OTHER CONSTITUTIONS

*England.*—Either House of Parliament has the right to provide for its due composition and to decide questions as to the legal qualifications of its members.

(19) *Delane v. Hillcoat*, 109 F.R. 115.

(20) May, *Parliamentary Practice*.

(21) *Reade v. Brearley*, 17 T.C. 687.

(22) Jennings, *Constitution of Ceylon*, pp. 163, 167.

(23) House of Commons (Disqualification) Act, 1782.

(24) Cf. Report of the Select Committee on Offices of Profit under the Crown (1941) H. C. Pap. 120, pp. xiii-xiv.

(25) *Michael Davitt's Case*, (1882) 137 C.J.

140; *Wensleydale Peerage Case*, (1856) 140 Hans 3; Keith, *Constitutional Law*, pp. 71, 86. If it is alleged that any candidate who has been elected is disqualified, his right to sit and vote in the House of Commons must be decided by the House itself, or, if the alleged disqualification has been raised in a petition under the Parliamentary Elections Act, 1868, by the Judges appointed to try such petitions [Halsbury].



*U. S. A.*—Under Art. I, Sec. 5 (1) of the American Constitution, similarly—

“ Each House shall be the judge of the elections, returns and qualifications of its own members.”

*Japanese.*—The Japanese Constitution similarly [Art. LV] gives to each House the power to judge disputes related to qualification of its members ; but a special majority of 2/3 of the members present is required to unseat a member.

*Burma.*—Sec. 78 of the Burmese Constitution says—

“ The Parliament may by law prescribe the conditions under and the manner in which ■ member of either Chamber of Parliament may be recalled.”

#### INDIA

ART. 103 : *Decision of disputes as to disqualification of members.*—Contrary to the English practice, the decision of questions as to disqualification of members is left to the President who, however, is required to act according to the opinion of the Election Commission. The President's decision is final and the Courts shall have no jurisdiction to question the validity of the President's decision, except on the ground that he has acted otherwise than according to the opinion of the Election Commission, for ‘ finality ’ can attach only to *intra vires* exercise of the power, when ■ power is limited by conditions. The word “ shall ” in cl. (2) of the present article also indicates that the President's obligation to act according to the opinion of the Election Commission is absolute. It is also to be noted that there is nothing in the present Article, corresponding to the provision in Art. 74 (2), *ante*.

*Analogous Provisions.*—The provisions of Art. 192 relating to the State Legislature are exactly similar.

While the decision of disputes relating to *disqualifications* of members of Parliament is vested in the President, the decision of *election disputes* is to be made by election tribunals, under Art. 324 (1), *post*.

**104.** If a person sits or votes as a member of either House of Parliament before he has complied with the requirements of article 99, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Union.

Penalty for sitting and voting before making oath or affirmation under article 99 or when not qualified or when disqualified.

#### OTHER CONSTITUTIONS

*Burma.*—Sec. 75 of the Burmese Constitution corresponds to Art. 104 of our Constitution, substituting a penalty of ‘ rupees one thousand ’ in place of five hundred rupees.

*Government of India Act, 1935.*—Sec. 27 of the Act of 1935 was substantially similar to the present article of our Constitution.

#### INDIA

ART. 104: *Penalty for sitting or voting by disqualified person.*—A person would make himself liable to the penalty specified ■ the present Article, if he sits or votes ■ ■ member of either House, under any of the following circumstances—

- (a) before taking the oath or affirmation required by Art. 99 ; or  
 (b) knowing, that he does not possess any of the qualifications required by Art. 84 ; or  
 (c) knowing, that he is *disqualified* for any of the reasons specified in Art. 102; or  
 (d) knowing, that he is *prohibited* by any law made by Parliament from sitting or voting as a member of either House.

The requirement of 'knowledge' in cases (b)-(d) did not exist in Sec. 27 of the Government of India Act, 1935. These words are introduced in order to exempt cases of *bona fide* mistake. It is obvious that the penalty under this Article will be imposed by the House itself.

### *Powers, Privileges and Immunities of Parliament and its Members*

**105.** (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof.

(2) No member of Parliament shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

CLS. (1)-(2)

#### OTHER CONSTITUTIONS

*England*: (A) *Freedom of Speech*.—In England, it is settled since the Bill of Rights, 1688, that members of Parliament enjoy absolute freedom of speech for debates and proceedings in the House, so that no action or proceeding lies for words spoken within the walls of Parliament, *e.g.*,—

(a) For defamation<sup>1</sup>. An action for defamation would not lie even for defamatory matter contained in a petition printed for circulation only to members of Parliament.<sup>2</sup>

(b) For contravention of the Official Secrets Acts<sup>3</sup>. But members cannot abuse this privilege by soliciting information from public servants in contravention of these Acts.<sup>3</sup>

(c) For treason or similar offences.<sup>4</sup>

(1) *Dillon v. Balfour*, (1888) 20 L.R. Ir. 600.

(2) *Lake v. King*, (1667) 1 Saund. 131.

(3) *Chalmers & Hood Phillips*, p. 101; H.C.

Papers (1938) 173.

(4) (1667) 9 C.J. 19; Bill of Rights, 1689.

Each House of Parliament will treat it as a breach of its privileges if legal proceedings are commenced or other action is taken against any person on account of anything which he may have said, or evidence which he may have given, in the course of any proceedings in the House itself or before one of its Committees.<sup>5</sup>

But though a member of Parliament may, with impunity make libellous attacks on private persons within the House, and though he is not liable in a Court of law even for such attack on another member, the House itself possesses the power to control undue licence of speech on the part of its members, under its right to regulate its proceedings and internal affairs, and to punish violations of such rules of the House by suspension, commitment or expulsion. Thus a member cannot—

(a) Use unparliamentary language. A member using such language is asked to explain or apologise, and if he refuses to do so, he may be punished by the House as it thinks fit.<sup>6</sup>

(b) Say anything disrespectful to either House or the Chair.

(c) Say anything personally opprobrious to other members.

(d) Refer to any other member by name.

(e) Use the King's name in an irreverent manner.

(f) Refer to any debate of the same session or any debate in the other House or use the King's name, for the purpose of influencing the House.<sup>6-a</sup>

The Speaker is entitled to stop speeches on the ground of improper language or irrelevance.

(B) *The Right to publish Debates and Proceedings and the Right to restrain publication by Others.*—Each House has an absolute privilege to publish its own debates and proceedings. Until the historical case of *Stockdale v. Hansard*<sup>7</sup>, it was understood that at common law the right of the House to publish its proceedings otherwise than among its own members was restricted by the ordinary law of defamation. But the Parliamentary Papers Act, 1840, passed to override the decision in the above case,<sup>7</sup> laid down that no proceeding for defamation lies for any publication made under the authority of either House of Parliament.

Just as the House has the unqualified right to publish its debates, reports, etc. under its own authority, it has the right to *restrain* publication by others without its authority,—whether by a member or a stranger. In early days it was asserted that any publication without authority of the House constituted breach of its privileges. But later, this rule has been relaxed and reports of Parliamentary debates, proceedings, etc., are allowed to be published by unofficial persons, subject to the ordinary law of libel. But such publication is, in theory, still by sufferance of Parliament, and in case of wilful misrepresentation of the House it has the right to punish the offender. Publication may also be restrained by direct legislation, e.g., in time of emergency.<sup>8</sup>

It follows from the above that though members of Parliament have an absolute freedom of speech within the walls of Parliament, they have no unqualified privilege of publishing their speeches *privately*.

“If a member publishes his speech, his printed statement becomes a separate publication, unconnected with any proceedings in Parliament.” [May]

Here they rank equally with ordinary citizens and if the published speeches contain defamatory matter<sup>9</sup> or matter tending to overthrow the State or the like, they would be liable under the ordinary law.

(5) (1818) 73 C.J. 389.

(6) *Case of O'Donnell*, 137 C.J. 323 (328).

(6-a) May, *Parliamentary Practice*, Ch. XII.

(7) (1839) 1 A. & E. 1.

(8) Keith, *Constitutional Law*, p. 74. Publi-

cation of the report of a Committee before it has been presented to the House, is a breach of privilege and may be punished as such [(1837) 92 C.J. 282].

(9) *Dillon v. Balfour*, (1888) 1 L.R. Ir. 600.



Now, the law of defamation offers a "*qualified privilege*" to reports of Parliamentary proceedings on the ground that such reports are "essential to the working of the Parliamentary system and to the welfare of the nation," which would out-balance the occasional inconveniences to individuals.<sup>10</sup> In order to have protection of this privilege, the report must be—

(a) fair and accurate, *i.e.*, a substantially faithful report; and (b) made in good faith and without malice.

Similarly, an *article* founded on proceedings in Parliament would be privileged, if it is an *honest and fair comment* on the facts<sup>10</sup>. Fair and accurate *extracts*, from authorised publications, would also be similarly privileged<sup>11</sup>. But "a garbled or partial report or a report of detached parts of proceedings, published with intent to injure individuals will, as in the case of reports of judicial proceedings, be disentitled to protection."<sup>12</sup>

On the same principle, a *bona fide* publication of a defamatory speech by a member for the information of his constituents is privileged<sup>13</sup>, but the publication by a member in a newspaper of a single defamatory speech in Parliament, for the purpose of injuring an individual, would not be entitled to any privilege.<sup>14</sup>

"If a member publishes his own speech, reflecting upon the character of another person, and omits to publish the rest of the debate, the publication would not be *fair*, and so would not be privileged, but a fair and faithful report of the whole debate would not be actionable."<sup>15</sup>

**Ire.—**Art. 15 (10), (12), (13) of the Constitution of 1937 provides—

"(10) Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.

(12) All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.

(13) The members of each House of the Oireachtas shall, except in case of treason as defined in this constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself."

**Japan.—**Art. 51 of the Japanese Constitution, 1946, says—

"Members of both Houses shall not be held liable outside the House for speeches, debates, or votes cast inside the House."

**Burma.—**Sec. 68 (1) of the Burmese Constitution combines the provisions of Cls. (1) and (2) of Art. 105 of *our* Constitution. Sec. 70, further, provides—

"All official reports and publications of the Parliament or of either Chamber thereof shall be absolutely privileged."

**Government of India Act, 1935.—**Cls. (1) and (2) of the present Art. of *our* Constitution have been formed by splitting up Sec. 28 (1) of the Act of 1935.

#### INDIA

**Need for Privileges of Parliament.—**The privileges are certain rights belonging to each House of Parliament collectively and some others belonging to the members individually, without which it would be impossible for either House to maintain its independence of action or the dignity of its position. Though, in England, the privileges of Parliament had their origin in the effort of Parliament to protect its liberties against the Crown, they are in fact a necessary condition of every free legislature so that it may efficiently perform the task undertaken by it on behalf of the nation and even rights of citizens have to be curtailed so far as necessary for this purpose. Thus, in order that there may be adequate ventilation of grievances, thorough examination of legislative proposals, or reasonable scrutiny of administrative acts, it is essential that no member of the legislature should

(10) *Wason v. Walter*, (1868) 4 Q.B. 73.

(11) *Mangena v. Wright*, (1909) 2 K.B. 958.

(12) *Chalmers and Hood Phillips*, p. 103.

(13) *Davison v. Duncan*, (1857) 7 E. & B.

229.

(14) *R. v. Crewey*, (1813) 1 M. & S. 273.

(15) *Wason v. Walter*, (1868) 4 Q. B. 73.

(75).

be penalised for anything said within its four walls. This right has been established in England after long struggles, and now "speech and action in Parliament are unquestioned and free" (*Anson*).

*Scope of Cls. (1)-(2) : Freedom of Speech and Publication.*—Our constitution itself lays down the privileges of the Indian Parliament relating to two matters; *viz.*, freedom of speech and publication of speeches and proceedings, in clauses (1) and (2). Outside the scope of these two clauses, the privileges of members of the Indian Parliament shall be the same as those of members of the English House of Commons, until the Indian Parliament itself takes up legislation relating to privileges in whole or in part.

CL. (1) : *Freedom of Speech.*—As in England, there will be freedom of speech within the walls of each House in the sense of immunity of action for anything said therein. But this does not mean unrestricted license to speak anything that a member may like, regardless of the dignity of the House. The freedom of speech is therefore subject to the rules framed by the House under its powers to regulate its internal procedure. Article 118 (2) says that until new rules are framed by the Houses, the rules and orders in force immediately before the commencement of the Constitution shall have effect, subject to modifications by the Speaker or the Chairman. Rule 159 of such adapted Rules of Procedure<sup>16</sup> requires that the speech—

(i) must, in the opinion of the Speaker, be relevant to the matter before the House and must not be a tedious repetition of the arguments of that member or of any other members ;

(ii) must not reflect upon the conduct of 'persons in high authority' whose conduct can only be discussed under the Constitution on a substantive motion ;

(iii) must not use offensive expressions regarding the conduct or proceedings of the Parliament or any State Legislature ;

(iv) must not reflect on any determination of the House except on a motion for amending or rescinding it ;

(v) must not use the President's name for the purpose of influencing the debate ;

(vi) must not be made for the purpose of wilfully obstructing the business of the House ;

(vii) must not make a personal charge against any member ;

(viii) must not utter treasonable or defamatory words ;

(ix) must not refer to any matter of fact on which a judicial decision is pending.

Another limitation is imposed by the Constitution itself, *viz.*, that the conduct of any Judge of the Supreme Court or a High Court shall not be discussed except on a motion for his removal [Art. 121].

While Cl. (1) guarantees freedom of speech within the Houses, Cl. (2) gives absolute immunity from action in Courts against a member of Parliament for anything said or any vote given by him in Parliament or in any committee thereof. The freedom of speech in Parliament is thus free of the restrictions contained in Art. 19 (2), which are imposed upon the freedom of speech of an ordinary citizen. Hence, ■ action, civil or criminal, would lie against a member for defamation, obscenity or the like. In *England*, an opinion has been expressed by *Wade and Phillips*<sup>16-a</sup> that the freedom of speech in Parliament relates only to words spoken by

(16) Rules of Procedure and Conduct of Business in Parliament,—Gaz. of India, Extraordinary, 14-2-50.

(16-a) *Wade & Phillips, Constitutional Law*, p. 111.

a member in the performance of his duties as a member of Parliament and does not extend to casual conversation amongst members on *private* affairs. But the words "anything said by him in Parliament" in clause (2) of the present article seem to be wide enough to cover even conversation on private affairs. So, under our Constitution, a member who is aggrieved by insulting words used by another member in private conversation *within the House*, while he may have his remedy from the House itself, may not get redress in a Court of law. But the privilege does not extend to anything said outside the House or any committee thereof.<sup>17</sup>

The words 'anything said or any vote given' make it clear that there is no question of immunity for any *criminal* act committed within the walls of the House.

Cl. (2) : *Right to publish*.—The words 'by or under the authority of either House of Parliament' in Cl. (2) indicate that the provision in this respect is similar to that in England (see p. 316, *ante*), viz., that the constitutional immunity covers only publications by the House or under its authority and that publication by a member, privately, will come under the ordinary law.

Under the ordinary law, publication of parliamentary proceedings by any person (other than a person acting under authority of a House of Parliament), has a 'qualified privilege', so that no action would lie for defamation if the report is fair and accurate and is not actuated by malice (see p. 317, *ante*).

*Analagous Provision*.—The provisions of Cls. (1) and (2) of Art. 194, relating to the State Legislature, are exactly similar to those of the present Clauses.

### CL. (3)

#### OTHER CONSTITUTIONS

*England*.—Though the English Constitution is unwritten, the law of privileges is largely well-settled, partly by decisions and partly by standard treatises, the foremost amongst which should be mentioned May's Parliamentary Practice, and Halsbury's Laws of England. Now, some of the privileges of the House of Commons are enjoyed by the members *individually* and some belong to the House *collectively*.

#### (A) PRIVILEGES OF MEMBERS INDIVIDUALLY

(1) *Freedom from Arrest*.—A member of the House of Commons is immune from arrest in *civil proceedings*, during a session of Parliament and for a period of forty days before and forty days after the session. It is available even when Parliament is dissolved or prorogued.<sup>18</sup> The immunity does not extend to—

(a) Bankruptcy proceedings; (b) Proceedings for criminal contempt of Court; (c) Preventive detention under statutory powers, but not for words spoken in the House; (d) Criminal charges of treason, felony, seditious libel or breach of the peace<sup>19</sup>; (e) Refusal to give security for good behaviour<sup>19</sup>. More generally, the "privilege is not claimable for any *indictable* offence".<sup>20</sup>

By a number of statutes, the immunity of members of the House of Commons from arrest in civil cases has now become a 'legal right rather than a Parliamentary privilege' (*May*). The arrest is irregular *ab initio*, and the arrested member is entitled to be discharged immediately upon motion in the Court from which the writ was issued (*May*).

Not only is a member immune from arrest in civil actions,—a person who has already been arrested in execution of a civil process, is entitled to be released if he *becomes* a member of Parliament during the period of his imprisonment, unless, of course, he is disqualified by law to sit in Parliament or is undergoing

(17) Cf. *R. v. Abington*, (1794) 1 Esp. 226.

(18) *Gody v. Duncombe*, (1847) 1 Exch.

430.

(19) (1675) 9 C.J. 342.

(20) (1831) 86 C.J. 701. When a member commits a crime he is liable to be arrested like

any one else, and on conviction, the Court notifies that to Parliament and the House then considers the question of expelling him. Except in the case of these indictable offences, a member of the House cannot be imprisoned or restrained without order of the House.



imprisonment for an indictable offence or criminal contempt of Court.<sup>21</sup> The principle is that "service in parliament is paramount to all other claims."

Finally, it should be noted that under the existing law in England, it is possible to commence and prosecute actions in any Court against members of Parliament and also to coerce them by every legal process, save arrest. Further, on the expiry of the period of the privilege mentioned above, the member is liable to be re-arrested on a fresh writ.

(ii) *Exemption from service as jurors.*—Under the Juries Act, 1870, which codifies the ancient privilege, members of Parliament are exempted from serving on juries, without reference to the sitting of Parliament.

(iii) *Exemption from attendance as witnesses.*—Members of the House of Commons have the privilege of exemption from being summoned as witnesses. But this privilege is usually waived, by the House granting leave of absence to its members ■ summoned, in order to aid the administration of justice. But no member is entitled to give evidence in relation to any debates or proceedings in the House, except by its leave.<sup>22</sup>

#### (B) PRIVILEGES OF THE HOUSE COLLECTIVELY.

We have already discussed one of the collective privileges, viz., the right to publish proceedings. The others are :

(i) *The right to exclude strangers.*—The House has the right to secure privacy of debate by excluding strangers at any time, but this is not resorted to except for imperative reasons, e.g., in time of war. But strangers may be excluded at any time in the interest of order, by the Speaker, on his own initiative. Any member dissatisfied by the presence of strangers may also draw the Speaker's attention to that fact and in that case, the Speaker will immediately put the question to vote and order withdrawal of the strangers if the vote is carried.

In India, under the existing rules, the Speaker may, whenever he thinks fit, order the 'withdrawal of strangers from any part of the House' [r. 178 of the Rules of Procedure, 1950].

(ii) *Right to regulate its internal affairs, and to decide matters arising within its walls.*—Each House of Parliament has the right to control and regulate its proceedings and also to decide any matter arising within its walls, without interference from the Courts. What is said or done within the walls of Parliament cannot be inquired into in a Court of Law<sup>23</sup>. The House has thus the exclusive power of interpreting a statute, so far as the regulation of its own proceedings is concerned ; even if that interpretation be erroneous, the Courts have no power to interfere with it directly or indirectly<sup>23</sup>. Similarly, if a member ■ turned out of the House by the Sergeant-at-Arms under Orders of the House, he has no remedy from the Courts.<sup>24</sup>

It has even been held that the House of Commons has absolute authority to determine whether any statute should apply to any matter taking place within its walls. Thus, neither the members of ■ Committee of the House nor ■ officer of the House were liable to be summoned for selling liquor within the precincts of the House without licence ■ required by the Licensing Act. For,

"in the matters complained of, the House of Commons was acting collectively in a matter which ■ within the area of the internal affairs of the House, and, that being so, any tribunal might ■ feel, ■ the authorities, an invincible reluctance ■ interfere."<sup>24, 25</sup>

But there is no authority for holding that the House would also be competent to deal with crimes committed within the House. On the other hand, Stephen, J., in *Bradlaugh v. Gossett*,<sup>23</sup> expressed the opinion that "the line must be drawn some-

(21) *Phillips v. Wellesley* (1830) 1 Dowl. 9. 271.

(22) *Chubb v. Solomons* 3 Car. & Kir. 75.

(23) *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 594.

(24-25) *R. v. Graham-Campbell*, (1935) 1 K.B.

where and that the House could not try, say, a murder which took place under its roof." In *Eliot's case*<sup>1</sup>, the charge of assault was held combined with the charge of seditious speech and so the question was left open whether the House could exclusively deal with a simple assault committed within the House.

(iii) *The right to punish parliamentary misbehaviour.*—From the right to regulate its internal affairs follows the right of the House to maintain order and to reprimand disorderly conduct on the part of its members, which power is exercised by the House through the Speaker or through the Chairman of the Committee, when the House sits in a Committee.

The Speaker's power to *stop* speeches which are improper or irrelevant has already been noted. Besides, the House may *suspend* or *expel* a member for obstruction of the Speaker or objectionable behaviour. In such a case, the Speaker, or the Chairman may be asked to 'name' the offending member. The question of suspension is then put and if carried, the member may be suspended for a limited period, or expelled for the rest of the session.<sup>1-a</sup> Expulsion, however, would not debar a member to sit if he is re-elected<sup>2</sup> ■ happened in the case of John Wilkes in 1774.

Expulsion is resorted to when a member is guilty of such an offence as renders him unfit to sit in Parliament, *e.g.*, engaging in open rebellion, or having been guilty of (i) forgery, (ii) perjury, (iii) fraud, (iv) breach of trust, (v) misappropriation of public money, (vi) conspiracy to defraud, (vii) fraudulent conversion of property, (viii) corruption in the administration of justice or in public offices or in the execution of duties as a member of the House, (ix) contempts, libels and other offences committed against the House itself, (x) conduct unbecoming the character of an officer and a gentleman, fleeing from justice, without any conviction, may also be a ground for expulsion (*May*).

(iv) *The right to punish members and outsiders for breach of its privileges.*—This is by far the highest of the privileges of the Houses of Parliament. It can punish for contempt or breach of its privileges in the same way as Courts can punish for contempt of their judicial authority [p. 76, *ante*]. This is a judicial power and this power gives to Parliament the epithet—"High Court of Parliament." The power to punish for contempt is to be distinguished from the power to control or remove disorderly conduct or obstruction within the House, which has just been noticed. The power to commit for contempt is the judicial power to inflict ■ *penal sentence* for the offence and extends even against strangers who may not set their foot on the floor of the House.

The modes of punishment which may be imposed by the House of Commons are—admonition, reprimand and imprisonment. Fine has become obsolete.

(a) When an *admonition* is contemplated, the offender is asked to at-

(1) *Eliot's case*, (1629) 2 St. Tr. 294.

(1-a) Rr. 171-2 of the Rules of Procedure and Conduct of Business in ■ Provisional Parliament (Gazette of India, Extraordinary, 14-2-50) provide—

"171. The Speaker may direct any member whose conduct is in his opinion grossly disorderly to withdraw immediately from the House, and any member so ordered to withdraw shall do so forthwith and shall absent himself during the remainder of the day's meeting.

172. (1) The Speaker may, if he deems it necessary, name a member who disregards the authority of the Chair or abuses the rules of the House by persistently and wilfully obstruc-

ting the business thereof. (2) If a member is so named by the Speaker, he shall forthwith put the question that the member (naming him) be suspended from the service of the House during the remainder of the session: Provided that the House may, at any time, on a motion being made, resolve that such suspension be terminated. (3) A member suspended under this rule shall forthwith quit the precincts ■ of the House."

(2) Unless the cause of his expulsion by the House constitutes in itself a disqualification ■ sit and vote ■ the House, it is open to his constituency to re-elect him. [Halsbury, Hailsham Ed., Vol. XXIV, p. 355].

tend at the bar of the House and he is then rebuked by the Speaker (b) *Reprimand* is admonition after bringing the offender to the House by force. (c) In the case of imprisonment, *habeas corpus* does not lie if the warrant expresses the commitment to be for contempt of the House.<sup>3</sup> This shows the magnitude of the power possessed by the House. Of course, "if the warrant does not profess to commit for contempt but for *some other matter* appearing on the return which could by no reasonable intendment be considered as a contempt," the Court would be entitled to enquire into the legality of the commitment by issuing *habeas corpus*.<sup>4</sup>

Any punishment imposed by the House of Commons (whatever be its nature), would cease to have effect at the end of the session of the House, by prorogation ■ dissolution, and the prisoner may then get his release by *habeas corpus*, if not released already. [See p. 164, *ante*.]

As May observes,<sup>4</sup> it is not possible to exhaust the various classes of acts, which may fall within "contempt of Parliament."

"Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions ■ which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results may be treated ■ a contempt, even though there is no precedent of the offence."<sup>4</sup>

Anyway, it would be instructive to cite some instances,<sup>5-7</sup> which have been regarded by the House of Commons ■ breaches of its privileges and have been punished accordingly :

(a) Wilful obstruction of the business of the House or of officers of the House while discharging their duties, *e.g.*, resistance to the Sergeant-at-Arms, and his staff in execution of the orders of the House.<sup>8</sup> Tumultuous or riotous gathering before the House in order to offer threat or intimidation to members or to obstruct business.<sup>9</sup>

It is to be noted in this connection that all officers and subjects have the duty to aid and assist the Sergeant-at-Arms in his execution of the orders of the House.<sup>10</sup> The Sergeant is also entitled to break open the doors of ■ private dwelling house, with the help of the civil or military forces, during the daytime (but not during night), if he has reasonable cause to suspect that any person against whom the Speaker's warrant has been issued is keeping himself concealed in that house.<sup>11</sup> But though the Sergeant may force an entrance, he is not entitled to remain in the house, if he comes to know that the person to be arrested is away from home,<sup>12</sup> nor to remain in the house after the search is over.<sup>13</sup>

(b) Disobedience to any of the orders or rules which regulate the proceedings of the House, *e.g.*, publishing such reports of Parliamentary proceedings to which the House takes exception, such as wilful misrepresentation or *mala fide* reports; reporting the evidence taken before ■ select committee before it has reported to the House<sup>13</sup>; tampering with witnesses or obstructing them in respect of evidence to be given to the House or any Committee thereof; giving false evidence before the House or its Committees; refusing to answer questions or to produce documents in the witness's possession; refusing to withdraw from the House when ordered (*May*).

(c) Insults and libels on the character, conduct and proceedings of the House and its members. Assaulting, challenging, threatening or otherwise molesting members ■ account of their conduct in Parliament or while coming or going from

(3) *Case of Sheriff of Middlesex*, (1840) 11 A. & E. 273; 113 E.R. 419.

(4) *May*, Parliamentary Practice, 14th Ed., p. 108.

(4) *May*, Parliamentary Practice, 14th Ed., p. 108.

(5-7) See also Halsbury, Hailsham Ed., Vol. XXIV, p. 345.

(8) 9 C.J. 341; ■ C.J. 263.

(9) *Dennis' case*, (1699) C.J. 230.

(10) 8 C.J. 586.

(11) 65 C.J. 264; *Burdett v. Abbot*, (1811) 14 M. & W. 157; 4 Taunt. 401.

(12) *Howard v. Gossett*, (1842) Car. & M. 382.

(13) 92 C.J. 282.



the House ; but a mistaken arrest of a member by a Police officer would not be punished as contempt<sup>14</sup>. Again, libel upon a member, in order to constitute a breach of privilege must concern the character or conduct *qua* member of Parliament, and based on matters arising in the actual transaction of the business of the House. Aspersions upon the conduct of members as magistrates, counsel, employers or in any other capacity, are not fit subjects for complaint to the House (*May*).

Offering of bribe to a member is regarded as an insult not only to the member himself but to the House. On the other hand, acceptance of bribe by a member has been severely punished by the House. To guard against indirect influence, it has been provided that members cannot accept professional fees for services connected with any proceeding or measure in Parliament. Hence, a member is incapable of practising as counsel before the House or any Committee thereof. No member should bring forward or promote any proceeding or measure in which he may have acted in consideration of any pecuniary fee or reward. But this rule would not preclude a member to take part in a debate relating to a decided criminal case, on the ground that he was engaged as a lawyer in that case (*May*).

(d) Reflections on the character of the Speaker and accusations of partiality in the discharge of his duty<sup>15</sup>.

*Australia*.—Sec. 49 of the Australian Constitution Act provides—

“The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.”

*Burma*.—Sec. 68 (2) of the Burmese Constitution says—

“In other respects, the privileges of members of either Chamber of Parliament shall be such as may, from time to time, be defined by an Act of the Parliament and, until so defined, shall be such as were immediately before the commencement of this Constitution enjoyed by members of the Legislature of Burma.”

Government of India Act, 1935. S. 28 (2)-(3) of the Act of 1935 was—

“(2) In other respects, the privileges of members of the Chambers shall be such as may from time to time be defined by Act of the Federal Legislature and, until so defined, shall be such as were immediately before the establishment of the Federation enjoyed by members of the Indian Legislature.

(3) Nothing in any existing Indian Act, and, notwithstanding anything in the foregoing provisions of this section, nothing in this Act, shall be construed as conferring, or empowering the Federal Legislature to confer, in either Chamber or on both Chambers sitting together, or any committee or officer of the Legislature, the status of a court, or any punitive or disciplinary powers other than a power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner.”

#### INDIA

*Scope of Cl. (3) : Privileges in other respects*.—Cls. (1)-(2) deal only with two matters, *viz.*, freedom of speech and right of publication. Outside the scope of these two clauses, the privileges of members of the Indian Parliament shall be the same as those of members of the House of Commons, until the Indian Parliament itself takes up legislation relating to privileges in whole or in part. In other words, if the Indian Parliament enacts any provision relating to any particular privilege at any time, the English law will to that extent be superseded in its application under the Indian Constitution.

It is to be noted that the powers, privileges and immunities of our Parliament, its members and Committees shall be such as are enjoyed by the members of the House of ‘Commons . . . . . at the commencement of this Constitution.’ Hence, any subsequent change in the law of Parliament in England, either by case-

law or by statute, will not extend to India. So, we are to discuss the *existing* state of the privileges of the House of Commons. Again, though the English Constitution is unwritten, the law of privileges is largely well-settled, partly by precedents reported in the Journals of the House, partly by decisions and partly by standard, treatises, the foremost amongst which should be mentioned May's *Parliamentary Practice*,<sup>16</sup> and Halsbury's *Laws of England*<sup>17</sup>.

Under *our* Constitution, both the Houses of the Legislature will be on the same footing ■ regards privileges, and each of them shall have the privileges enjoyed by the House of Commons, in the same manner and to the same extent<sup>18</sup>.

The Legislature under the Government of India Act, 1935, suffered from ■ serious disability, *viz.*, that it had no power to commit for contempt [Sec. 28 (3)], just as colonial Legislatures do not possess this power.<sup>19</sup> But the Constitution, by adopting the privileges of the House of Commons, *in toto*, confers this power upon each House of the Union Parliament [Art. 105 (3)] as well as of the State Legislatures [Art. 194 (3)].

*Existing Law.*—It follows from Cl. (3) of Art. 105 that any provision of the existing law which provides a rule contrary to a privilege of the House of Commons shall be void, unless Parliament incorporates the provision in a fresh legislation enacted after the commencement of the Constitution. Thus, under the existing law, we have provision exempting members of Legislatures from arrest or detention in prison under civil process, in the Legislative Members Exemption Act, XXIII of 1925. Of course, the scope of arrest in civil process itself has been much narrowed down by the amendment of section 51 of the Civil Procedure Code in 1936. The above Act of 1925 exempts ■ member from arrest during the continuance of a meeting of the Chamber or Committee thereof of which he is ■ member or of ■ joint sitting of the Chambers, and during a period of 14 days before and after such meeting or sitting. Since the duration of immunity in the case of members of House of Commons is longer, *viz.*, 40 days before and after session, it is obvious that members of our Parliament will enjoy the 40 days' immunity notwithstanding the above Act. On the other hand, exemption from service as jurors is already provided by Sec. 320 (aa) of the Criminal Procedure Code, which will hold good under the Constitution.

*The Committee of Privileges.*—Rr. 181-196 of the Rules of Procedure and Conduct of Business in Parliament<sup>20</sup> provide that there shall be ■ Standing Committee of Privileges to determine whether there has been any breach of privilege of Parliament in any case referred to it and to report to the House with recommendations for action. A question of privilege may be referred to the Committee either by the Speaker *suo motu*, or upon a motion of a member being allowed by the House.

*Parliamentary Privilege and the Courts.*—so long ■ *our* Parliament does not enact any contrary rule, the position in this respect will be the same as in England. In England, after a series of conflicts between the House of Commons and the Courts, the following propositions have been established :

(i) Neither House of Parliament has the right to do anything in contravention of the Law, in the assertion of its privileges.<sup>21</sup>

(ii) Each House of Parliament is the sole judge of the question whether any of its privileges has been *infringed* ; but whether either House does in fact *possess a particular privilege* is ■ question for the Courts to decide. In other words,

(16) May, *Parliamentary Practice*, 13th Ed., pp. 50-148.

(17) Halsbury, Hailsham Ed., Vol. XXIV, pp. 346-359.

(18) In England, the privileges of the House of Lords are different from those of the Commons,

on some points.

(19) *Kielley v. Carson*, 4 Moo. P.C. 63.

(20) Not. No. 30-II 50-A, 9-3-50, *Gazette of India*, Extraordinary, d. 10-3-50, pp. 1055-7.

(21) *Ashby v. White*, (1704) 14 St. Tr. 695.

neither House possesses the power of declaring what are and what are not its privileges. The law of privilege is ■ part of the Common law of the land and must be known to the judges like any other part of the law.<sup>21-a</sup> The House of Commons cannot under cover of a declaration of its privileges create any new privilege.<sup>22</sup> That would be to give to the resolution of a single branch of the legislation the force of ■ legislative enactment. Neither House, therefore, is alone competent to declare the *extent* of its privileges and this is subject to judicial determination: From this follows anomalous results shall as that if the House commits for contempt of privilege which is not *specified*, it cannot be examined by the Courts, but if the nature of the contempt is *specified*, the Courts can enquire into it. Thus, the writ of Habeas Corpus would be available for the release of any one committed for contempt by the House, if the cause of committal stated in the return is insufficient. But if *no cause* for committal other than contempt of the House is shown in the return, the Court is powerless.<sup>23</sup> In short, though the House has exclusive authority to commit for contempts as is possessed by every Court of record, and the Courts cannot enquire into the grounds of a commitment for contempt by the House of Commons,<sup>23</sup> the Courts deny the right of the House to define its own privileges<sup>24</sup>.

(iii) Commitment by the House of Commons terminates with the session, so that upon prorogation or dissolution, the prisoner is entitled to his discharge upon a writ of *habeas corpus*.<sup>25</sup>

(iv) The Courts will not interfere with the interpretation of ■ statute by either House of Parliament so far as the regulation of its own proceedings within its own walls is concerned<sup>1</sup>.

*Analogous Provision.*—Art. 194 (3), relating to the Houses of the State Legislature is identical.

#### CL. (4)

*Extention to persons who are not members.*—This Clause extends the privileges contained in this Article to persons who have ■ right to speak in either House of Parliament, even though he may not be a member of that House (*vide* Art. 88., p. 299, *ante*).

**106.** Members of either House of Parliament shall be entitled to receive such salaries and allowances as may Salaries and allowances of members. from time to time be determined by Parliament by law, and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Dominion of India.

#### Legislative Procedure

**107.** (1) Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

Provisions as to introduction and passing of Bills.

(21-a) *Ashby v. White* (1704) 14 St. Tr 695.  
 (22) *Stockdale v. Hansard*, (1839) A. & E. 1.  
 (23) *Case of the Sheriff of Middlesex*, (1840) 11 A. & E. 273.  
 (24) *Case of Aylesbury Men*, (1705) 2 Raym

1105.  
 (25) Keith, *Constitutional Law*, p. 75.  
 (1) *Bradlaugh v. Gossett*, (1884) 12 Q.B.D. 271 (281); see also Halsbury, *Hailsham Ed.*, Vol. XXIV, p. 345.



(2) Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the People.

#### OTHER CONSTITUTIONS.

*England.*—Bills, other than money or appropriation bills may originate in either House. But by convention, bills affecting the privileges or proceedings of either House are usually introduced in the House concerned and bills dealing with the representation of the people originate in the House of Commons. The general rule is that a Bill is passed only if it is passed by both Houses either without amendments or with amendments which are agreed to by both Houses, after which the Bill is presented for the Royal assent. If a Bill is amended by the House to which it is sent by the originating House, the Bill is returned to the latter for consideration of the amendments and a compromise is then sought to be effected by communication between the Houses. If compromise fails, the Bill is lost.<sup>2</sup>

The above general statement must now be read subject to the Parliament Act, 1911, as amended in 1949 (*see* p. 277, *ante*), which has relegated the House of Lords to a subordinate position, and has deprived it of any power to throw out a measure which the Commons are determined to enact. It is to be noted that this Act applies only to Bills which are introduced in the House of Commons and then sent to the Lords. So, the foregoing general statement is still applicable to Bills originating in the House of Lords and sent to the Commons. Such Bills cannot be enacted unless the Commons agree to the Bill without amendment or with amendments which are acceptable to the Lords. The text of the Parliament Act, 1911, as amended in 1949, is as follows :

"Sec. 2.—(1) If any Public Bill (other than a Money Bill or a Bill containing any provisions which extend the maximum duration of Parliament beyond five years) is passed by the Commons in two successive sessions (whether of the same Parliament or not), and, having been sent to the Lords at least one month before the end of the session, is rejected by the Lords in each of these sessions, that Bill shall, on the second rejection by the Lords, unless the Commons direct to the contrary, be presented to the King for the Royal Assent and thereupon become an Act of Parliament without the consent of the Lords. But the foregoing provision shall not take effect unless one year has elapsed between the date of second reading in the first of the sessions in the Commons and the date of its passing the Commons in the second session."

*U. S. A.*—All bills for 'raising revenue' must originate in the House of Representatives (Art. I, Sec. 7 (1)). Save this exception as regards revenue legislation, the powers of the two Houses in legislation are absolutely equal, and a Bill is presented for the signature to the President only if the Bill has been passed by both Houses in the same form (Art. I, Sec. 7 (2)). (*See* further, under Art. 108, p. 330, below).

*Australia.*—*See* Sec. 53 of the Australian Constitution Act, reproduced under Art. 109, p. 334, *post*.

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(2) Keith, Constitutional law, p. 103 ; Chalmers and Hood Phillips, p. 125.

*Canada.*—Except in regard to money Bills (*see* under Art. 109, *post*, the two Houses have equal powers of legislation.

*South Africa.*—The position is similar.

*Eire.*—Art. 20 of the Constitution of 1937, lays down—

“(1) Every bill initiated in and passed by Dail Eireann shall be sent to Seanad Eireann and may, unless it be a money bill, be amended in Seanad Eireann and Dail Eireann shall consider any such amendments.

(2) 1° A bill other than a money bill may be initiated in Seanad Eireann, and if passed by Seanad Eireann, shall be introduced in Dail Eireann.

2° A bill initiated in Seanad Eireann if amended in Dail Eireann shall be considered a bill initiated in Dail Eireann.”

(3) A bill passed by either House and accepted by the other House shall be deemed to have been passed by both Houses.

*Ceylon.*—The relevant provisions of the Ceylon (Constitution) Order in Council, 1946, are—

“Sec. 31 (1).—A Bill, other than a Money Bill, may be introduced in the Senate.

Sec. 32. (1) A Bill shall not be deemed to have been passed by both Chambers unless it has been agreed to by both Chambers, either without amendment or with such amendments only as are agreed to by both Chambers.

(2) A Bill which has been passed by the Senate with any amendment which is subsequently rejected by the House of Representatives shall be deemed not to have been passed by the Senate.”

The provision in sec. 32 (2) is to be read with sec. 34.

*Burma.*—Secs. 98-100 of the Burmese Constitution provide—

“98. Every Bill initiated in and passed by the Chamber of Deputies shall be sent to the Chamber of Nationalities and may, unless it be a Money Bill, be amended in the Chamber of Nationalities and sent back to the Chamber of Deputies for its consideration.

99. Every Bill, other than a Money Bill, may be initiated in the Chamber of Nationalities and if passed by the Chamber, shall be sent to the Chamber of Deputies which may amend the Bill and sent it back to the Chamber of Nationalities for its consideration.

100. A Bill passed by one Chamber and accepted by the other Chamber shall be deemed to have been passed by both Chambers of Parliament.”

*Government of India Act, 1935.*—Art. 107 of the Constitution reproduces Sec. 30 of the Act of 1935, with nominal changes only.

#### INDIA.

*Cl. (1) : Introduction of other than financial bills.*—This clause provides that a Bill other than financial, may be introduced in either House of Parliament. The expression “and other than financial Bills,” makes a departure from the English practice. In *England*, only ‘Money Bills’ technically so called cannot be introduced in the House of Lords. Other Bills, including financial provisions are occasionally introduced in the House of Lords with the financial provisions in the bracket and the House passes the other clauses of the Bill as if the financial clauses were not there.

But under *our* Constitution, while Art. 109 (1) says that Money Bills shall not be introduced in the Council of States, Art. 117 (1) provides that a Bill or amendment making provision for any of the matters specified in Art. 110 shall also not be introduced in the Council of States. So, under *our* Constitution the House of the People shall have the sole right of initiation of any Bill including financial provisions, relating to any matter enumerated in Art. 117 (1).<sup>2-a</sup>

*Cl. (2) : Passing through both Houses.*—The procedure regarding Money Bills is separately dealt with in Art. 109.

(2-a) As Bills involving expenditure, under Art. 117 (3), *post*,

The present clause refers to Bills other than Money Bills<sup>3</sup>. When a Bill is passed in one House, and then sent to another,—the latter may take one of several courses :

(i) If the latter House agrees to the Bill without amendment, it will be deemed to have been passed by both Houses of Parliament and at once presented to the President for his assent (Art. 111).

(ii) It may reject the Bill altogether. In such a case, the provision of Art. 108 (1) (a) as to joint sitting may be applied by the President.

(iii) It may pass the Bill with amendments. The Bill will then be returned to the other House. If the House which originated the Bill accepts the amendments, the Bill will be presented to the President for his assent (Art. 111). If, however, the originating House cannot agree to the amendments, and no final agreement between the Houses is reached by means of negotiation, the President may apply the provision as to joint sitting [Art. 108 (1) (b)].

(iv) It may take no action on the Bill, *i.e.*, keep it lying on its table without returning it to the originating House. In such a case, if 6 months have elapsed since the date of its reception of the Bill, the President may summon a joint sitting [Art. 108 (1) (c)].

Thus, it appears that up to the stage of joint sitting, the two Houses of our Parliament shall have equal powers as regards Bills other than Money Bills. At the joint sitting, of course, the House of the People may gain a predominance owing to its numerical strength.

Cl. (3) : *Effect of Prorogation on pending bills.*—Under the *English* Constitution, not only pending questions and motions, but also all pending bills lapse on prorogation<sup>4</sup> (see p. 295, *ante*).

Under *our* Constitution, pending motions would lapse, but not pending Bills. A Bill is pending in Parliament since the time of its introduction, till it is finally passed by both Houses. Hence, on the termination of a session, Bills which have been introduced shall be carried over to the pending list of business of the next session.

Cls. (4)-(5) : *Effect of dissolution on pending Bills.*—Under the *English* system,<sup>5</sup> the effect of dissolution is the same as that of prorogation (see above). But *our* Constitution departs from the *English* practice and follows the Government of India Act, 1935, and provides as follows :—

(i) A Bill which originated in the Council of States and is still pending there (not having been passed by the House of the People) will not lapse at all on account of dissolution.

(ii) But a Bill which is pending in the Council after having been passed by the House of the People, will lapse. Similarly, a Bill which is pending in the House of the People, whether originating in that House, or sent to it by the Council of States, shall lapse on dissolution.

(iii) But in the cases under (ii) above, the Bill will not lapse if the President has, prior to the dissolution, notified his intention to summon a joint sitting of the two Houses [Art. 108 (1) (5)].

Another point of difference from the *English* system is that under the *English* rule Bills pending for the assent of the Crown lapse on dissolution<sup>5-a</sup> but Cl. (5)

(3) It should be carefully noted that under *our* Constitution, there is no distinction between public and private bills as in England. All Bills other than Money Bills have the same procedure, as provided in Arts. 107-8.

(4) Keith, *Constitutional Law*, p. 53; Halsbury, 1912 Ed., para. 1282. This is also the practice in the Dominions (Jennings, *Constitution of Ceylon*, p. 142).

(5) Keith, *Constitutional Law*, p. 53.  
(5-a) Halsbury, 1912, Ed., para. 1282.



of Art. 107 of our Constitution makes it clear that it is only Bills pending in the Houses that lapse and not Bills which have been passed by the Houses and are pending for the assent of the President.

*Analogous Provision.*—See Art. 196, for corresponding provisions relating to State Legislature.

**108.** (1) If after a Bill has been passed by one House and transmitted to the other House—  
 Joint sitting of both Houses in certain cases.

(a) the Bill is rejected by the other House ; or

(b) the Houses have finally disagreed as to the amendments to be made in the Bill ; or

(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it,

the President may, unless the Bill has lapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill :

Provided that nothing in this clause shall apply to a Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses :

Provided that at a joint sitting—

(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill ;

(b) if the bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other

amendments as are relevant to the matters with respect to which the Houses have not agreed ;

and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

#### OTHER CONSTITUTIONS

*England.*—See p. 279, *ante*.

*U.S.A.*—It has already been noted (p. 277, *ante*), that in the case of other than revenue legislation, the two Houses of the American Congress have equal powers, and no Bill which has not received assent of both Houses in the same form can become law. Further, there is no provision in the Constitution itself, for solving deadlocks or disagreements between the two Houses. The absence of constitutional provision has, however, led to the *practice* of conferences between the two Houses. When a Bill has passed either House, it is transmitted to the other. If the latter amends the Bill, it must return it to the former for reconsideration of the Bill and for adoption or rejection of the amendments. If the former is unable to accept the amendments, each House would appoint representatives on a joint conference committee which, meeting in secret, would try to compromise the difference as much as possible. The Conference committee has unlimited power over the Bill and may even re-write it, if necessary. The Committee would then report to the respective Houses and the Houses may then either accept the report of the committee in whole or reject it. If the report of the committee be rejected by either House, there would, of course, be an end of the Bill. According to *Bryce* <sup>6</sup>—

“In a contest the Senate usually, though not invariably, gets the better of the House. It is smaller, and therefore more easily keep its majority together, its members are more experienced ; and it has the great advantage of being permanent, whereas the House is a transient body.”

*Australia.*—Sec. 57 of the Australian Constitution Act provides for solution of a deadlock between the two Houses by ~~the~~ of a double dissolution followed by a joint sitting, if necessary. If the House of Representatives passes a Bill which the Senate rejects and again after an interval of 3 months passes the same Bill and it is again rejected by the Senate, the Governor-General may dissolve both the Houses simultaneously. If after the double dissolution, the two Houses do not agree ~~on~~ that Bill ~~is~~ passed by the House of Representatives, the Governor-General may convene a joint sitting of the Houses, and if the Bill is passed by an absolute majority of the members sitting together, it will be deemed to have been passed. There has been one instance of the application of this provision,—in 1914.

*South Africa.*—Sec. 63 of the South African Constitution Act provides—

“If the House of Assembly passes any bill and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, and if the House of Assembly in the ~~the~~ session again passes the bill with or without any amendments which have been made ~~by~~ agreed ~~by~~ by the Senate and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, the Governor-General may during that session convene a joint sitting of the members of the Senate and the House of Assembly. The members present at any such joint sitting may deliberate and shall vote together upon the bill as last proposed by the House of Assembly and upon amendments, if any, which have been made therein by one House of Parliament

(6) Bryce, *American Commonwealth*, Vol. I, p. 185.

and not agreed to by the other; and any such amendments which are affirmed by a majority of the total number of members of the Senate and House of Assembly present at such sitting shall be taken to have been carried, and if the bill with the amendments, if any, is affirmed by a majority of the members of the Senate and House of Assembly present at such sitting, it shall be taken to have been duly passed by both Houses of Parliament : Provided that, if the Senate shall reject or fail to pass any bill dealing with the appropriation of revenue or moneys for the public service, such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such bill."

*Eire.*—Arts. 23-24 of the Constitution of Eire, 1937, contain provisions similar in principle to those of the Parliament Act, 1911 (of England). The substance of these provisions is that if a Bill other than a Money Bill is not returned to the *Dail* in such form as the *Dail* approves within 90 days after being sent to the *Seanad Eireann* (i.e., the Senate), the Bill will be deemed to have been passed by both Houses if the *Dail* passes a resolution to that effect within 180 days thereafter. But if the Prime Minister certifies that a Bill, other than a constitutional amendment, is designed to meet some public emergency,—the President may, after consulting the Council of State, abridge the above period of 90 and 180 days; but a law so passed shall remain in force only for 90 days from the date of its enactment or for such longer time as both Houses may agree upon.

But the provision in Art. 27 of the Constitution of Eire is novel. It says that if a Bill is passed over the head of the Senate by the *Dail*, under Art. 23 (above), the President may, at the request of a majority of Senators and a third of the *Dail*, decline his assent to the Bill on the ground that it is of such national importance that the will of the people ought to be ascertained. Thereafter the Bill shall drop, unless within 18 months of the President's decision, the *Dail* reaffirms the Bill after a general election, or the Bill is approved by a referendum, held under Art. 47 (2).

*Japan.*—Art. LIX of the Japanese Constitution says—

"A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.

A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.

The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, as provided for by law.

Failure by the 'House of Councillors' to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the House of Representatives to constitute a rejection."

*Burma.*—Sec. 109 of the Burmese Constitution is substantially the same as our Art. 108, except that only sub-cl. (c) of Cl. (1) is absent from the Burmese section.

*Government of India Act, 1935.*—The Act of 1935 prescribed joint sitting to resolve disagreements between the two Houses, but the summoning of the joint sitting was to be done by the Governor-General 'acting in his discretion.'

#### INDIA

ART. 108 : *Removal of deadlock between the two Houses by joint sitting.*—If we compare the provisions of this article, with those of Art. 197, relating to the State Legislature, it will be obvious, that while the English precedent of giving predominance to the lower House has been given in case of difference between the two Houses of the State Legislature, the Australian device of joint sitting has been prescribed for similar difference in the Union Parliament. The reason for this difference in treatment is that the second Chamber in the Union Parliament, viz., the Council of States will represent the federal principle,<sup>7</sup> and that its composition will also be different from the second Chamber of the State Legislatures. The Council of



States will also differ from the English House of Lords, inasmuch as it will largely be an elected body worthy of not much less respect than the House of the People.

CL. (1) : *When the sitting would take place.*—Under cl. (1) there is no time limit as to when the sitting would take place. It may take place at *any* time subsequent to the notification, ■ the President may direct.

Under Sec. 31 (2) of the Government of India Act, 1935, the date of sitting was limited by two conditions—(a) it was to be in the next session subsequent to the notification ; (b) it was to be after the expiration of 6 months from the date of the notification.

Neither condition restricts the President's power under the present clause.

CL. (4) : *Procedure at the joint sitting.*—Our Constitution differs from the *Australian* Constitution in not requiring an absolute majority of the total number of members of the two Houses (Sec. 57, para. 3) for passage of the amendments at the joint sitting. Under *our* Constitution ■ simple majority of the total number of members present and voting at the joint sitting will pass the Bill with such amendments as are agreed to by such majority. This will obviously give the House of the People the upper hand, inasmuch as its membership is double that of the Council of States. The *Proviso* prevents the introduction of new amendments at the joint sitting so as to cause further delay in the passage of the Bill. The Speaker of the House of the People shall preside at the joint sitting [Art. 118 (4) ].

CL. (5) : *Dissolution cannot prevent joint sitting.*—This clause is complementary to the provision in Cl. (5) of Art. 107, *ante*. When the President notifies his intention to summon a joint sitting under Cl. (1) of Art. 108, a subsequent dissolution will not cause the Bill to lapse nor to stand in the way of the joint sitting.

Special procedure in respect of Money Bills.

**109.** (1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept *any* of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without *any* of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen

days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

#### OTHER CONSTITUTIONS

*England.*—The rule that Money Bills may originate in the House of Commons is not sanctioned by any statute but is the result of constitutional struggle between the two Houses culminating in the resolution of the Commons in 1678<sup>8</sup>, that all aids and supplies are the sole gift of the Commons. But the Lords could still freely amend or reject Money Bills passed by the House of Commons. This has been put a stop to by the Parliament Act, 1911, under which the Lords can neither amend nor reject a Money Bill; they can at most prevent a Money Bill being passed for a period of one month. Sec. 1 (1) of this Act says—

“If a Money Bill, having been framed by the Commons and sent to the Lords at least one month before the end of the session, is not passed by the Lords without amendment within one month after it has been sent up, the Bill, unless the Commons direct to the contrary, shall be presented to the King and become a statute on receipt of the Royal Assent *without the consent of the Lords.*”

*U. S. A.*—Art. I, Sec. 7 (1) of the Constitution says—

“All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.”

Thus, excepting the power of initiation, the Senate has equal powers over revenue bills. There is no difference as regards appropriation bills.

*Canada.*—Sec. 53 of the Br. North America Act says—

“Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.”

So Money Bills may originate only in the House of Commons (lower House), but the Senate can reject or even amend them<sup>9</sup>.

*Australia.*—The Senate may neither originate nor amend Money Bills. It may only suggest amendments.

S. 53 of the Constitution Act provides—

“Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.”

*South Africa.*—Sec. 60 of the South African Constitution Act provides—

“(1) Bills appropriating revenue or moneys or imposing taxation shall originate only in the House of Assembly. But a bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties.

(2) The Senate may not amend any bills so far as they impose taxation or appropriate revenue or moneys for the services of the Government.

(3) The Senate may not amend any bill as to increase any proposed charges or burden on the people.”

(8) (1678) 9 C.J. 235, 509.

(9) Keith, Constitutional Law, 1939, p. 501.

*Eire.*—Art. 21 of the Constitution of 1937 provides—

■ (1) <sup>10</sup> Money Bills shall be initiated in Dail Eireann only.

<sup>20</sup> Every Money Bill passed by Dail Eireann shall be sent to Seanad Eireann for its recommendations.

(2) <sup>10</sup> Every Money Bill sent to Seanad Eireann for its recommendations shall, at the expiration of a period not longer than 21 days after it shall have been sent to Seanad Eireann, be returned to Dail Eireann, which may accept or reject all or any of the recommendations of Seanad Eireann.

<sup>20</sup> If such Money Bill is not returned by Seanad Eireann to Dail Eireann within such 21 days ■ is returned within such 21 days with recommendations which Dail Eireann does not accept, it shall be deemed to have been passed by both Houses at the expiration of the said 21 days."

*Burma.*—The provisions of Secs. 103-5 of the Burmese Constitution are similar to those of Eire, quoted above.

*Government of India Act, 1935.*—See Sec. 37, reproduced under Art. 110, below.

### INDIA

ART. 109 : *Procedure regarding Money Bills.*—While Arts. 107-8 deal with the procedure in the two Houses ■ regards Bills other than Money Bills, Arts. 109-110 lay down the procedure for Money Bills. A Money Bill is to originate only in the lower House, following the procedure throughout the Parliamentary systems. Our Council of States shall also have no power to reject or amend a Money Bill. It shall only have the power to *suggest* recommendations, which may or may not be accepted by the House of the People. This idea of suggesting recommendations is taken from the Constitutions of Australia and Eire. The English House of Lords has no such power of suggesting amendments, but it may interpose a delay of one month. But the power of our Council of States to interpose delay is shorter,—it is fourteen days only [Cl. (5)]. If it fails to return the Bill to the House of the People within 14 days of its receipt of the Bill, the Bill will be deemed to have been passed by both Houses, at the expiration of that period. This is obviously taken from the Parliament Act, 1911, substituting even a shorter period.

So, the power and control of the House of the People over Money Bills shall be absolute, though it has been given the opportunity of having the views of the other Chamber.

**110.** (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely :—

Definition of "Money Bills."

(a) the imposition, abolition, remission, alteration or regulation of any tax ;

(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India ;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund ;

(d) the appropriation of moneys out of the Consolidated Fund of India ;



(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure ;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State ; or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

#### CLS. (1)-(2)

#### OTHER CONSTITUTIONS

*England.*—A Money Bill is defined in Sec. 1 (2) of the Parliament Act, 1911, as follows :

“ A Money Bill means a public Bill which, in the opinion of the Speaker of the House of Commons, contains only provisions dealing with the following topics :—

- imposition, repeal, remission, alteration, or regulation of taxation ;
- imposition for any financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation of such charges ;
- supply ;
- appropriation, receipt, custody, issue or audit of accounts of public money ;
- raising or guarantee of any loan or the repayment thereof ; or
- subordinate matters incidental to the above topics or any of them.

Bills relating to rates or loans raised by local authorities are not to be regarded as Money Bills.”

*Eire.*—Art. 22 (1) of the Constitution of 1937 says—

“ (1) 1° A Money Bill means a bill which contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation ; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges ; supply ; the appropriation, receipt, custody, issue or audit of accounts of public money ; the raising or guarantee of any loan or the repayment thereof ; matters subordinate and incidental to these matters or any of them.

2° In this definition the expressions ‘ taxation ’, ‘ public money ’ and ‘ loan ’ respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.”

*Burma.*—Sec. 106 of the Burmese Constitution reproduces the above article of the Constitution of Eire.

*Government of India Act, 1935.*—Sec. 37 of the Government of India Act, 1935, provided—

“(1) A Bill or amendment making provision—

(a) for imposing or increasing any tax ; or

(b) for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Federal Government ; or

(c) for declaring any expenditure to be expenditure charged on the revenues of the Federation, or for increasing the amount of any such expenditure,

shall not be introduced or moved except on the recommendation of the Governor-General.

(2) A Bill or amendment shall not be deemed to make provision for any of the purposes aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered.”

### INDIA

*Cls. (1)-(2) : Definition of Money Bill.*—These two Clauses adopt the definition given in the Parliament Act, 1911, and in Sec. 37 of the Government of India Act, 1935, with some verbal changes.

‘Only’.—This word provides that a Bill shall be deemed to be a Money Bill if it contains any of the matters contained in Cls. (a)-(g), *without any other extraneous provision*. This is to safeguard the upper House against an abuse of this provision by the lower House, by treating ordinary bills as Money Bills,—adding to them some financial clause<sup>10</sup>. Bills which do not contain financial provisions only, but include general as well as financial provisions, are dealt with by Art. 117, *post*.

*Cl. (a).*—‘Tax’ in this clause excludes taxes imposed by any local authority or body for local purposes. This is made clear by Cl. (2), which corresponds to the 2nd paragraph of sec. 1 (2) of the (English) Parliament Act, 1911. Art. 117 (1), *Proviso* is to be read with this clause. Though a Bill for reduction or abolition of a tax will be a Money Bill, it would not require the President’s recommendation for its introduction.

*Cl. (b).*—As to ‘borrowing’ or ‘giving’ guarantee by the Government of India, *see* Arts. 292 and 293 (2), *post*.

*Cl. (c).*—As to the Consolidated and Contingency Funds, *see* Arts. 266-7, *post*.

*Cl. (d).*—*See* Arts. 114, 266 (3), *post*.

*Cl. (e).*—Under Art. 112 (3) (g), additional items of expenditure may be charged on the Consolidated Fund by legislation. Such Bills will come under the present clause. So also bills for increasing any amount already charged.

*Cl. (f).*—*See* Art. 266 (1)-(2) ; 283 ; 149-151, *post*.

### CLS. (3)-(4)

### OTHER CONSTITUTIONS

*England.*—The relevant provisions of Sec. 1 (3) of the Parliament Act, 1911, are—

(10) *See* the meaning of this word in sec. 1 of the Parliament Act, 1911 ; in secs 53-54 of the Australian Constitution Act ; and the observations in *Cadbury, Ltd. v. Fed. Commissioners* (1944) 70 C.L.R. 362 (373).

"There shall be endorsed on a Money Bill when sent up to the Lords, and when presented to the King for assent, a certificate signed by the Speaker that the Bill is a Money Bill. Before so certifying the Speaker is to consult, if practicable, two members to be appointed from the Chairman's panel at the beginning of the session by the Committee of Selection."

Sec. 3 of the Act says—

"The Speaker's certificate shall be conclusive for all purposes, and shall not be questioned in any Court of law."

*Eire.*—Sec. 22 (2) of the Constitution of Eire introduces a novel provision by making over the question, whether a bill is a money Bill or not, to a Committee of both Houses. Subject to this, the Chairman of the *Dail* has final authority.

*Burma.*—The above provisions of the Constitution of Eire have been adopted in Sec. 107 of the Burmese Constitution.

### INDIA

*Cls. (3)-(4) : Speaker's decision and Certificate :* Cl. (3) follows sec. 3 of the Parliament Act, 1911, but is better drafted in so far as it makes it clear that not only the certificate of the Speaker to be ultimately endorsed on the Bill, but the initial decision of the Speaker is final.

Sec. 1 (3) of the Parliament Act, 1911, further provides that in coming to this decision, the Speaker shall "consult, if practicable, two members to be appointed from the Chairman's Panel at the beginning of the session by the Committee of Selection." There is no provision corresponding to this in the Indian Constitution. So, the Speaker, in *India*, will make the decision on his sole authority and discretion.

Now as to the Speaker's discretion,—it is to be noted that in *England*, the Speaker's decision has not always been as might have been expected, in view of the statutory definition of Money Bills in the Parliament Act. Thus,—

"In practice, there have been Bills which would at first sight appear to be 'financial', but which have not been certified by the Speaker as Money Bills; even the annual Finance Bill is sometimes not so certified. The converse is equally true, and Bills which do not appear to be financial have been certified as Money Bills . . . . ."<sup>11</sup>

Though the Indian Speaker's decision is equally unquestionable, it would appear from the use of the words 'shall be deemed' in Cl. (i) of this article that the intention of the framers of the Constitution is that if a bill plainly comes within the definition contained in that sub-section,—e.g., the annual Finance Bill, the Speaker should not, constitutionally, refuse to endorse his certificate upon it.

**111.** When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom :

Assent to Bills.

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.



## OTHER CONSTITUTIONS

*England.*—The King being an essential part of the Legislature, royal assent is necessary for the enactment of ■ law, even though it has passed through both Houses. In modern times, however, royal assent is given ■ a matter of course, to ■ Bill that has been passed by both Houses or by the House of Commons under the provisions of the Parliament Act, 1911 (as amended in 1949).

In law, the Crown still possesses the prerogative of absolute veto.<sup>12</sup> But this veto power of the Crown has become obsolete since 1707, owing to the development of the Cabinet system, under which all public legislation is initiated and conducted in the Legislature by the Cabinet. Judged by practice and usage, thus, there is at present no Executive power of veto in England<sup>13</sup>.

*U. S. A.*—Sec. 7 (2) of Art. I of the Constitution of the United States says—

“ Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes ■ law, be presented to the President of the United States if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter its objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law ”.

In the United States, a bill which is presented to the President for his approval, may meet with one of four consequences : *First*, if the President approves the bill, he signs it, and then it becomes law. *Second*, if the President does not approve the bill, he may with 10 days *return* it without his signature to that branch of the Congress in which it originated, with a statement of his objections. Each House of Congress then reconsiders it and if it is adopted in each House by a two-thirds vote of the *members present*<sup>14</sup>, the bill becomes a law, notwithstanding the absence of the President's signature. The qualified veto is then overridden. If the bill fails to obtain the two-thirds majority in each House, the veto stands, and it fails to become law. *Third*, the President may neither sign the bill nor return it to the House in which it originated, but may let it lie on his desk until the ten-day limit has expired. In that event the bill becomes ■ law without his signature. But (*fourth*), if in the last-mentioned case, Congress has meanwhile adjourned before the expiry of the ten-day limit, the bill fails to become ■ law. This method of preventing ■ bill to go on the statute-book is known as the ‘pocket veto’, for by simply withholding bills presented to the President during the last few days of the session of Congress, the President can prevent the bills to become law<sup>15</sup>.

The qualified veto is in effect an appeal to the Legislature itself which is asked to revise its own judgment. Especially is this true of the United States, where the Executive ■ obliged to state the reasons for his objections<sup>16</sup>. As ■ matter of fact though the President's veto may be overridden by the Congress by ■ two-thirds

(12) On the subject of ‘veto,’ generally, see my article on ‘the President of India’ in (1949) F.L.J. pp. 120-4 (Jour.).

(13) Thus, Chalmers & Hood Phillips (p. 52) opine—“the exercise of this prerogative to-day would be *unconstitutional*.” Keith (Constitutional Law, p. 106), also observes,—

“If the Crown is opposed to ■ measure at the present day, it would either attempt to dissuade the Ministry from introducing it, ■ ask it to make the issue clear by an appeal to the nation by dissolution; if the nation show itself in

favour of the measure the Crown must yield. If the Ministry refused to dissolve and determined to demand assent to ■ bill under the Parliament Act, 1911, the King would have to yield or to dismiss them.”

(14) *Missouri Ry. Co. v. Kansas*, (1919) 248 U.S. 276.

(15) Munro, Constitution of the United States, pp. 28-9.

(16) Garner Introduction ■ Political Science, ■. 566.

majority of the members who constitute a quorum in either House, it is not very often that Congress has so overridden the President's veto<sup>17</sup>.

It is to be noted in this connection, that this power of veto of the American President is a 'total' veto, i.e., he must either reject or accept the Bill as a whole. He cannot veto any particular provisions.

*Eire.*—Art. 13 (3) of the Constitution of Eire, 1937, says—

"(3) 1° Every bill passed or deemed to have been passed by both Houses of the Oireachtas shall require the signature of the President for its enactment into law. 2° The President shall promulgate every law made by the Oireachtas."

Art. 25, on the other hand, provides—

"(1) As soon as any bill, other than a bill expressed to be a bill containing a proposal for the amendment of this constitution, shall have been passed or deemed to have been passed by both Houses of the Oireachtas, the Taoiseach shall present it to the President for his signature and for promulgation by him as a law in accordance with the provisions of this article.

(2) 1° Save as otherwise provided by this constitution, every bill so presented to the President for his signature and for promulgation by him as a law shall be signed by the President not earlier than 5 and not later than 7 days after the date on which the bill shall have been presented to him.

2° At the request of the Government, with the prior concurrence of Seanad Eireann, the President may sign any bill the subject of such request on a date which is earlier than 5 days after such date as aforesaid.

(3) Every bill the time for the consideration of which by Seanad Eireann shall have been abridged under article 24 of this constitution shall be signed by the President on the day on which such bill is presented to him for signature and promulgation as a law."

*Burma.*—Art. 58 of the Burmese Constitution says—

"(1) Every Bill, passed or deemed to have been passed by both Chambers of Parliament, shall require the signature of the President for its enactment into law.

(2) The President shall promulgate every law enacted by the Parliament."

Sec. 111, on the other hand, provides—

"(1) As soon as any Bill shall have been passed by both Chambers of Parliament, it shall be presented to the President for his signature and promulgation as an Act in accordance with the provisions of this section.

(2) Save as otherwise provided by this Constitution, every Bill so presented to the President shall be signed by him not later than seven days after the date of presentation.

(3) If any Bill is not signed by the President within seven days after the date of presentation, the same shall become an Act in the like manner as if he had signed it on the last of the said seven days."

The Burmese President, thus, has no power of veto.

*Government of India Act, 1935.*—See Sec. 32 of that Act.

## INDIA

*Art. 111: President's assent to Bills.*—A Bill will not be an Act of the Indian Parliament unless and until it receives the assent of the President. When a Bill is presented to the President, after its passage in both Houses of Parliament, the President shall be entitled to take any of the following three steps: (i) He may declare his assent to the Bill; or (ii) He may declare that he withholds his assent to the Bill; or (iii) He may, in the case of other than Money Bills, return the Bill for re-consideration of the Houses, with or without a message suggesting amendments.

In case (iii), if the Bill is passed again by both Houses of Parliament with or without amendment and again presented to the President, it would be obligatory upon him to declare his assent to it.

*Nature of the President's Veto Power.*—The veto power of our President is a combination of the absolute, suspensive and pocket vetos. Thus,—

(17) Up to 1941, the President has vetoed 1663 Bills, of which only 11 per cent. have been

eventually passed by the overriding vote of Congress.

(i) As in England and under the Government of India Act, 1935, there would be an end to a Bill if the President declares that he withholds his assent from it. Though such refusal has become obsolete in England since the growth of the Cabinet system under which it is the Cabinet itself which ■ to initiate the legislation ■ well as to advise ■ veto,—such a provision was made in the Government of India Act, 1935. But notwithstanding the introduction of full Ministerial responsibility, the same provision has been incorporated in the new Constitution. The veto power shall be exercised on ministerial advice.

(ii) If, however, instead of refusing his assent outright, the President remits the Bill or any portion of it for re-consideration, a re-passage of the Bill by an ordinary majority would compel the President to give his assent to the Bill. It differs from the qualified veto in the United States in so far as no extraordinary majority is required to effect the enactment of a returned bill. The effect of ■ return by the Indian President is thus merely 'suspensive'.

(b) Another point to be noted is that the Constitution does not prescribe any time-limit within which the President is to declare his assent or refusal, or to return the Bill. The article simply says that if the President wants to return the Bill, he shall do it 'as soon as possible' after the Bill is presented to him. By reason of this absence of a time-limit, it seems that the Indian President would be able to exercise something like ■ 'pocket veto', by simply keeping the Bill on his desk for an indefinite time.

*The Proviso : Return for reconsideration.*—While the power of veto possessed by the President is total and there is no provision for vetoing any particular portion of ■ Bill, the President's power of return includes the power to return for reconsideration of any particular provision of the Bill. It is obvious that when a specific provision is thus remitted for reconsideration, the Legislature shall have no power to reconsider the other provisions of the Bill which have not been remitted.

*Date of passing of an Act.*—As in England, the date of passing of an Act is the date when the Royal assent is given to a Bill<sup>18</sup>, so under our Constitution, a Bill becomes an Act of the Union Parliament on the date when it receives the President's assent<sup>19</sup>. The date is material since the validity of a legislation will depend upon the powers of the Legislature and the other circumstances existing on that date<sup>20</sup>.

*Analogous Provision.*—Cf. Art. 200 relating to Governor's power of veto over State Bills.

## PROCEDURE IN FINANCIAL MATTERS

### *Some General Principles of Financial Procedure in England and India.*

The financial procedure in England is entirely ■ up ■ Sir Erskine May's<sup>20</sup> famous aphorism—

"The Crown demands money, the Commons grant it, and the Lords assent to it."

The following principles may be deduced from it :

(a) The Crown, i.e., the Executive cannot raise money by taxation, borrowing or otherwise, or spend money, without the authority of Parliament. The power to grant money includes the raising of money by ■ tax or loan ■ well as the authorising of expenditure.

[This principle has been embodied in Art. 265 of our Constitution.]

(18) *Ex parte Rashleigh*, (1875) 2 Ch.D. 9 (12).

(19) *Cf. Umayal v. Lakshmi*, A.J.R. 1945 F.C. 25 (40).

(20) May, *Parliamentary Practice*, 13th Ed., p. 446.



(b) Since the Crown has to act through Ministers, none but a Minister can make the demand for a grant, i.e., either to raise money or to authorise its expenditure. A private member may move to reduce ■ particular tax or a vote, but not to *increase* it. Accordingly, any proposal for the levy of a new tax or for the increase of an existing tax must come from the Government. This rule, however, applies to general taxes only, and not to taxes for local purposes, which are popularly known as 'rates.'

[This principle underlies Art. 117 (1) of *our* Constitution],

Similarly, in the matter of *expenditure*, though a private member of the House of Commons may move a resolution that public money may be profitably expended upon purposes specified in the resolution, none but a member of the Government can move that ■ specific sum of money be granted for ■ specific purpose.

"The Crown, acting with the advice of its responsible ministers, being the executive power, is charged with the management of all the revenues of the country, and with all payments for the public service. The Crown, therefore, in the first instance, makes known to the Commons the pecuniary necessities of the Government; and the Commons grant such aids and supplies as are required to satisfy these demands, and provide by taxes, and by the appropriation of other sources of the public income, the *ways and means* to meet the *supplies* which are granted to them . . . . . But the Commons do not vote money unless it be required by the Crown; nor impose or augment taxes unless the taxation be necessary for the public service, as declared by the Crown, through its constitutional advisers."<sup>20-2</sup>

In other words, all financial proposal must proceed from the Government and the Commons have no power to *increase* the financial proposals of the Government.

[This principle is embodied in Art. 113 (3) of *our* Constitution.]

(c) From the words 'the Commons grant it, and the Lords *assent* to the grant', it is clear that the House of Lords (the Upper House) has a mere subsidiary function in the matter of financial legislation. Hence Money Bills can originate only in the House of Commons. Further, since the Parliament Act of 1911, ■ Money Bill can neither be amended nor rejected by the House of Lords. It can at most cause a delay of one month in the passing of a Money Bill [see *ante*]. As May<sup>21-22</sup> observes this superiority in the matter of financial legislation has given to the House of Commons a position of absolute supremacy in the English political system—

"The most important power vested in any branch of the Legislature is the right of imposing taxes upon the people and of voting money for the exigencies of the public service. The exercise of this right by the Commons is practically a law for the annual meeting of Parliament for redress of grievances; and it may also be said to give to the Commons the *chief authority* in the State. In all countries the *public purpose* is one of the main instruments of political power; but with the complicated relations of finance and public credit in England, the power of giving or withholding supplies at pleasure, is one of *absolute supremacy*."

[This principle underlies Art. 109 of *our* Constitution].

STAGES IN FINANCIAL LEGISLATION IN ENGLAND AND INDIA.—The procedure under the Constitution of India shall differ from the English on the following points:

(i) In *England*, the Estimates and the Annual Financial Statement, (i.e., the Budget), are presented only to the House of Commons. They are not submitted to the House of Lords and the Lords have no concern with them.

But under *our* Constitution [Art. 112 (1)], as under the Government of India Act, 1935 [sec. 33 (1)], the annual financial statement shall be laid before *both* Houses of Parliament and the estimates shall be open to discussion in either House of Parliament,—but the demands for grants shall be submitted only to the House of the People [Art. 113 (2)].

(ii) In *England*, the presentation of the Estimates precedes the 'introduction of the Budget', or the Budget Speech by the Chancellor of the Exchequer.

In *India*, the procedure of financial legislation is to start with the presentation of the Annual financial statement, and then the consideration of the estimates shall take place.

(iii) Another most striking feature of the English procedure is the complicated system of work in the House of Commons and Committees of the Whole House in the matter of financial legislation. The House of Commons does not consider a financial proposal until it has been considered in one of the two Committees of the whole House,<sup>23</sup>—the Committee of Supply and the Committee of Ways and Means.

The above Committee system of financial procedure has some defects, which have been pointed out by critics of the English system as follows :

(a) There is an unnecessary waste of time and duplication of business in the Committees of the Whole House and in the House. The financial proposals practically come before the members five times and each time there is scope for debate :

(i) in the Committee of Supply ; (ii) in the House on Report from that Committee ; (iii) in the Committee of Ways and Means ; (iv) in the House on Report from that Committee ; (v) in the House during second reading of the Finance and Appropriation Acts.

(b) Secondly, though there are so many opportunities, the complicated procedure in fact involves shortage of time for effective discussion. Thus, by a Standing Order [No. 15 (2)], not more than 20 days shall be allotted for the consideration of the annual estimates in the Committee of Supply. Since about 100 to 200 votes or demands for supply have to be dealt with within this period of 20 days, the Committee has to resort to the ' guillotine ' in order to close the debate on Supply within the allotted period of time. As a result of this, many of the demands cannot be discussed at all and have to be passed *en bloc* on the last of the above 20 days, or on the last day that the Committee sits, without any discussion at all.

The *Government of India Act*, 1935, departed from the English system of discussing the financial proposals in the Committees of the Whole House, and, instead, under this Act, all the financial proposals contained in the Budget were discussed in the House itself,—thus avoiding the unnecessary ' Report stage '.

The *Constitution of India* adopts the system under the *Government of India Act*, 1935, and rejects the Committee system, which obtains not only in England, but also in the Dominions, e.g., in Canada<sup>24</sup>. So, under the *Constitution of India*, the proposals for taxes and other impositions as well as the demands for grants will be considered by the House of the People sitting as the House [Arts. 113 (2) ; 117].

But while the *Government of India Act* further shortened the procedure by obviating the necessity of an Appropriation Act, the latter has been introduced in the *Constitution* [Art. 114].

To sum up : the procedure in the *Indian Parliament* will involve the following stages :

(a) *Presentation of the Annual Financial Statement*.—After the estimates have been prepared, the President shall cause the annual financial statement for the ensuing year to be laid before both Houses of Parliament. It is not provided by the *Constitution*, who will present the Statement in the two Houses respectively. Under the *Government of India Act*, 1935, the Finance Minister personally presented the Budget to the Lower House. This practice has been followed also after commencement of the *Constitution*, in the Provisional Parliament<sup>24-a</sup>.

(23) Standing Order 64.

(24) Findlay Shirras, *Public Finance* (1936), Vol. II. p. 990.

(24-a) Rules 131-2 of the Rules of Procedure in Parliament, 1950.

The Annual financial Statement shall contain the estimated receipts ■ well as the expenditure of the Government of the Union. The estimates of expenditure, again, shall—

(a) distinguish expenditure on revenue account from other expenditure as under the Act of 1935 [Sec. 33 (2)] :

(b) distinguish between items of expenditure which are 'charged upon the Consolidated Fund' and items which are not so charged.

(b) *The general discussion in both Houses.*—As under the Act of 1935, the presentation of the Budget will be followed by a general discussion of the Statement as a whole, in either House. It is to be noted that no item of expenditure will be exempted from this general discussion (and herein the Constitution is improved than the Act of 1935, from the democratic point of view). So, at this stage, each House of Parliament shall be entitled to discuss each of the items of expenditure, including even those that are 'charged' and are thus excluded from *vote*. But this discussion is to be a general discussion, relating to policy,—involving ■ review and criticism of the administration of the Departments concerned, and a ventilation of the grievances of the people.

One important point to be noted in this connection is that under the *Act of 1935*, it was the Governor-General, who, in his discretion, was empowered to make rules 'for securing the timely completion of financial business' [Sec. 38 (1) (b)], and it was a grievance of the Legislature that the rules curtailed the freedom of the Legislature to make an effective criticism and discussion. But the Constitution empowers Parliament itself to make such provisions *by law*. [Art. 119, *post*].

(c) *Voting of the demands by the House of the People.*—The Council of State shall have no further business with the annual financial statement beyond the general discussion.

In the House of the People, after the general discussion is over, the estimates shall be submitted in the form of demands for grants on the particular heads, followed by ■ vote of that House. The House of the People shall have the following powers in respect of each demand : (i) to assent to the demand ; or (ii) to refuse it ; or (iii) to reduce it. It follows, thus, that the House shall have no power to increase ■ demand, or to alter the destination of a grant, or to put any condition as to the appropriation of the grant.

In the matter of voting of the grants, the system under *our Constitution* departs from that under the *Government of India Act, 1935*, and follows the *English principle* that the Lower House has the exclusive right of granting supplies. Under the Act of 1935, the demands were submitted to both Chambers [Sec. 34 (2)] and the Upper Chamber had practically equal powers subject to the directions of the Governor-General and the provision for ■ joint session [Sec. 34 (3)]. Under the Constitution, the Upper House having no function in the matter of voting the demands, no question of a joint session arises in this matter.

(d) *The Appropriation Act.*—At the next stage, too, the procedure under the Constitution Act will differ from the procedure under the Act of 1935, and follow the English practice.

Under the Act of 1935, after the demands had been voted by the Legislature, the Governor-General authenticated by his signature, ■ schedule specifying the grants made by the Legislature, the 'charged' expenditure and any other expenditure which had been refused or deduced by the Legislature but was in the opinion of the Governor-General necessary for the due discharge of his special responsibilities. The two peculiarities of this system were—(i) There was no provision for any Appropriation Act or any other legislation finally embodying the grants voted by the Legislature and authorising the issue of the money so granted, from the public



revenues. The final act was not a legislative, but an executive act. It was the authenticated Schedule of the Governor-General which was the only authority known to Audit, for any appropriation of revenue, by whatever legal procedure it might have been sanctioned. (ii) The vote of the Legislature was not final in the matter of supplies, inasmuch as the Governor-General, in his discretion, had the power to override the adverse vote of the Legislature by his certificate, on the ground that his special responsibilities would be affected by the adverse vote.

Under the Constitution, the President shall have no power to override the vote of the House of the People. And, as in England, the grants as voted by the House will be embodied in a Money Bill and passed by Parliament as such. This Act will be known as the Appropriation Act and will be the sole legal authority for the appropriation of money from the Consolidated Fund of India.

(e) *The Finance Act.*—Similarly, the new taxing proposals of the Budget will be embodied in another Bill and passed as the annual Finance Act.

### *Procedure in financial matters*

**112.** (1) The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the “annual financial statement”.

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of India ; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India, and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of India—

(a) the emoluments and allowances of the President and other expenditure relating to his office ;

(b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People ;

(c) debt charges for which the Government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt ;

(d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court ;

(ii) the pensions payable to or in respect of Judges of the Federal Court ;

(iii) the pensions payable to or in respect of Judges of any High Court which exercises jurisdiction in relation to any area included in the territory of India or which at any time before the commencement of this Constitution exercised jurisdiction in relation to any area included in a Province corresponding to a State specified in Part A of the First Schedule ;

(e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India ;

(f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal ;

(g) any other expenditure declared by this Constitution or by Parliament by law to be so charged.

#### OTHER CONSTITUTIONS

CL. (1) : *England*.—In England, the annual financial statement or the Budget statement of the Chancellor of the Exchequer is presented subsequent to the presentation of the 'Estimates'. Both are presented before and dealt with by two Committees of the Whole House, called the Committee of Supply and the Committee of Ways and Means.

The Estimates contain a comprehensive survey of the needs of the ensuing year and are presented in the form of grants of money required for the different purposes and Departments, during the ensuing year, founded on the estimates of that expenditure as prepared by the different Departments. The Estimates are presented to the Committee of Supply at the beginning of the session, and it is the business of that Committee to consider the estimates and vote such grants of money as it deems necessary.

After some progress has been made in the Committee of Supply in the consideration of the estimates and the voting of grants, the Chancellor of the Exchequer makes his financial statement or 'introduces the Budget', in the Committee of Ways and Means, on some date nearabout 1st April. In this statement, the Chancellor gives a comprehensive survey of the mode in which he proposes to meet the needs as described in the Estimates. In the Budget Speech, the Chancellor reviews the public finance of the last year, gives an estimate of the requirements of the current year, develops his views of the resources of the country, and submits his proposals for meeting the requirements, and "declares whether the burthens upon the people are to be increased or diminished" (*May*).

When the resolutions founded on the Chancellor's Statement are passed, fixing the new taxation for the year (i.e.) relating to the annual taxes as distinguished from the taxes made permanent by statute, the resolutions are embodied in a bill and passed as the annual Finance Act.

*Burma*.—Sec. 125 of the Burmese Constitution provides—

(1) The Government shall prepare estimates of receipts and estimates of expenditure of the Union for each financial year, and shall present them to the Chamber of Deputies for consideration.

(2) The procedure to be adopted in the Chambers of Parliament with respect to the submission of estimates of expenditure, the appropriation of the revenues of the Union and all matters connected therewith shall, in so far as provision is not made in that behalf by this Constitution, be regulated in accordance with law.

*Government of India Act, 1935*.—Sec. 33 (1) of the Act provided—

"(1) The Governor-General shall in respect of every financial year cause to be laid before both Chambers of the Federal Legislature a statement of the estimated receipts and expenditure of the Federation for that year, in this Part of this Act referred to as the 'annual financial statement'."

## INDIA

CL. (1) : ' *Annual Financial Statement* '—This expression is borrowed from Sec. 33 (1) of the Government of India Act, 1935. It stands for the popular word 'Budget'. Though Cl. (1) only says that the financial statement shall contain statement of the estimated receipts and expenditure for the coming financial year,—as a matter of practice, every budget contains three elements—

(a) a review of the public finance of the preceding year, including the actual receipts and expenditure in that year ; (b) an estimate of the receipts and expenditure of the coming year ; (c) proposals for meeting the requirements of the coming year.

' *Financial year* '.—This refers to the period from the 1st April of a year till the end of the 31st March of the next Calendar year.

## CL. (3) :

## OTHER CONSTITUTIONS

*England*.—In England expenditure or payments out of the Consolidated Fund are divided under two heads—'Consolidated Fund Services' and 'Supply Services'. The distinction between the two is that payments in respect of the Consolidated Fund Services are made under the authority of some permanent Act of Parliament or statute which makes a grant for a fixed number of years. The result is that payments on account of the 'Consolidated Fund Services' have not to be put to the vote of Parliament annually. Such payments would continue to be made without vote of Parliament so long as the particular statute does not expire or is not repealed by some subsequent statute. Payments on account of the 'Supply Services', on the other hand, have to be voted by Parliament each year. Thus, the recipient of a Consolidated Fund Service is much more independent of Parliamentary control than a person who, or a Department which, has to rely on the passing of an annual Act for his or its supply.

It is open to Parliament to add to the list of Consolidated Fund Services by passing a permanent Act whenever it is desired to increase the independence of an official. Where, on the other hand, the object is to give to Parliament the opportunity of criticizing each year the work of the official or department, the payment will be included in the 'Supply Services'.

The following are some of the Consolidated Fund Services :

(a) The National Debt. (b) The King's Civil List. (c) Local Taxation Accounts,—representing contribution towards the cost of local administration of certain national services. (d) Courts of Justice,—including payments to the Lords of Appeal in Ordinary, Judges of the Supreme Court, County Court Judges and the like. (e) Salaries and allowances, including those paid to the Speaker, the Leader of the Opposition, the Comptroller and Auditor-General. (f) Annuities and pensions, including payments to ex-Judges, ex-Speakers and other distinguished persons and their descendants.

It is interesting to note that the Consolidated Fund Services form about 40 p.c. of the total national expenditure of England.

*Ceylon*.—Sec. 66 (2) of the Ceylon Constitution Order in Council, 1946, provides—

"The interest on the public debt, sinking fund payments, the costs, charges and expenses incidental to the collection, management and receipt of the Consolidated Fund and such other expenditure Parliament may determine shall be charged on the Consolidated Fund".

Other items charged by the various provisions of the Constitution Order are to be found in secs. 6 (3) ; 11 (2) ; 52 (4) ; 53 (6) ; 58 (7) ; 63 ; 64 ; 11 (2).

*Government of India Act, 1935*. —See sub-sec. (3) of sec. 33 of that Act.



## INDIA

Cl. (3) : *Expenditure charged on the Consolidated Fund of India*—Broadly speaking, the items of expenditure included in this clause correspond to the 'Consolidated Fund Services' of England. But the enumeration of items charged on the Consolidated Fund<sup>25</sup> of India as contained in the present clause is not exhaustive. As sub-clause (g) says, it includes other expenditure declared to be so charged by any other provision of the Constitution. Besides, Parliament is empowered to add to the list by law.

The items charged by *other* provisions of the Constitution are—(a) Administrative expenses of the Supreme Court, salaries of its officers [Art. 146 (3)]. (b) Administrative expenses of Comptroller and Auditor-General [Art. 148 (6)]. (c) Grants-in-aid to the States [Art. 275 (1)]. (d) Expenses of the Union Public Service Commission [Art. 322].

It has been observed already that the Indian Parliament, like the *English*, shall have the power to add to the above list. This power was criticised in the Constituent Assembly on the ground that one Parliament should not have the power to curtail the right of its successors to vote on any financial matter. But the successor would not really be bound by any act of its predecessor, according to the fundamental principle of sovereignty of Parliament, and the successor Parliament would be at liberty to repeal the Act of its predecessor which includes any new item within the list of 'expenditure charged on the Consolidated Fund'. It may be noted that any legislation in respect of such expenditure is a Money Bill within the meaning of Art. 110 (1) (e). It is further to be noted that any of the items so declared by the Constitution itself (as enumerated in items (i) to (ix) above), cannot be removed from the privilege, without the process of constitutional amendment.

It may also be pointed out that the 'expenditure charged on the Consolidated Fund of India' is similar in nature to the 'expenditure charged on the revenues of the Federation' in sec. 33 (1) (3) of the *Government of India Act, 1935*,—both being equally withheld from the vote of Parliament. But the main *difference*, which should not be ignored, is that under the Constitution there is no function to be discharged by the President in his discretion, so that there is nothing in the list in Art. 92 (3), corresponding to Cls. (e) as well as (f) and (g) of sec. 33 (3) of the *Government of India Act, 1935*. *Secondly*, under sec. 33 (4), it was the Governor-General, in his discretion, who was to decide whether any proposed expenditure falls within the "class of expenditure charged on the revenues". But under the Constitution, there is no such provision. *Thirdly*, two of the items so charged [Cls. (a) and (f) of sec. 33 (3)] under the *Government of India Act, 1935* were not open to discussion in the Legislature. But under Art. 113 (1) of the Constitution, *all* the items of expenditure charged upon the Consolidated Fund of India, though not submitted to the vote of Parliament, shall be open to discussion in either House of Parliament, including even the emoluments of the President. *Fourthly*, it should be noted that apart from expenditure required for the discretionary functions of the Governor-General, all the items charged under the Act of 1935 have not been so charged under the Constitution. The most important of these which have been excluded from the Constitution are—salaries of Ministers (sec. 33 (3) (c)) and salaries etc. of members of the All-India Services [sec. 247 (4)] of the Act of 1935].

(a) As regards the salaries of Ministers, this was charged in the Act of 1935, as a matter of reaction against the abuse of powers by the Legislatures under the *Government of India Act, 1919*. But the power of the Legislature to move for a nominal reduction in the Ministers' salaries by way of criticising a Department or ventilating a grievance, is an essential feature of the system of Parliamentary Government in England<sup>1</sup>, and there is no reason why it should not be same in India under the Constitution which introduces the English system. It may be

(25) As to the 'Consolidated Fund,' see art. 266, *post*.

(1) Lowell, *Government of England*, p. 347.

expected, however, that the Parliament of India will follow the English convention of moving a token cut, instead of disallowing the salaries of Ministers in toto and thus creating a deadlock in the administration as was done by some Provincial Legislatures under the Act of 1919.

(b) As regards the salaries and pensions etc. of the All-India Services, they are no longer to enjoy any special privilege under the Constitution, for, the privilege under the Acts of 1919 and 1935 were due to the fact that they were appointed under a covenant with the Secretary of State, which it was beyond the competence of the Indian Legislatures to affect. It is essential for a truly responsible Government that all the public servants must be fully under the control of the Legislature.

*Cl. (3) (c) : Debt Charges.*—The debt charges or the charges for the repayment of national debt is withheld from the annual vote of Parliament in order to maintain the confidence of the money market in the credit of the Government. The management expenses of the national debt are also charged on the Consolidated Fund. There are several methods of repayment of public debt :

(a) Budgeting for a surplus of income over expenditure.

(b) Arranging for a fixed amount of revenue in the Budget to create a 'Sinking Fund' for the repayment of debt. It is thus a fund set aside annually from the public revenue, so that the accumulated total of the Fund together with interest on it, will be sufficient to redeem the loan or loans at the time of maturity.

In *England*, the interest and management expenses of the National Debt are charged on the Consolidated Fund, but the Sinking Fund is no longer included in the Consolidated Fund Services ; and the annual payment towards reduction of debt, known as the 'New Sinking Fund' is liable to suspension or reduction by Parliament, in the annual Finance Act. Similarly, in case of any surplus of income over expenditure in any year it is open to Parliament to vote that the surplus will go towards reduction of the National Debt,—the sum so allocated being called the 'Old Sinking Fund'.

(c) Redemption by terminal annuities ; and

(d) Redemption by conversion of existing debts into debts carrying a lower rate of interest.

**113.** (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.

Procedure in Parliament with respect to estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and the House of the People shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the President.

## CL. (1) :

## OTHER CONSTITUTIONS

*England.*—The Consolidated Fund charges or services, being secured by permanent Acts do not require an annual vote of Parliament, and hence do not come before the Committee of supply at all.<sup>2</sup> It is only the estimates for the rest of the expenditure, called the Supply Services that are presented before the Committee of Supply. So, there is no opportunity of criticising or discussing the Consolidated Fund Services in Parliament, each year.<sup>3</sup>

*Government of India Act, 1935.*—Sub-sec. (1) of sec. 34 of that Act was in similar language as cl. (1) of the present Article. Hence, discussion of the non-votable items was permissible (excepting two items).

## INDIA

*Cl. (1) : Discussion of expenditure charged on the Consolidated Fund.*—This clause departs from the English precedent and follows the Government of India Act, 1935, in allowing discussion of expenditure charged on the Consolidated Fund. No item is exempted from discussion. Hence, though the Indian Parliament may not reduce or refuse the items of expenditure enumerated in Art. 112 (3), either House will get an opportunity, each year, to criticise the conduct or administration of the services which are charged.

## CL. (2) :

## OTHER CONSTITUTIONS

*England.*—Though Standing Order No. 63 [see under Cl. (3), below] merely prohibits the House of Commons from proceeding upon any motion for ■ grant unless recommended by the Crown, this rule has been extended by construction to prohibit any *amendment* for *increasing* ■ grant beyond the amount recommended by the Crown, or for *altering* its *destination* as recommended by the Crown. But since reduction is not forbidden, it is a practice for a private member who seeks an increase of any item of expenditure,—to move to reduce it, thereby drawing the attention of the Government to its insufficiency.<sup>4</sup>

*Government of India Act, 1935.*—Under that Act, the demands for grants were submitted to both Chambers [s. 34 (2)] and both had the powers specified in Cl. (2) of the present Article.

## INDIA

*Cl. (2) : Power of the House over demands.*—It follows from the principle underlying the next clause viz. that no demand for a grant can be made except on the recommendation of the President, i.e. on the responsibility of the Government. Hence, the House may assent to, refuse or reduce a demand, but cannot increase the same, for 'increase' of a demand would involve the 'making' of a demand to the extent of the increase. Nor can the House alter the destination of a grant [see also Art. 114 (2), *post.*]

*The voting of grants.*—The Constitution differs from the provision in sec. 34 (2) of the Government of India Act, 1935, inasmuch as under the Constitution, the Council of States shall have no power over grants at all. The estimates will, of course, be laid before both Houses, and there will be ■ general discussion of the Budget as ■ whole (including the charged items), in both Houses in the same manner,—as regards the general principles involved therein. After the general discussion is over, the items of expenditure other than those that are charged shall be submitted

(2) Lowell, Government of England, Vol. I, P. 284.

(3) Wade and Phillips, Constitutional Law, P. 158.

(4) Lowell, Government of England, 1912, Vol. I, pp. 281-2; May, Parliamentary Practice 580-1.



in the form of demands for grants, *in the House of the People only*. The voting of the grants is a powerful medium of control of the House of the People over the administration and policy of the different Departments.

*Rules of Procedure.*—Rr. 130-3 of the Rules of Procedure of the Provisional Parliament would illustrate the procedure on the Budget :

“ 130. There shall be no discussion of the Budget on the day on which it is presented to Parliament.

131. (1) A separate demand shall ordinarily be made in respect of the grant proposed for each Ministry, provided that the Finance Minister may include in one demand grants proposed for two or more Ministers or Departments or make a demand in respect of expenditure which cannot readily be classed under particular Ministries. (2) Each demand shall contain, first, a statement of the total grant proposed, and then a statement of the detailed estimate, under each grant divided into items. (3) Subject to these rules, the Budget shall be presented to Parliament in such form as the Finance Minister may, after considering the suggestions, if any, of the Estimates Committee, settle.

132. (1) On a day to be appointed by the Speaker subsequent to the day on which the Budget is presented and for such time as the Speaker may allot for the purpose, Parliament shall be at liberty to discuss the Budget ■ ■ whole or any question of principle involved therein, but at this stage no motion shall be moved nor shall the Budget be submitted to the vote of Parliament. (2) The Finance Minister shall have a right of reply at the end of the discussion. (3) The Speaker, may, if he thinks fit, prescribe a time limit for speeches.

133. (1) The Speaker in consultation with the Leader of the House shall allot so many days as may be compatible with the public interest for the discussion and voting of demands for grants. (2) On the last day of the allotted days, at 5 o'clock, the Speaker shall forthwith put every question necessary to dispose of all outstanding matters in connection with the demands for grants. (3) Motions may be moved to reduce any grant. (4) No amendments to motions to reduce any grant shall be permissible . . . ”

#### CL. (3) :

#### OTHER CONSTITUTIONS

*England.*—In 1713, the House of Commons adopted ■ self-imposed limitation, which, as amended, stands thus—

“ This House will receive no petition for any sum relating to the public service, or proceed upon any motion for ■ grant or charge upon the public revenue, whether payable out of the Consolidated Fund or out of money to be provided by Parliament; unless recommended by the Crown.”<sup>6</sup>

The principle underlying this Standing Order has already been explained (*see p. 342, ante*). It applies not only to direct motions for grants, but also to any motion which *indirectly* involves the expenditure of public money<sup>6</sup>. No such motion can be moved by ■ private member without royal recommendation, i.e. recommendation of the Government.

“ When the main object of a Bill is the creation of a public charge, a resolution for that charge must be passed in Committee of the Whole upon a recommendation from the Crown before the Bill is introduced. But when the charge is merely *subsidiary* or *incidental*, the Bill can be brought in previously, the clauses or provisions creating the charge being printed in italics. The words so printed are regarded as mere blanks with an indication of the way they are eventually intended to be filled, and they cannot be considered by the House until a Committee of the Whole has passed the necessary resolutions on a recommendation from the Crown.”<sup>7</sup>

The wisdom of this self-imposed limitation is evident when we compare the system obtaining in the *United States* where the Legislature has the power to change, increase or decrease appropriations as it thinks fit and to compel the Executive to spend money at the instance of individual members of the Legislature. The results of the American system are waste and extravagance, improper pressure ■ members of the Legislature by their constituencies and the appropriation of

(5) Standing Order 63.

(6) Jennings, *Parliament*, 1948, p. 250.

(7) Lowell, *Government of England*, Vol. I, p. 280 n. ; May, *Parliamentary Practice*, pp. 528-9.

public funds for the benefit of individual constituencies at the cost of the general body of tax-payers. The English system, on the other hand, safeguards the taxpayer against—

“the casual benevolence of a House wrought upon by the eloquence of a private member, against a scramble for public money among unscrupulous politicians bidding against one another for the favour of a democracy . . . . .”<sup>8</sup>

The *English* principle, thus, makes the Government of the day responsible for all taxation and expenditure of the nation, and prevents irresponsible extravagance at the instance of individual members of Parliament.

*Canada.*—Sec. 54 of the British North America Act says—

“It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-General in the session in which such vote, resolution, address or bill is proposed.”

*Australia.*—Sec. 56 of the Commonwealth of Australia Constitution Act is—

“A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.”

*Government of India Act, 1935.*—Sub-sec. (4) of sec. 34 provided—

“No demand for a grant shall be made except on the recommendation of the Governor-General.”

## INDIA

*Cl. (3) : No demand except on recommendation of the President.*—The provision in Cl. (3) of Art. 117 is complementary to the present clause. The two together ensure the principle that the Executive shall be solely responsible for the expenditure of the public money, whether that takes place through a Money Bill, or, indirectly, through some general statute involving expenditure.

*Analogous Provision.*—Similarly, proposals for imposition or increase of taxes require recommendation of the President [Art. 117 (1)].

**114.** (1) As soon as may be after the grants under article 113 have been made by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated

Appropriation Bills.

Fund of India of all moneys required to meet—

(a) the grants so made by the House of the People ; and

(b) the expenditure charged on the Consolidated Fund of India but not exceeding in any case the amount shown in the statement previously laid before Parliament.

(2) No amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 115 and 116, no money shall be withdrawn from the Consolidated Fund of India except under appropriation made by law passed in accordance with the provisions of this article.

#### OTHER CONSTITUTIONS

*England.*—Resolutions of the Committee of Supply, voting the grants, are not sufficient to appropriate money for the purposes for which the grants have been made. For that legislation is required. All public revenues, raised by taxation or otherwise, are carried into the Consolidated Fund. No money can issue out of this Fund without an Act of Parliament. It is the Annual Appropriation Act which authorises in detail the application of the amounts voted to the purposes for which they have been granted, and the issue or 'appropriation' of money out of the Consolidated Fund for these purposes. Of course, before the passing of the annual Appropriation Act, interim statutes called Consolidated Fund Acts are passed from time to time, giving effect to the resolutions of the Committee of Supply, to meet urgent requirements of the Departments. The Appropriation Act, passed at the end of the session, confirms the appropriations made by the Consolidated Fund Acts and also deals with the grants so far undisposed of. The Appropriation Act also limits the expenditure of each Department to the sums granted by Parliament, which are set out in a Schedule to the Act.

#### INDIA

*Cl. (1) : Appropriation Act.*—The objects of an Appropriation Act have been already explained. Cl. (3) of the present Article and Art. 266 (3), *post*, lay down that no moneys shall be appropriated out of the Consolidated Fund 'except in accordance with law . . . . .'. The Appropriation Act provides that law. The voting of the grants by the House of the People, under Art. 113 would not *ipso facto* authorise the issue of money out of the Consolidated Fund to meet the grants. It will require a Money Bill [Cf. Art. 110 (1) (d), *ante*], to be passed in conformity with the present Article. This Bill, called the Appropriation Bill, will include not only the grants voted by the House of the People but also the non-votable items of expenditure 'charged on the Consolidated Fund of India' (Art. 112 (3)).

#### Illustration.

By way of illustrating the provisions of this Article, let us reproduce, in extenso the first Appropriation Acts<sup>9</sup> passed by the Indian Parliament—

#### THE APPROPRIATION (RAILWAYS) ACT (XXIII OF 1950.)

*An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of India for the service of the year ending ■ the 31st day of March, 1951, for the purposes of railways.*

BE it enacted by Parliament ■ follows :—

1. *Short title.*—This Act may be called THE APPROPRIATION (RAILWAY) ACT, 1950.
2. *Issue of Rs. 2,78,64,64, 000 out of the Consolidated Fund of India for the year 1950-51.*—From and out of the Consolidated Fund of India there may be paid and applied sums not exceeding those specified in column 3 of the Schedule amounting in the aggregate to the sum of two hundred and seventy-eight crores, sixty-four lakhs and sixty-four thousand rupees towards defraying the several charges which will come in course of payment during the year ending on the 31st day of March, 1951, in respect of the services relating to railways specified in column 2 of the Schedule.
3. *Appropriation.*—The sums authorised to be paid and applied from and out of the Consolidated Fund of India by this Act shall be appropriated for the services and purposes expressed in the Schedule in relation ■ the year ending on the 31st day of March, 1951.

<sup>9</sup> It has been held in Parliament that there is nothing in Art. 114 (1) ■ prevent the passing of more than ■ Appropriation Act. Thus,

the Railways appropriation has been separate ■ and ■ second Appropriation Act has been passed ■ in 1950 [Act XXXIX of 1950.]



## SCHEDULE.

No. of Vote.	Services and purposes.	Sums not exceeding.		
		Voted by Parliament.	Charged on the Consolida- ted Fund.	Total.
		RS.	RS.	RS.
1	Railway Board .. ..	34,43,000	..	34,43,000
2	Audit .. ..	28,76,000	..	28,76,000
3	Miscellaneous Expenditure .. ..	61,52,000	..	61,52,000
4	Working Expenses— Administration .. ..	22,76,77,000	..	22,76,77,000
5	Working Expenses— Repairs and Maintenance .. ..	51,84,68,000	..	51,84,68,000
6	Working Expenses— Operating Staff .. ..	35,52,81,000	..	35,52,81,000
7	Working Expenses— Operation (Fuel) .. ..	28,32,24,000	..	28,32,24,000
8	Working Expenses— Operation other than Staff and Fuel.	9,97,39,000	..	9,97,39,000
9	Working Expenses— Miscellaneous Expenses .. ..	15,02,26,000	..	15,02,26,000
9A	Working Expenses— Labour Welfare .. ..	3,12,68,000	..	3,12,68,000
10	Payments to Indian States and Com- panies .. ..	37,40,000	..	37,40,000
11	Working Expenses— Appropriation to Depreciation Fund.	17,00,00,000	..	17,00,00,000
12A	Open Line Works— (Revenue) Labour Welfare .. ..	1,45,21,000	..	1,45,21,000
12B	Open Line Works— (Revenue) Other than Labour Welfare.	2,29,76,000	..	2,29,76,000
13	Appropriation to Development Fund ..	10,00,00,000	..	10,00,00,000
14	Appropriation to Revenue Reserve Fund.	2,00,65,000	..	2,00,65,000
15	Construction of New Lines .. ..	2,66,31,000	..	2,66,31,000
16	Open Line Works— Additions .. ..	14,33,52,000	..	14,33,52,000
17	Open Line Works— Replacements .. ..	22,72,67,000	..	22,72,67,000
18	Open Line Works— Development Fund .. ..	6,00,00,000	..	6,00,00,000
19	Capital Outlay in Vizagapatam Port ..	10,60,000	..	10,60,000
20	Dividend payable to General Revenues.	31,84,98,000	..	31,84,98,000
Grand Total ..		2,78,64,64,000	..	2,78,64,64,000

## THE APPROPRIATION ACT (XXIV OF 1950.)

*An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of India for the service of the year ending on the 31st day of March, 1951.*

BE it enacted by Parliament as follows :—

1. *Short title.*—This Act may be called THE APPROPRIATION ACT, 1950.

2. *Issue of Rs. 19,24,94,34,000 out of the Consolidated Fund of India for the year 1950-51.*—From and out of the Consolidated Fund of India there may be paid and applied sums not exceeding those specified in column 3 of the Schedule amounting in the aggregate to the sum of one thousand nine hundred and twenty-four crores, ninety-four lakhs and thirty-four thousand rupees towards defraying the several charges which will come in course of payment during the year ending on the 31st day of March, 1951, in respect of the services specified in column 2 of the Schedule.

3. *Appropriation.*—The sums authorised to be paid and applied from and out of the Consolidated Fund of India by this Act shall be appropriated for the services and purposes expressed in the Schedule in relation to the year ending on the 31st day of March, 1951.

## SCHEDULE.

1 No. of Vote.	Services and purposes.	3 Sums not exceeding.		
		Voted by Parliament.	Charged on the Consolidated Fund.	Total.
		Rs.	Rs.	Rs.
1	Customs .. ..	2,05,50,000	..	2,05,50,000
2	Union Excise Duties .. ..	4,90,94,000	..	4,90,94,000
3	Taxes on Income (including Corporation Tax).	2,68,48,000	..	2,68,48,000
4	Opium .. ..	1,21,02,000	..	1,21,02,000
5	Stamps .. ..	1,12,40,000	5,33,000	1,17,73,000
6	Forest .. ..	31,42,000	..	31,42,000
7	Irrigation (including Working Expenses), Navigation, Embankment and Drainage Works met from Revenue.	25,50,000	91,000	26,41,000
8	Indian Posts and Telegraphs Department (including Working Expenses).	30,08,27,000	1,12,72,000	31,20,99,000
9	Cabinet .. ..	22,84,000	..	22,84,000
10	Parliament .. ..	28,33,000	50,000	28,83,000
11	Ministry of Home Affairs ..	67,37,000	..	67,37,000
12	Ministry of Information and Broadcasting.	1,03,01,000	..	1,03,01,000
13	Ministry of Law .. ..	1,45,69,000	..	1,45,69,000
14	Ministry of Education .. ..	34,87,000	..	34,87,000
15	Ministry of Agriculture .. ..	27,08,000	..	27,08,000
16	Ministry of Health .. ..	6,25,000	..	6,25,000
17	Ministry of External Affairs ..	51,68,000	..	51,68,000
18	Ministry of Finance .. ..	1,18,88,000	..	1,18,88,000
19	Ministry of Commerce .. ..	58,23,000	..	58,23,000
20	Ministry of Labour .. ..	23,22,000	..	23,22,000
21	Ministry of Works, Mines and Power.	13,00,000	..	13,00,000
22	Ministry of Communications ..	5,28,000	..	5,28,000
23	Ministry of Transport .. ..	24,29,000	..	24,29,000
24	Ministry of Food .. ..	42,23,000	..	42,23,000
25	Ministry of States .. ..	12,84,000	..	12,84,000
26	Ministry of Defence .. ..	31,85,000	..	31,85,000
27	Ministry of Industry and Supply ..	22,16,000	..	22,16,000
28	Ministry of Rehabilitation ..	14,88,000	..	14,88,000
29	Payments to other Governments, Departments, etc., on account of the administration of Agency Subjects and management of Treasuries.	16,62,000	..	16,62,000
30	Audit .. ..	3,74,54,000	12,30,000	3,86,84,000
31	Administration of Justice .. ..	2,71,000	9,12,000	11,83,000
32	Jails and Convict Settlements ..	5,000	..	5,000
33	Police .. ..	48,57,000	..	48,57,000
34	Ports and Pilotage .. ..	44,89,000	..	44,89,000
35	Lighthouses and Lightships ..	11,22,000	..	11,22,000
36	Ecclesiastical .. ..	1,000	..	1,000
37	Tribal Areas .. ..	1,20,41,000	..	1,20,41,000
38	External Affairs .. ..	3,39,99,000	..	3,39,99,000
39	Survey of India .. ..	75,99,000	..	75,99,000
40	Botanical Survey .. ..	92,000	..	92,000
41	Zoological Survey .. ..	2,93,000	..	2,93,000
42	Geological Survey .. ..	36,29,000	..	36,29,000
43	Mines .. ..	17,04,000	..	17,04,000

3				
Sums not exceeding.				
No. of Vote.	Services and purposes.	Voted by Parliament.	Charged on the Consolidated Fund.	Total.
		RS.	RS.	RS.
44	Archaeology .. .. .	35,10,000	..	35,10,000
45	Meteorology .. .. .	80,80,000	..	80,80,000
46	Department of Scientific Research.	1,42,35,000	..	1,42,35,000
47	Other Scientific Departments ..	1,25,43,000	..	1,25,43,000
48	Education .. .. .	1,02,37,000	..	1,02,37,000
49	Medical Services .. .. .	38,78,000	..	38,78,000
50	Public Health .. .. .	68,65,000	..	68,65,000
51	Agriculture .. .. .	1,30,97,000	..	1,30,97,000
52	Civil Veterinary Services ..	26,52,000	..	26,52,000
53	Industries and Supplies .. ..	4,33,15,000	..	4,33,15,000
54	Salt .. .. .	1,28,94,000	2,19,000	1,31,13,000
55	Overseas Communication Service.	65,97,000	2,50,000	68,47,000
56	Delhi Transport Service .. ..	67,78,000	1,82,000	69,60,000
57	Telephone Factory .. .. .	21,57,000	3,36,000	24,93,000
58	Aviation .. .. .	3,20,03,000	..	3,20,03,000
59	Broadcasting .. .. .	2,04,75,000	..	2,04,75,000
60	Commercial Intelligence and Sta- tistics.	55,69,000	..	55,69,000
61	Census .. .. .	18,01,000	..	18,01,000
62	Joint Stock Companies .. ..	4,80,000	..	4,80,000
63	Indian Dairy Department .. ..	7,11,000	..	7,11,000
64	Miscellaneous Departments ..	1,73,40,000	..	1,73,40,000
65	Currency .. .. .	85,68,000	2,40,000	88,08,000
66	Mint .. .. .	87,80,000	..	87,80,000
67	Central Road Fund .. .. .	2,90,00,000	..	2,90,00,000
68	Communications (including National Highways).	3,62,50,000	..	3,62,50,000
69	Other Civil Works .. .. .	3,28,37,000	15,54,000	3,43,91,000
70	Territorial and Political Pensions	28,43,000	4,46,26,000	4,74,69,000
71	Superannuation Allowances and Pensions.	2,65,40,000	5,04,000	2,70,44,000
72	Stationery and Printing .. ..	1,73,83,000	..	1,73,83,000
73	Miscellaneous .. .. .	22,88,39,000	16,000	22,88,55,000
74	Expenditure on Displaced Persons.	6,00,00,000	..	6,00,00,000
75	Defence Services—Effective Army.	1,41,33,37,000	..	1,41,33,37,000
76	Defence Services—Effective Navy.	8,47,64,000	..	8,47,64,000
77	Defence Services—Effective Air Force.	14,91,37,000	..	14,91,37,000
78	Defence Services—Non-effective charges.	15,03,50,000	4,000	15,03,54,000
79	Grants-in-aid to States .. ..	11,56,00,000	3,84,00,000	15,40,00,000
80	Miscellaneous Adjustments between the Union and State Governments.	1,01,000	..	1,01,000
81	Resettlement and Development ..	3,31,68,000	..	3,31,68,000
82	Civil Defence .. .. .	1,37,000	..	1,37,000
83	Pre-Partition Payments .. ..	2,00,00,000	..	2,00,00,000
84	Delhi .. .. .	1,95,65,000	..	1,95,65,000
85	Ajmer .. .. .	80,11,000	..	80,11,000
86	Kutch .. .. .	41,55,000	..	41,55,000
87	Himachal Pradesh .. .. .	1,38,72,000	..	1,38,72,000
88	Bilaspur .. .. .	7,23,000	..	7,23,000
89	Bhopal .. .. .	83,96,000	..	83,96,000
90	Manipur .. .. .	28,21,000	..	28,21,000
91	Tripura .. .. .	42,18,000	..	42,18,000
92	Andaman and Nicobar Islands ..	1,25,76,000	..	1,25,76,000
93	Relations with States .. ..	47,24,000	..	47,24,000
	Interest on Debt and other Obliga- tions and Reduction or Avoidance	..	36,50,07,000	36,50,07,000



1 No. of Vote.	2 Services and purposes.	3 Sums not exceeding.		
		Voted by Parliament.	Charged on the Consolidated Fund.	Total.
		Rs.	Rs.	Rs.
	of Debt.			
	Staff, Household and Allowances of the President.	..	15,76,000	15,76,000
	Union Public Service Commission.	..	16,53,000	16,53,000
94	Capital Outlay on Forests ..	20,00,000	..	20,00,000
95	Capital Outlay on the India Security Press.	12,56,000	..	12,56,000
96	Capital Outlay on Indian Posts and Telegraphs (not met from Re- venue).	5,97,26,000	..	5,97,26,000
97	Indian Posts and Telegraphs—Stores Suspense (not met from Revenue).	1,000	..	1,000
98	Capital Outlay on Industrial De- velopment.	9,63,00,000	..	9,63,00,000
99	Capital Outlay on Civil Aviation ..	1,49,98,000	..	1,49,98,000
100	Capital Outlay on Broadcasting ..	60,00,000	..	60,00,000
101	Capital Outlay on Currency ..	1,84,000	..	1,84,000
102	Capital Outlay on Mints ..	49,60,000	..	49,60,000
103	Delhi Capital Outlay ..	1,75,70,000	..	1,75,70,000
104	Capital Outlay on Civil Works ..	2,97,01,000	..	2,97,01,000
105	Commuted Value of Pensions ..	42,75,000	..	42,75,000
106	Payments to Retrenched Personnel.	1,000	..	1,000
107	Defence Capital Outlay ..	2,15,00,000	..	2,15,00,000
108	Capital Outlay on Schemes of State Trading.	7,37,22,000	..	7,37,22,000
109	Capital Outlay on Development	16,90,18,000	..	16,90,18,000
110	Interest-free and Interest-bearing Advances.	8,39,08,000	34,80,75,000	43,19,83,000
	Repayment of Debt .. ..	..	14,50,47,03,000	14,50,47,03,000
	Grand Total ..	3,92,80,01,000	15,32,14,33,000	19,24,94,34,000

*Cl. (2) : Scope of debate and amendment on Appropriation Bill.*—Though an Appropriation Bill is in the nature of a formal legislation, to give effect to grants already voted by Parliament, and to expenditure charged by the Constitution, it would offer scope to a general debate on matters of public importance and administrative policy and questions affecting economy and accounts.

But there are two limitations to amendments that may be proposed to such Bill. These are—(i) No amendment may be proposed which will have the effect of varying the amount or altering the destination of any grant. (ii) No amendment shall be proposed varying the amount of any expenditure charged on the Consolidated Fund. Limitation (i) obviously ensures that the grants already voted by the House should not be disturbed.

‘Altering the destination of ■ grant’ would also mean a violation of the rule in Art. 113 (3). So, an amendment to alter the destination of ■ grant as laid in the President’s demand, shall be out of order. This is in conformity with the English practice—

“If a financial resolution provides that the money is to be used for the benefit of certain recipients an amendment ■ out of order which would alter the recipients of the money so as to give it to recipients other than those named under the King’s recommendation”.<sup>16</sup>

(16) 312 H.C. Deb. 55. 1138, quoted in Jennings, Parliament, p. 258.

## CL. (3).

## OTHER CONSTITUTIONS

*England.*—See p. 353, *ante*.

*Ceylon.*—Sec. 67 of the Ceylon Constitution Order in Council, 1946, provides—

“(1) Save as otherwise expressly provided in sub-section (3) of this section, no sum shall be withdrawn from the Consolidated Fund except under the authority of a warrant under the hand of the Minister of Finance.

(2) No such warrant shall be issued unless the sum has by resolution of the House of Representatives or by any law been granted for specified public services for the financial year during which the withdrawal is to take place or is otherwise lawfully charged on the Consolidated Fund.

(3) Where the Governor-General dissolves Parliament before the Appropriation Bill for the financial year has received the Royal Assent, he may, unless Parliament shall have already made provision, authorise the issue from the Consolidated Fund and the expenditure of such sums as he may consider necessary for the public services until the expiry of a period of three months from the date on which the new House of Representatives is summoned to meet.”

## INDIA

*Cl. (3) : No other means of withdrawal.*—The Consolidated Fund (Art. 266) would be a reservoir of all the revenues, taxes and collections of the Government of India. An Appropriation Act would be the only means of outlet from the reservoir. Art. 266 (3) also reiterates this provision.

‘*Subject to the provisions of Arts. 115-6*’.—These words provide that not only the annual Appropriation Acts but also similar Acts passed to provide supplementary, excess or exceptional grants, votes on account or votes of account, shall be authority for appropriation of money out of the Consolidated Fund.

*Analogous Provision.*—Provisions similar to those of the present articles are made in Art. 204, *post*, as regards the State.

Supplementary, additional  
or excess grants.

**115.** (1) The President shall—

(a) If the amount authorised by any law made in accordance with the provisions of article 114 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year ; or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year,

cause to be laid before both the Houses of Parliament another statement showing the estimated amount of that expenditure or cause to be presented to the House of the People a demand for such excess, as the case may be.

(2) The provisions of articles 112, 113 and 114 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned

therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or grant.

## CL. (1) (a)

## OTHER CONSTITUTIONS

*England.*—In England, ■ supplementary estimate may be presented—

“either for a further grant to a service already sanctioned by Parliament, in addition to the ■ already demanded for the current financial year, or for ■ grant caused by a fresh occasion for expenditure that has arisen since the presentation of the sessional estimates, such as expenditure newly imposed upon the executive government by statute, or to meet the cost created by an unexpected emergency, such ■ an immediate addition to an existing service, or the purchase of land, or of a work of art. The need for a supplementary grant to ■ existing service is not infrequently caused by the system in force to ensure the control of Parliament over public expenditure. To provide for the early presentation of the annual estimates, the departments are obliged to compute in the month of November their anticipated expenditure for the ensuing financial year, dating from the coming 15 April. Fallibility must attend calculations which range over 16 months in advance; and as to large ■ demand for money is ■ grave departmental error, the official tendency is to make the demand too small. If the lesser error occurs, to avoid the still greater evil of excess expenditure, recourse of necessity must be had to ■ supplementary grant.”<sup>11</sup>

*Government of India Act, 1935.*—There was provision for Supplementary Estimates in sec. 36 of that Act.

## INDIA

Cl. (1) (a) : *Supplementary Estimates.*—Supplementary estimates are looked upon with jealousy by popular legislatures, as they tend to diminish control of the legislature over the national expenditure, but even in England supplementary estimates are occasionally necessary owing to the exigencies of Government or unforeseen circumstances. Thus, the need for supplementary or additional grants may arise when the amount specified in the annual estimate for a particular service is found *insufficient* for the purposes of the current year, or for some new service, not contemplated in the ordinary estimates for that year.<sup>12</sup> In the absence of any such provision, “it would be impossible for the Government to carry on without Parliament being called from day to day”.<sup>13</sup>

Supplementary estimates must be passed by the House before the end of the financial year. The procedure for passing the Supplementary Estimates is, under Cl. (2) of the present article, the same as that for the Annual Estimates, [Arts. 112-4], and the supplementary or additional grants will similarly be embodied in an Appropriation Act.

## CL. (1) (b)

## OTHER CONSTITUTIONS

*England.*—“The need for an excess grant arises when ■ department has, by means of advances from the civil contingencies fund, or out of funds derived from ‘extra receipts,’ carried expenditure upon a service beyond the amount granted to that service, during the financial year for which the grant was made.” The Commons recorded a permanent disapproval of these departmental excesses by resolving in 1849 that “when a certain amount of expenditure for a particular service has been determined upon by Parliament, it is the bounden duty of the department which has that service under its charge and control, to take care that the expenditure does not exceed the amount placed at its disposal for that purpose.”<sup>14</sup>

## INDIA

Cl. (1) (b).—Sometimes the amount granted for any service ■ found insufficient for the purposes during the financial year and the Department is obliged to spend

(11) May, Parliamentary Practice.  
(12) Ilbert, Parliament (H. U. Library).  
(13) Dr. Ambedkar in the Constituent

Assembly.  
(14) May, Parliamentary Practice.



the excess, by drawing it out of the Contingency Fund [Art. 267 (1)], in advance of Parliamentary sanction. In such ■ case, sanction of Parliament should be obtained as soon as possible after the excess expenditure has been ascertained. A demand for the excess shall be presented to the House as if it were ■ demand for ■ grant under Art. 113.

Cl. (2) : *Procedure for Supplementary Estimates.*—The procedure for the passing of supplementary estimates and excess grants shall be the same as that for demands for grants, subject to such adaptations as the Speaker may deem necessary.<sup>14-a</sup>

Votes on account, votes of credit and exceptional grants.

**116.** (1) Notwithstanding anything in the foregoing provisions of this Chapter, the House of the People shall have power—

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 113 for the voting of such grant and the passing of the law in accordance with the provisions of article 114 in relation to that expenditure ;

(b) to make a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement ;

(c) to make an exceptional grant which forms no part of the current service of any financial year ;

and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of India for the purposes for which the said grants are made.

(2) The provisions of articles 113 and 114 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure.

CL. (1) (a).

#### OTHER CONSTITUTIONS

Cl. (1) (a).—*England.*—Owing to the fact that the financial year ends on the 31st March, it is obviously impossible for the House of Commons, which usually does not meet until the middle of January or the beginning of February, to grant the whole of the annual supplies for the ensuing year before the 1st April. At the same time Ministers of the Crown must be supplied with money for the purpose of carrying on the government of the country. As a matter of practice, therefore, Parliament is obliged every year to grant in advance some of the money which is demanded by the Crown for the expenses of the various departments *before* the whole of the estimates for the year have been agreed to by the House of Commons. (*Halsbury*).

#### INDIA

Cl. (1) (a) : *Votes on Account.*—Following the English practice, the present sub-clause makes provision for grants in advance to be made by the House for enabling the departments to carry on until the passing of the Annual Financial Statement

is complete. Votes on account may be passed on any day subsequent to the presentation of the Budget. The object of providing limited amounts by votes on account is to enable Parliament to debate the Budget in detail.

*Procedure for Vote on Account.*—R. 136 of the Rules of Procedure and Conduct of Business in Parliament says—

“(1) A motion for vote on account shall state the total sum required, and the various amounts needed for each Ministry, Department or item of expenditure which compose that sum shall be stated in a schedule appended to the motion. (2) Amendments may be moved for the reduction of the whole grant or for the reduction or omission of the items whereof the grant is composed. (3) Discussion of a general character shall be allowed on the motion or any amendments moved thereto, but the details of the grant shall not be discussed further than is necessary to develop the general points. (4) In other respects, a motion for vote on account shall be dealt with in the same way as if it were a demand for grant.”

CL. (1) (b).

#### OTHER CONSTITUTIONS

*England.*—“Unexpected demands upon the resources of the United Kingdom for defence, or for a warlike expedition, which on account of the magnitude or indefiniteness of the service, cannot be stated with the detail given in an ordinary estimate, are laid before Parliament by an application, based on an estimate of the total sum required, for a *vote of credit*. Sums obtained upon a vote of credit are, like other grants of supply, available solely during the financial year in respect of which the grant is made.”<sup>15</sup>

#### INDIA

Cl. (1) (b) : *Vote of Credit.*—Owing to an unexpected demand for money caused by some national emergency, Government may require funds for which it is not possible to give detailed estimates. In such a case the House would grant the money required by a vote of credit, passed in the same way as annual grants.

CL. (1) (c).

#### OTHER CONSTITUTIONS

*England.*—An exceptional grant may be required to meet the cost of an undertaking which forms no part of the current service of the year, such as . . . loans to foreign countries, fortifications and works. Demands for financial aid are also sometimes made by a message from the Crown for a grant necessary for the maintenance of the dignity of the Crown, e.g., marriage of the Princess Royal<sup>16</sup>.

#### INDIA

Cl. (1) (c) : *Exceptional Grant.*—An exceptional grant or special grant is analogous to a vote of credit in this that an exceptional grant is made for a particular and special purpose which does not form part of the ordinary expenditure of the year. In such a case, the house would grant money for that particular purpose, separately. The procedure for votes of credit and exceptional grants shall be the same as demands for grants, subject to such adaptations as the Speaker may deem necessary [R. 137 of the Rules of Procedure].

There was no provision in the Government of India Act, 1935, for any of the grants included in Art. 116.

**117.** (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States :

Special provisions as to financial Bills.

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.

CL. (1) :

#### OTHER CONSTITUTIONS

*England.*—The rule that 'the Crown demands money' applies not only to supply, *i.e.*, the authorisation of expenditure, but also to revenue, *i.e.*, the authorisation of taxation. Historically, the authorisation of expenditure required the imposition of taxation,<sup>16-17</sup> and so, Standing Order 63 [quoted at p. 351, *ante*], which was adopted in 1713, is limited, in its terms, to the authorisation of expenditure. But, since then, authorisation of expenditure and imposition of taxation have come to be effected by different legislation. Hence, S. O. 63, has come to be applied to taxation as well. As *May*<sup>18</sup> explains it—

"The principle that the sanction of the Crown must be given to every grant of money drawn from the public revenue, applies equally to the taxation levied to provide that revenue. No motion can therefore be made to *impose* a tax, save by a Minister of the Crown, *unless* such tax be made in *substitution*, by way of equivalent, for taxation at that moment submitted to the consideration of Parliament; nor can the amount of a tax proposed on behalf of the Crown be augmented, nor any alteration made in area of imposition. In like manner, no *increase* can be considered either of an existing, or of a new or temporary tax for the service of the year, except on the initiative of a minister, acting on behalf of the Crown; nor can a member other than a minister move for the introduction of a Bill framed to effect a reduction of duties, which would *incidentally* effect the increase of an existing duty, or the imposition of a new tax, although the aggregate amount of imposition would be *diminished* by the provisions of the Bill."

Hence, the exclusive right to propose *fresh* taxation or *increase* of the rates of existing taxes, belongs to the Government, and no private member may bring any motion having either of these effects. But a private member —(a) can move to reduce taxation or can bring in a Bill to repeal or reduce taxes which the Government has not proposed to touch, or can move for a further reduction when the Government proposes to reduce a tax; (b) can, when the Government brings in a plan for revision of taxation, move to substitute a different plan, provided only the revenue to be yielded by the new tax will not be greater than that yielded by the one sought to be substituted. But neither of these motions can incidentally increase other taxes.<sup>19</sup>

*Canada.*—Sec. 54 of the British North America Act says—

(16-17) Jennings, *Parliament*, 1948, p. 251.

(18) *May*, *Parliamentary Practice*, 13th Ed., p. 511.

(19) Lowell, *Government of England*, 1912 Vol. I, p. 283; *May*, *Parliamentary Practice*, pp. 533-5.



"It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue or of any tax or impost, to any purpose, that has not been first recommended to that House by message of the Governor-General in the session in which such vote, resolution, address, or Bill is proposed."

*Australia.*—Sec. 56 of the Constitution Act says—

"A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

*Ceylon.*—Sec. 69 of the Constitution Order in Council, 1946, provides—

"No Bill or motion, authorising the disposal of, or the imposition of charges upon, the Consolidated Fund or other funds of the Island, or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force shall be introduced in the House of Representatives except by a Minister, nor unless such Bill or motion has been approved either by the Cabinet or in such manner as the Cabinet may authorise."

*Government of India Act, 1935.*—Sec. 37 (1), as amended in 1947, provided—

"(1) A Bill or amendment making provision—

(a) for imposing or increasing any tax ; or

(b) for regulating the borrowing of money or the giving of any guarantee by the Dominion Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Dominion Government, or

(c) for declaring any expenditure to be expenditure charged on the revenues of the Dominion, or for increasing the amount of any such expenditure, shall not be introduced or moved except on the recommendation of the Governor-General."

#### INDIA

Cl. (1) : *No financial Bill to be introduced except on recommendation of President.*—This provision is a counterpart of that in Art. 113 (3). Not only demands for grants but also any Bill or amendment relating to taxation, borrowing and the other matters enumerated in Art. 110 (1) shall require the recommendation of the President for its introduction, whether such Bill deals exclusively with the money matter so as to be a "Money Bill" within the meaning of Art. 110 (1), or not. The only exceptions are (i) Bills or motions for reduction or abolition of any tax ; (ii) imposition of fines, fees and licenses, taxes by local authority. [see also p. 329, ante].

It should be noted in this connection that in India, an annual Finance Act is passed as in England, to sanction the imposition of new taxes as well as introduction of changes in the rates of taxes or duties imposed by permanent Acts. The Annual Finance Act embodies the taxation or revenue proposals for the financial year, while the Appropriation Act embodies the expenditure proposals. Thus, the Finance Act (XXV of 1950) made certain changes in the rates of income-tax by amending the Income-tax Act (XI of 1922) ; made certain changes in rates of customs duties by amending the Indian Tariff Act, 1934 ; discontinued the salt duty and altered rates of certain other duties included in the Central Excise and Salt Act (I of 1944) ; altered rates of Postage by amending the Indian Post Office Act (VI of 1898) ; and so on.

CL. (3) :

#### OTHER CONSTITUTIONS

*England.*—Though an ordinary Bill which contains a financial clause or imposes a charge on the revenues is not a "Money Bill" within the meaning of the Parliament Act, 1911, still the exclusive right of the House of Commons to initiate financial legislations is maintained even in regard to such Bill. If such a Bill is introduced in the House of Lords, the financial clauses are omitted when the Bill is read a third time in the House of Lords ; but when the Bill is sent to the House of Commons, the financial clauses are printed in the Bill in special type. The House of Commons reinserts the financial clauses and then passes the Bill.

Alternatively, the financial clauses are allowed to remain in the Bill in the House of Lords, with a clause just following, to negative the charge ; and when the Bill is received in the Commons, they omit the formal negative clause and then pass the Bill.

## INDIA

*Cl. (3) : Bill involving expenditure.*—This clause deals with a Bill which does not relate solely to a proposal for expenditure, and is, therefore, not a 'Money Bill.' An ordinary Bill, which involves expenditure<sup>19-a</sup>, may be introduced in either House (though a Bill requiring taxation cannot). But it shall not be passed by either House except on the recommendation of the President.

So, if the Upper House introduces a Bill having such a consequence, the consideration of the Bill shall be suspended until the President's recommendation is received. It seems that once the President's recommendation is obtained, the Bill will then be passed as an ordinary Bill, so that the upper House (the Council of State) shall then have co-ordinate powers even though the Bill has a financial consequence.

*Procedure Generally.*

**118.** (1) Each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

Rules of procedure.

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.

(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Houses.

(4) At a joint sitting of the two Houses, the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside.

CL. (1) :

## OTHER CONSTITUTIONS

*England.*—Each House, having the exclusive power of regulating its procedure, has made a number of standing orders, the object of which is to make an economical use of time, to allocate time for different classes of business and the course of procedure. The Standing Orders have not to be re-adopted after each election and some of them are very old ; but they can be repealed or altered at any time, by a majority vote. The Standing Orders, however, do not cover the entire rules of procedure of the House and there are many things which are regulated by usage.<sup>20</sup>

Some of the Standing Orders of the House of Commons we have already mentioned (p. 351, *ante*). Some of the other important rules and orders of the House of Commons relating to the maintenance of order may be stated as follows<sup>21</sup> :

(a) A member who wishes to speak (except on a point of order) must rise in his place uncovered. But when a member is so much incapacitated by illness that he cannot stand, it is customary for the House to give him leave to retain his seat while speaking.

(19-a) As in England, r. 57 (2) of the Rules of Procedure in our Provisional Parliament requires that "Clauses or provisions in Bills involving expenditure from public funds shall

be printed in thick type or in italics."  
(20) An acknowledged authority on this subject is Erskine May's *Parliamentary Practice*.  
(21) Halsbury, 1912 Ed., para. 1229, *et seq.*

(b) A member must speak in English, and is not allowed to read his speech. He may refer to notes but may not read from any book or document the report of a debate in the House held during the same session<sup>22</sup>.

(c) When several members rise to address the House at the same time, it rests with the Speaker to decide which member he will call upon to speak. When a member's name has been called upon by the Speaker, the member may speak; he must address himself not to the House, but to the Speaker.

(d) A member is not allowed to speak upon the same question more than once in the same debate, unless he has moved a substantive motion, in which case he has a right of reply<sup>23</sup>. But a member who has already taken part in a debate, may by leave of the House, speak a second time on the same question, if he wishes to explain some material point in his first speech which has been misunderstood, or desires to make a personal explanation.

(e) A member must keep his seat and not walk about the House while a debate is proceeding. The Speaker may order members who are standing at the bar to take their places, and, if they disobey, may instruct the Serjeant-at-arms to clear the gangway. A member must not interrupt, in a disorderly manner, another member who is addressing the House, nor may he read a newspaper or book while a debate is proceeding. It is for the Speaker to decide what is interruption within the scope of this rule.

*U. S. A.*—Sec. 5 (2) of Art. I says—

“Each House may determine the rules of its proceedings; punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.”

*Australia*.—Sec. 50 (ii) of the Constitution Act says—

“Each House of Parliament may make rules and orders with respect to—

(ii) The order and conduct of its business and proceedings either separately or jointly with the other House”.

*Japan*.—Art. LVIII says—

“Each House shall establish its rules pertaining to meetings, proceedings and internal discipline and may punish members for disorderly conduct. However, in order to expel a member, a majority of two-thirds or more of those members present must pass a resolution thereon.”

*Ceylon*.—Sec. 21 (iii) of the Constitution Order in Council, 1946, deals with this matter.

*Burma*.—Sec. 80 (1) of the Burmese Constitution is identical with Art. 118 (1) of our Constitution.

*Government of India Act, 1935*.—The first paragraph of sub-section (1) of Sec. 38 of the Act of 1935 was similar to present Cl. (1) of the Constitution.

## INDIA

Cl. (1): *Rules of Procedure*.—As in England, each House of our Parliament shall have exclusive power to make rules to regulate its procedure and conduct of business. One of the objects of such rules is to economise time<sup>24</sup> and to make an orderly conduct of the proceedings. But no less important is the safeguarding of the right and opportunity of the Opposition or the party in minority to criticise the Government, which is a fundamental principle underlying Parliamentary Government<sup>24</sup>. Of course, these rules and Standing Orders are merely resolutions of the House and may be amended or suspended by a majority vote at any time. But according to constitutional usage, in *England*, the Government, i.e., the majority in power does not interfere with the rights of the minority parties by amending the

(22) May, *Parliamentary Practice*, 11th Ed., pp. 321-2.  
p. 310.

(23) May, *Parliamentary Practice*, 11th Ed.,

(24) Jennings, *Parliament*, 1948, pp. 50, 134.



Standing Orders as often as may suit its interests. This rule is worth following, in India.

*'Subject to the provisions of the Constitution'.*—These words indicate that the rule-making power of the Houses of Parliament is not absolute as in England, but is limited by the provisions of the Constitution as in the United States. Thus, if a rule made by a House violates a fundamental right, the Courts have the power to declare it invalid<sup>25</sup>.

*Cl. (2) : Existing rules of procedure as adapted by Speaker.*—This Clause provides that until rules are made by Parliament under Cl. (1) of this Article, the Rules of Procedure and Standing Orders in force immediately before the commencement of the Constitution shall have effect, with modifications and adaptations as may be made by the Speaker of the House of the People or the Chairman of the Council of States. The Speaker of Parliament has already made adaptations under the present Clause, and the adapted rules have been published as the Rules of Procedure and Conduct of Business in Parliament<sup>1</sup>.

The more important of these rules relating to conduct of business, corresponding to the English rules already referred to (p 364, *ante*), are reproduced below:

*156. Rules to be observed by members while present in the House.*—Whilst the House is sitting, a member—(i) shall enter and leave the House with decorum; (ii) shall not cross the House irregularly; (iii) shall not read any book, newspaper or letter except in connection with the business of the House; (iv) shall maintain silence; (v) shall not interrupt any member while speaking by disorderly expression or noises or in any other disorderly manner.

*157. Member to speak when called by the Speaker.*—When a member rises to speak, his name shall be called by the Speaker. If more members than one rise at the same time, the member whose name is so called shall be entitled to speak.

*158. Mode of addressing the House.*—A member desiring to make any observations on any matter before the House shall speak from his place, shall rise when he speaks and shall address the Speaker: Provided that a member disabled by sickness or infirmity may be permitted to speak sitting.

*160. Questions to be asked through the Speaker.*—When, for purposes of explanation during discussion or for any other sufficient reason, any member has occasion to ask a question of another member on any matter then under the consideration of the House, he shall ask the question through the Speaker.

*163. Order of speeches and right of reply.*—(1) After the member who moves has spoken other members may speak to the motion in such order as the Speaker may call upon them. If any member who is so called upon does not speak, he shall not be entitled, except by the permission of the Speaker, to speak to the motion at any later stage of the debate. (2) Except in the exercise of a right of reply or as otherwise provided by these rules, no member shall speak more than once to any motion, except with the permission of the Speaker. (3) A member who has moved a motion may speak again by way of reply, and if the motion is moved by a private member, the Minister concerned may, with the permission of the Speaker, speak (whether he has previously spoken in the debate or not) after the mover has replied: Provided that nothing in this sub-rule shall be deemed to give any right of reply to the mover of a motion to reduce any demand for grant or to the mover of an amendment to a Bill or a resolution, save with the permission of the Speaker.

*164. Procedure when Speaker rises.*—(1) Whenever the Speaker rises he shall be heard in silence and any member who is then speaking or offering to speak shall immediately sit down. (2) No member shall leave his seat while the Speaker is addressing the House."

**119.** Parliament may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, each House of Parliament in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of India, and, if and so far as any provision of any law so made

Regulation by law of procedure in Parliament in relation to financial business.

(25) Cf. *United States v. Ballin*, 144 U.S. 1.

(1) *Gazette of India*, Extraordinary, dated 14-2-50; 10-3-50; 25-4-50.

is inconsistent with any rule made by a House of Parliament under clause (1) of article 118 or with any rule or standing order having effect in relation to Parliament under clause (2) of that article, such provision shall prevail.

**120.** (1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, Language to be used in business in Parliament shall be transacted in Hindi or in English:

Provided that the Chairman of the Council of States or Speaker of the House of the People, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother tongue.

(2) Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom.

**121.** No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.

#### OTHER CONSTITUTIONS

*England.*—The conduct of Judges of the superior Courts or County Court Judges, cannot be discussed in the House of Commons, save on a substantive motion<sup>2</sup>.

#### INDIA

*Art. 121.—Restriction of Discussion relating to Judges.*—This Article makes the Judges of the Supreme Court and High Courts immune from any discussion in Parliament with respect to their conduct except upon a motion for their removal, under Art. 124 (4).

*Analogous Provision.*—See Art. 211, *post*.

**122.** (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers.

#### CL. (1) :

#### OTHER CONSTITUTIONS

*England.*—It has already been seen (p. 322, *ante*), that each House of Parliament has got exclusive powers over all that takes place within its four

(2) May, *Parliamentary Practice*, 13th Ed., p. 271.

walls, excepting crimes. The Courts have, therefore, no jurisdiction to enquire into the regularity or validity of the proceedings of either House. For the same reason, the Courts have no right to question the validity of an Act of Parliament on the ground of any defect in procedure, *e.g.*, that it was not passed through the customary three readings in the House of Commons<sup>3</sup> or that the Bill was not assented to by a majority of members present and voting. The King's Printer's copy would be accepted by the Court as conclusive evidence that the Act had been passed in the proper manner and form<sup>4</sup>. So far as Money Bills are concerned, the Parliament Act, 1911 itself (Sec. 3) provides that the Speaker's certificate that the provisions of the Act have been complied with is conclusive and cannot be questioned by the Courts. Courts have, however, refused to accept resolutions of either House having the effect of an Act of Parliament<sup>5</sup>.

*U. S. A.*—In the U. S. A. the position is not so clear. But the consensus of opinion is that the Journals of the Houses (Art. I, Sec. 5) cannot be referred to, to invalidate an Act of Congress, on the ground of defect in *procedure*, which has been signed by the Presiding officers of each House and then deposited with the State Department, with the President's signature<sup>6</sup>. But the Courts would interfere when some express constitutional provision has been violated, *e.g.*, when a Bill relating to revenue measure, has been passed without originating in the House of Representatives<sup>7</sup>.

*Dominions.*—In *Australia*, the Privy Council upheld an order of injunction to restrain the presentation of a New South Wales Bill to the Governor, on the ground that the Bill had not undergone the constitutional provision of a referendum required for such Bill<sup>8</sup>. On the other hand, the *South African* Supreme Court has held<sup>9</sup>, that under the Status of Union Act, 1934, the South African Parliament was a sovereign Legislature, and that, accordingly, the Courts would not inquire into the question whether the special procedure prescribed by Sec. 152 of the Constitution Act for repealing or amending certain 'entrenched' clauses of that Act had been observed.

*Burma.*—Cl. (1) of Sec. 82 of the Burmese Constitution is the same as Cl. (1) of Art. 122 of our Constitution.

*Government of India Act, 1935.*—Sub-sec. (1) of Sec. 41 of that Act was identical with the present Clause of our Constitution.

#### INDIA

Cl. (1) : *Courts not to inquire into irregularity of procedure in Parliament.*—It is clear from the above clause, that our Courts would not be entitled to question the validity of any 'proceeding' in Parliament on the ground of irregularity of 'procedure'. Thus, the Courts cannot invalidate an Act or interfere with a motion on the ground that it was passed without a quorum [Art. 100 (3)], or that it was not determined by a majority of votes of the members present and voting [Art. 100 (1)]. As in *England*, an authenticated copy of the Act will conclusively show that the Act has been duly passed under the proper form and procedure. As to authentication, rule 96 of the Rules of Procedure and Conduct of Business<sup>9</sup> in Parliament says—

"When a Bill is passed by Parliament, a copy thereof shall be signed by the Speaker : Provided that in the absence of the Speaker from New Delhi the Secretary may authenticate the Bill for the Speaker in case of urgency."

(3) Chalmers & Hood Phillips, Constitutional Law, pp. 23, 26.

(4) *Stockdale v. Hansard*, (1839) 9 A. & E. 1; *Bowles v. Bank of England*, (1913) 1 Ch. 57.

(5) *Flint v. Stone Tracy Co.*, 220 U.S. 107; Willoughby, Constitutional Law, Vol. II, p. 653.

(6) *Hubbard v. Lowe*, 226 Fed. 135.

(7) *A. G. for N. S. W. v. Trethowan*, (1932) A.C.

526.

(8) *Ndlwana v. Hofmeyr*, (1937) App. Div. (South Africa) 229.

(9) *Gazette of India*, Extraordinary, 14-2-50.



Art. 100 (2) expressly provides that any proceeding in Parliament shall not be invalid on the ground that there was any vacancy in the membership thereof, or some person who was disqualified or not entitled to sit or vote did sit or vote at that proceeding.

Nevertheless, this Article would not debar the Court from investigating into the very capacity of either chamber to function by reason of some alleged *lack of power or capacity* under the provisions of the Constitution from which it derives power<sup>10</sup> e.g., owing to want of proper summons, expiry of term.

*Analogous Provision.*—Identical provision is made in Art. 212 (1), as regards the State Legislature.

#### CL. (2) :

#### OTHER CONSTITUTIONS

*England.*—From the power of each House of Parliament to regulate its procedure and conduct of business, it follows that the acts of its officers who are entrusted with powers or duties on this behalf cannot be challenged in the Courts. Thus, the Speaker's interpretation of a Statute, however, wrong cannot be interfered with by the Courts, directly or indirectly.<sup>11-12</sup> Nor is there any appeal to the Courts from the Speaker's order stopping a speech or disallowing a motion or ordering a stranger to withdraw. On the other hand, if a member is turned out of the House by the Sergeant-at-Arms under orders of the House, he has no remedy from the Courts.<sup>12</sup>

An extreme case of immunity of officers of Parliament took place in the case of *R. v. Graham Campbell*<sup>13</sup> which went so far as to establish that the House of Commons has the power to sanction *breaches* of any statute relating to any matter taking place within the walls of the House. Thus, neither the members of a Committee of the House nor an officer of the House could be summoned for selling liquor within the precincts of the House without licence as required by the Licensing Act: For,

"In the matters complained of, the House of Commons was acting collectively in a matter which fell within the area of the internal affairs of the House, and, that being so, any tribunal might well feel on the authorities, an invincible reluctance to interfere."<sup>12</sup>

*Burma.*—Cl. (2) of Sec. 122 of the Burmese Constitution corresponds to cl. (2) of Art. 122 of our Constitution.

#### INDIA

Cl. (2) : *No jurisdiction of Court over officer regulating procedure.*—This cl. provides that the presiding officer of each House or any other officer or member of Parliament who is for the time being vested with the power to regulate procedure, conduct of business or maintenance of order in Parliament, shall not be subject to jurisdiction of the Court 'in the exercise of those powers.'<sup>14</sup>

This cl. is intended to give effect to the rules prevailing in England, which we have already discussed above but it may be said that a case like that of *R. v. Graham Campbell*<sup>13</sup> would not be upheld by our Courts, for the immunity under the present clause extends only to acts done in the exercise of powers for 'regulating procedure, conduct of business or maintaining order'. So our Courts shall have the jurisdiction to enquire whether any particular act of an officer or member of Parliament *in fact* relates to any of these three matters.<sup>15</sup> Selling of liquor within the precincts of the House cannot reasonably be said to be connected with any of them.

(10) *Umayal Achi v. Lakshmi* A.I.R. 1945 F.C. 28 (36, 42).

(11-12) *Bradlaugh v. Gossett*, (1884) 12 Q.B.D. 271.

(13) *R. v. Graham-Campbell*, (1935) 1 K.B. 594.

(14) No decision like *Kumar Sankar v. Cotton*, 40 C.L.J. 515 will be possible under the Constitution.

(15) Cf. *U. Lan v. U. Chit Hlaing*, A. I. R. 1941 Rang. 49 (53).

### CHAPTER III.—LEGISLATIVE POWERS OF THE PRESIDENT.

**123.** (1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

Power of President to promulgate Ordinances during recess of Parliament.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions ; and

(b) may be withdrawn at any time by the President.

*Explanation.*—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this constitution be competent to enact, it shall be void.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 42 of the Act of 1935 was as follows—

“(1) If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require :

Provided that the Governor-General—

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section if a Bill containing the same provisions would under this Act have required his previous sanction to the introduction thereof into the Legislature; and (b) shall not, without instructions from His Majesty, promulgate any such ordinance if he would have deemed it necessary to reserve a Bill containing the same provisions for the signification of His Majesty's pleasure thereon.

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance—

(a) shall be laid before the Federal Legislature and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, or, if before the expiration of that period resolutions disapproving it are passed by both Chambers, upon the passing of the second of those resolutions ; (b) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General ; and (c) may be withdrawn at any time by the Governor-General.

(3) If and so far as an Ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.”

#### INDIA.

*Article 123 : Ordinance-making power of the President.*—This article empowers the President the power to legislate by Ordinances, to meet with any circumstances that require immediate action, when Parliament is not in session.

This provision is a relic of the Government of India Act, 1935; the head of the Executive has no such independent power of legislation in *England*<sup>16</sup> since the *case of Proclamations*<sup>17</sup>, nor is there any such precedent in the Dominions, or even in Eire. But though the Government of India Act serves as the source of this provision of our Constitution, it differs from the provisions of the Act of 1935 on the following points—

*Firstly*, this power is to be exercised by the President on the advice of his Council of Ministers, while under the Act of 1935, the Governor-General could exercise his individual judgment in some cases and was required to obtain the previous instructions from the Crown, in certain cases<sup>18</sup>.

*Secondly*, whereas under the Act of 1935, the Governor-General had parallel powers of legislation by Ordinances and Governor-General's Act, even when the Legislature was in session<sup>19</sup> no such powers are reproduced in the Constitution. Hence, the President shall have no independent power of legislation when Parliament is in session.

#### CL. (1).

*When both Houses of Parliament are not in session.*—A session is the period of time intervening the first meeting of Parliament and its prorogation or dissolution, whichever takes place earlier [see under article 85 (1), *ante*]. Parliament must therefore be deemed to be in session till it is prorogued or dissolved<sup>20</sup>. An Ordinance made by the President under the present article [or by a Governor under Article 213(1)] shall be void, if it is promulgated before order of prorogation is made and notified<sup>21</sup>. The President's Ordinance-making power arises as soon as *either* House is prorogued. The reason is that one House is not competent to make laws [Arts. 79, 111.]

*'Is satisfied'*.—The satisfaction referred to in this clause is the satisfaction of the President. The President is not bound to expound reasons for promulgating an Ordinance or to prove them affirmatively in a Court of law.<sup>22</sup> He is the sole judge of the question whether circumstances exist which call for immediate legislation by Ordinance. The existence of such necessity is not a justiciable matter which the Courts could be called upon to determine by applying an objective test<sup>22</sup>. Even if the President states the reasons which satisfied him as to the necessity of immediate action, the Courts cannot question the *bona fides* of such action<sup>23</sup>. 'Immediate action' has no necessary connection with any 'emergency'.

(16) Dr. Ambedkar observed [Constituent Assembly Debates, Vol. VIII, p. 214] that the Ordinance-making power during recess of Parliament was similar to the power of the Crown to make a proclamation of emergency under the Emergency Powers Act, 1920 and then to make regulations. But it is submitted that such powers are entirely statutory, and the Regulations are to be made subject to the limitations and conditions imposed by the statute and are liable to be set aside by the Courts if they are *ultra vires*. But Art. 123 of the Indian Constitution does not lay down in what conditions and for what purposes the Ordinance-making power is to be used. The words 'satisfied' show clearly that so far as the Courts are concerned they shall have no power to question the justification either as to the occasion or purpose or the subject-matter of an Ordinance, even if the Ordinance is not made in good faith Cf. *Jnan Prasanna—v. West Bengal*, (1948) 53 C.W.N. 27 (70) (F.B.)—[except on the justiciable ground of exceeding the legislative powers conferred on the Union Parliament by the Constitution.]

(17) *Case of Proclamations*, (1610) 2 St. Tr. 723.

(18) Proviso to Sec. 42 (1), Government of India Act, 1935.

(19) Secs. 43-44, *ibid*.

(20) *Narayanaswami v. Inspector of Police*, (1948) F.L.J. 43 (48), (F.B.).

(21) *Bidya v. Province of Bihar*, A.I.R. 1950 Pat. 18.

(22) *Lakhinarayan v. Province of Bihar*, (1950) S.C.J. 32 (35).

(23) *Jnan Prasanna v. Province of West Bengal*, (1948) 53 C.W.N. 27 (70) F.B. In this case, the Governor of West Bengal exercised his Ordinance-making power in order to prevent the High Court from pronouncing a decision which would be unwelcome to the Provincial Government. The Ordinance was nevertheless held to be valid on the ground that the Court was not competent to enquire into the circumstances justifying the promulgation of the Ordinance, even though the Full Bench disapproved in strong terms such an executive policy to prevent judicial decisions by legislation.



For the same reason, there is nothing illegal or fraudulent on the part of the President to prorogue Parliament for the very object of making an Ordinance.<sup>24</sup>

#### CLAUSE (2).

*Duration of an Ordinance.*—No maximum period of duration of an Ordinance promulgated under this article is laid down. The duration is to depend upon the re-assembly of Parliament. If on re-assembly, Parliament disapproves of the Ordinance, it would cease to have effect immediately; otherwise, it shall continue for another six weeks from the date of re-assembly of Parliament.

This provision of the Constitution thus suffers from the same defect as existed in section 42 of the Government of India Act, 1935. Of course, Dr. Ambedkar assured<sup>25</sup> the Constituent Assembly that there was no ground for the apprehension that the President would misuse his power by postponing the re-assembly of Parliament for an indefinite time, because the exigencies of the Government would not permit such an action. But as against the above view, it may be submitted that liberty is an object which has sometimes to be guarded even against an Executive theoretically resting on popular support. It is in times of crisis and unsettled conditions that there is the greatest need for safeguards against executive action; and if a Ministry, dubious of its hold over the Legislature advises the Executive head to resort to this Ordinance-making power and the latter accedes on ground of party alliance or otherwise, there is a possible scope for abuse of the power by way of proroguing Parliament and then legislating by Ordinances, say, for 6 months (the maximum limit of recess under Article 85 (1)).

#### CL. (3).

*Extent of the Legislative power of the President.*—Clauses (2) and (3), read together, make it clear that the power of President to legislate by Ordinance during recess of the Union Parliament is co-extensive with the power of Parliament itself. The President may enact by Ordinance what Parliament might have enacted, but he cannot enact what Parliament could not [see Arts. 245-254, *post*].

Since Parliament can amend or repeal its own Acts, it follows, therefore, that the President may, by Ordinance, amend or repeal laws passed by the Parliament itself, subject, of course, to the limitation in clause (2) as to the duration of that Ordinance.<sup>1</sup> Similarly, where a law passed by the Legislature could be retrospective in operation, there is nothing to bar an Ordinance on the same subject from being retrospective<sup>2</sup>. Hence, an Ordinance can be given retrospective operation even from a date when the Legislature was in session<sup>3</sup>.

On the other hand, an Ordinance violating the Fundamental Rights would be void. Similarly, an Ordinance of the President cannot transgress the legislative powers of Parliament itself. Since the President cannot enact what Parliament could not, he cannot make a provision in his Ordinance that the validity of its provisions shall not be open to challenge in the Courts,—on the ground of its being *ultra vires* his powers<sup>4</sup>.

## CHAPTER IV.—THE UNION JUDICIARY.

### General

#### POSITION OF THE SUPREME COURT OF INDIA.

The position of the Supreme Court of India can be discussed with reference to its powers as an Appellate Court, as a Federal Court and as a guardian of the Constitution.

(24) *In re Veerabhadra*, A.I.R. 1950 Mad. 243 (256).  
 (25) Constituent Assembly Debates, Vol. VIII, p. 215.  
 (1) *Vide Emperor v. Benoarilal* (1945) 49 C.W.N. 178 (P.C.); *Cf. Jnan Prosanna v. Province of West Bengal*, (1948) 53 C.W.N. 27 (71) (F.B.).  
 (2) *United Provinces v. Atiga*, (1942) F.C.R. 110.  
 (3) *Jnan Prosanna v. Province of West Bengal* (1948) 53 C.W.N. 27 (72) (F.B.).  
 (4) *Cf. Shibnath v. Porter*, A.I.R. 1943 Cal. 377 (384) S.B.

*As ■ Federal Court :*

It is acknowledged on all hands that—

“A Federal Court is an essential element in a Federal Constitution. It is at once the interpreter and guardian of the Constitution and ■ tribunal for the determination of disputes between the constituent units of the Federation.”

Every federal Constitution, whatever the degree of cohesion it aims at establishing, involves a distribution of powers between the Union and the units composing the Union,<sup>5</sup> and both Union, and State Governments derive their authority from and are limited by, the same Constitution. In a Unitary Constitution, like that of England, there is no such problem to solve, for there the local administrative or legislative bodies are mere subordinate bodies under the central authority. Hence, there is no problem of judicially determining disputes between the central and local authorities. But in a federal Constitution, the powers are divided between the national and State Governments, and it becomes necessary that there must be some authority to determine disputes between the Union and the States or the States *inter se* and to maintain the distribution of powers as made by the Constitution. In the American Constitution, this duty of the Federal Court is accentuated by the fact that the American Constitution is in the nature of a treaty between the component units (see p. 31, *ante*) and that the Constitution sets up a double government and double allegiance<sup>6</sup>.

As to its duties as a federal Court, the Supreme Court itself has observed—

“This Court has no more important function than that which devolves upon it, the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge harmoniously with the other, the duties entrusted to it by the Constitution”.<sup>7</sup>

Article III, Sec. 2 (1) of the United States Constitution, thus, empowers the Supreme Court to determine—

“all controversies to which the United States shall be a party ; to controversies between two or more States. . . . .”

Though *our* federation is not in the nature of a treaty or compact between the component units (see p. 32), there is nevertheless, a division of legislative as well as administrative powers between the Union and the States. Article 131 of our Constitution, therefore, vests the Supreme Court with original and exclusive jurisdiction to determine justiciable disputes between the Union and the States or between the States *inter se*. This provision, however, differs from that of Article III, Sec. 2 (1) of the United States Constitution as well as of Sec. 75 of the Australian Constitution in this that *our* Supreme Court shall have no original jurisdiction to decide disputes between *residents* of different States or between a State and a resident of another State. Such disputes would, under *our* Constitution come up to the Supreme Court only in appeal, if the provisions relating thereto are satisfied.

Of course, in the case of disputes between the Union and the States, the province of *our* Supreme Court may differ considerably from that of the Supreme Court of the United States, owing to the difference in the very nature of the federation ■ the two countries<sup>8</sup>. The absence in *our* Constitution of the theories of ‘State rights’ ‘Immunity of Instrumentalities’, ‘dual Government’, ‘divided sovereignty’ and the vesting of residuary powers and the power of issuing *administrative* directions in the Union, and its overriding powers in emergencies would no doubt tend to minimise litigation between the Union and the States in *our* country. Nevertheless, as the experience under the Government of India Act, 1935, has shown, the very elaborateness of the legislative lists and the attempt at exhaustiveness, ■

(5) Report of the Joint Parliamentary Committee (J.P.C.) on Indian Reforms, Vol. I, Part I.

(6) Cf. *Baxter v. Commissioner of Taxation* (1907)

4 C.L.R. 1087 (1110).

(7) *Hammer v. Dagenhart* (1918) 247 U.S. 251.

(8) See pp. 31-32, *ante*.

(9) See further, under Part XI, *post*.

will lead to the growth of justiciable doubts and disputes as to legislative powers, at least so long as the principles of interpretation applied by the Supreme Court are not well settled. Though *our* Constitution has strengthened the Union more than in any other federal country, nevertheless, it is not a unitary system that is proposed to be set up by the Constitution, and it is the interpretation of the Supreme Court in particular cases that will hold the centripetal and centrifugal forces in the balance and save the original distribution of powers from any aggressive encroachment on the part of the Union Government. As Sir Alladi Krishnaswami Aiyar<sup>10</sup> has recently observed—

“The future evolution of the Indian Constitution will thus depend to a large extent upon the work of the Supreme Court and the direction given to it by that Court. From time to time, in the interpretation of the Constitution, the Supreme Court will be confronted with apparently contradictory forces at work in the society for the time being. While its function may be one of interpreting the Constitution as contained in the instrument of Government, it cannot in the discharge of its duties afford to ignore the social, economic and political tendencies of the times which furnish the necessary background. It has to keep the poise between the seemingly contradictory forces. In the process of the interpretation of the Constitution, ■ certain occasions, it may appear to strengthen the Union at the expense of the Units and at another time it may appear to champion the cause of provincial autonomy and regionalism. On one occasion it may appear to favour individual liberty ■ against social or State control and at another time it may appear to favour social or State control. It is the great tribunal which has to draw the line between individual liberty and social control. . . .”

#### *As a Court of Appeal :*

Like the House of Lords in England, the Supreme Court of India is the final appellate tribunal of the land, and in some respects, the jurisdiction of the Supreme Court is even wider than that of the House of Lords. For, while *civil* appeals from the decisions of the Court of Appeal now lie to the House of Lords only by leave of the Court of Appeal or of the House of Lords itself<sup>11</sup>,—in cases of high value, under articles 133 (1) (a-b) of *our* Constitution, there will lie an appeal as of right to the Supreme Court, once the certificate ■ to value is obtained from the High Court. On the other hand, as regards *criminal* appeals an appeal lies to the House of Lords only if the Attorney-General certifies that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that ■ further appeal should be brought<sup>12</sup>. But in cases specified in clauses (a) and (b) of Article 134 (1) of *our* Constitution (death sentence), an appeal will lie to the Supreme Court, as of right. Further, the right of the Supreme Court to entertain appeal, by special leave, in any cause or matter determined by any Court or tribunal in India save military tribunals, is unlimited (Article 136).

The jurisdiction of a final Court of appeal is, of course, no necessary appendage of a federal Court, as is illustrated by the Dominion Constitutions. In the Constitution Acts of Canada, Australia and South Africa, there was provision for final appeal to the Judicial Committee of the Privy Council. It is only in 1949<sup>13</sup> and 1950<sup>14</sup> that *Canada* and *South Africa* have, respectively, brought Bills to totally abolish Privy Council appeals. *Australia*, however, has expressed her determination to retain the appellate link with the Crown in Council<sup>15</sup>.

Similarly, the *Government of India Act*, 1935, though it established a Federal Court, retained the final appeal to the Privy Council. But, after the passing of the Indian Independence Act, and before the commencement of this Constitution, the appellate jurisdiction of the Privy Council in civil cases, was transferred to the Federal Court, by the Federal Court (Enlargement of Jurisdiction) Act (I of 1948).

(10) Address by Sir A. K. Aiyar, A.I.R. 1949 Jour. 35.

(11) Administration of Justice (Appeals) Act, 1934.

(12) Criminal Appeal Act, 1907.

(13) Statesman, Calcutta, 31st January, 1949. The validity of the Canadian Bill has been upheld by the Privy Council itself, in *A. G. of Ontario v. A. G. of Canada*, (1947) 51 C.W.N.

886 (P.C.).

(14) Statesman, Calcutta, February 8-9, 1950.

(15) Dr. Evatt in Australian House of Representatives; Statesman, Calcutta, 11th February, 1949. The latest appeal to the Privy Council which has been reported, appears to be *Commonwealth of Australia v. Bank of N. S. W.* (1949) ■ All. Eng. Rep. 755 (P.C.).



That Act, however, did not affect appeals pending before the Privy Council. The *Constitution* has finally severed all connections with the Privy Council, and the Supreme Court of India is the final appellate tribunal under the Constitution, in any cause or matter.

Needless to point out that the Appellate jurisdiction of our Supreme Court is much larger than that of the Supreme Court of the *United States* which is concerned only with cases arising out of federal jurisdiction, or the validity of laws.

*As Guardian of the Constitution :*

As against unconstitutional acts of the Executive, the jurisdiction of the Court<sup>s</sup> is nearly the same under all constitutional systems. But not so is the control of the Legislature by the Judiciary. It is sometimes supposed that the power of the Courts to pronounce upon the validity of laws enacted by the Legislature on the ground of contravention of the Constitution depends upon a written Constitution. But this is not necessarily true, for there have been written Constitutions which vest in the Legislature the power to determine its own limits. For example, the *Swiss Constitution* empowers the federal Supreme Court to declare an Act of the Cantonal Legislature to be invalid, if repugnant to the provisions of the federal Constitution, but the Court is given no such powers as regards laws passed by the Federal Legislature. On the other hand, Article 113 of the *Swiss Constitution* directs the Federal Tribunal to give effect to the laws passed by the Federal Assembly. The most extreme example of a written Constitution having Parliamentary supremacy is the Constitution of the *French Republic*. In 1790, the Constituent Assembly of France had declared—

“The tribunals shall not participate directly or indirectly in the exercise of the legislative power, nor interfere with or suspend the execution of the decrees of the legislative body.....”

The Legislature, under all successive Constitutions of France, has thus remained the sole judge of its own powers and Courts have had no power to determine the constitutionality of laws passed by the French Parliament, and this is the position even under the Constitution of 1946. In this Constitution, no such power is vested in the Judiciary. On the other hand, it sets up a machinery, called the Constitutional Committee (Article 91), which may take steps for revision of the Constitution itself, if laws passed by the National Assembly are found to be conflicting with any provision of the Constitution.

In fact, the question whether the Court shall act as the guardian of the Constitution and sit upon the constitutionality of laws, depends not upon the written or unwritten character of the Constitution, but upon the question whether the Constitution is founded on the theory of legislative or Parliamentary supremacy or supremacy of the Constitution as a fundamental law by which the powers of the Legislature are limited. The Judiciary has the undisputed power to interpret and administer the law. So, if there be an organic and supreme law over the Legislature, the Courts will certainly refuse to apply a statute that is repugnant to or contravenes that fundamental law. It will be seen that the radical application of this doctrine of the supremacy of the Constitution and the Court acting as its guardian, has led to the establishment of ‘judicial supremacy’ in the Constitution of the United States.<sup>15-a</sup>

We have already noticed (p. 44) that the *English Constitution* offers the most radical example of Parliamentary supremacy. If a law is once on the Statute Book, it is binding on the Courts until it is amended or repealed, and the Courts cannot declare it as void on the ground of being opposed to the Constitution, or on any ground whatsoever; strictly speaking, the term ‘unconstitutional law’ is thus a misnomer in England. No doubt the judges interpret the law in England as in America, but in England there is only one law, and that is the law passed by Parliament.

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(15-a) See my Article ‘Indian Constitution 158-170 (Jour.). through American Eyes’ in (1949) F. L. J. pp.

As *May* observes—

“The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be *unjust* and contrary to the principles of sound government: But Parliament is not controlled in its discretion and when it errs, its errors can be corrected by itself.”<sup>16</sup>

On the other hand, many written Constitutions, which follow the theory of constitutional supremacy have expressly declared in the Constitution itself that—

“the Constitution shall be the supreme law of the land.”<sup>17</sup>

Some of them even expressly enjoin the Courts to declare upon the constitutionality of laws. Thus Article XCVIII of the *Japanese* Constitution declares that no law, contrary to the provisions of the Constitution shall have any legal validity, and Article LXXXI says,—

“The Supreme Court is the Court of last resort with power to determine the constitutionality of any law. . . .”

Similarly, Article 34 (1) (2) of the Constitution of *Eire* declares—

“The jurisdiction (original) of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution. . . .”

Art. 34 (4) 4 of the Constitution *Eire*<sup>17-a</sup>, again, provides :—

“No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution”.

Art. 15, Cl. (4) 2 on the other hand, provides :—

“Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid”.

From these provisions, the Irish Supreme Court has observed—

“Constitutions frequently embody, within their framework important principles of polity expressed in general language. In some Constitutions it is left to the Legislature to interpret the meaning of these principles, but in other types of Constitutions, of which ours is one, an authority is chosen which is clothed with the power and burdened with the duty of seeing that the Legislature shall not transgress the limits set upon its powers. . . . If it be established in any case that the legislature has exceeded its powers it is the duty of this Court to so declare.”<sup>18</sup>

In the *United States*, the Constitution itself does not specifically vest in the Judiciary any power to declare laws enacted by the Legislature to be unconstitutional. But this power has been deduced by the Supreme Court from its power to determine—

“all cases arising under the Constitution” (Art. III, s. 1 (1), read with art. VI (2) which says—  
“This Constitution. . . shall be the supreme law of the land.”

The argument can be best expressed only in the words of the fathers of the Constitution themselves. Thus wrote Hamilton<sup>19</sup>—

“The interpretation of the laws is the proper and peculiar province of the Courts—the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents [i.e., of the Legislature.]”

Again,—

“A limited Constitution. . . one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the Courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing”.

(16) May, Parliamentary Practice.

(17) See Art. VI (2) of the U.S.A.; Art. XCVIII of the *Japanese* (see p. 48, *ante*); Art. 13 of the *Weimar*, Constitutions.

(17-a) The provision in S. 137 of the *Burmese*

constitution is identical.

(18) *National Union v. Sullivan*, (1947) I.R. 77 (99-100).

(19) Hamilton, *Federalist*, p. 39.

Or, in the words of Chief Justice Marshall<sup>20</sup>—

“The powers of the Legislature are defined and limited ; and that these limits may not be mistaken or forgotten, the Constitution is written. . . . The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it ; . . . if the latter part be true, then written Constitutions are *absurd attempts*, on the part of the people to limit a power, in its own nature illimitable. . . .

It is emphatically the province and duty of the judicial department to say what the law is. . . . If, then, Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution and not such ordinary act must govern the case to which they both apply.”

But while the power to pronounce upon the unconstitutionality of a statute was originally asserted as incidental to the judicial power,—since the case of *Marbury v. Madison*<sup>20</sup>, it has come to be considered a *duty* of every judge in the United States to treat as void any enactment which violates the constitution<sup>21-22</sup>. The Courts cannot properly decline to exercise this power<sup>23</sup>.

The radical application of the above reasoning has, in the United States, led to the establishment of the doctrine of Judicial Supremacy<sup>24</sup>. The doctrine has been thus expressed by Willoughby<sup>25</sup>—

“the fundamental principle of American constitutional jurisprudence is that laws and not men shall govern.”<sup>24</sup>

This means that no act of the government or of any official is valid unless it is supported by some law and no law is valid in the United States *which is not recognised as such by the Courts*. And no act either of the Executive or of the Legislature is upheld by the Courts unless it is in conformity with or warranted by the provisions of the Constitution from which the Executive or the Legislative derives its powers.

Of course, the power to invalidate laws has not been so frequently used<sup>1</sup> by the Supreme Court of the United States as may be supposed. Nevertheless, it is by a radical application of this doctrine combined with that of ‘due process’ (see p. 112, *ante*), that the American Supreme Court has become ‘the balance wheel’ of the Constitution<sup>24</sup>. Under the American Constitution, ‘everything which may pass under the form of an enactment is not to be considered the law of the land’, so long as the Supreme Court does not uphold it as valid, and thus the key to any social and economic progress has been placed at the hands of the Supreme Court. So, it has come to be that—

“The Constitution is what the Supreme Court says”.

“The Supreme Court has come to examine the validity of laws not only from the standpoint of legislative powers, but also from the standpoint of its own opinion about the ‘ideals’ of the Constitution, and the reasonableness of laws”.<sup>2,3</sup>

In *Australia*, the duty of the Courts to declare invalid statutes inconsistent with the Constitution has been drawn<sup>4</sup> from Sec. 55 of the Constitution Act, which says—

“This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of the State. . . .”

(20) *Marbury v. Madison*, (1803) 1 Cr. 137.

(21-22) Dicey, *Law of the Constitution*.

(23) Cooley, *Constitutional Limitations*, 7th Ed., p. 228.

(24) See pp. 45-6, *ante*. See also, my article on ‘The Indian Constitution through American Eyes’ in (1949) F.L.J. pp. 158-170 (Jour.).

(25) Willoughby, *Constitutional Law of the U.S.*, Vol. I, p. 1.

(1) During its career of 150 years, the Supreme Court has invalidated some 60 Acts passed by Congress (Munro, *Government of the United States*, 1944, p. 534), and no federal law has been invalidated during the decade 1936-46.

A list of the Acts invalidated and the relevant decisions up to 1924 is given in Cooley’s *Constitutional Law*, pp. 21-3, *f.n.* We may mention some of the more important decisions : *Lochner v. N. Y.*, (1905) 198 U.S. 45 ; *Hammer v. Dagenhart*, (1918) 247 U.S. 251 ; *Adkins v. Children’s Hospital*, (1923) 261 U.S. 525 ; *Knickerbocker Co. v. Stewart*, 253 U.S. 149 ; *Schenck v. U.S.*, (1918) 249 U.S. 47.

(2-3) Cardozo, *Nature of Judicial Process*, quoted in Brogan, *Government of the People*, p. XXVII.

(4) *Baxter v. Commissioner of Taxation*, (1907) 4 C.L.R. 1087.



and the covering Cl. V, which is also to the same effect.

As Rich, J.,<sup>5</sup> observed—

“ The legislative powers of the Parliament are not plenary, but are restricted to those conferred upon it by the Constitution and are subject to any limitations imposed by the Constitution. It cannot free itself from such limitations or conditions; only the process provided by section 128 of the Constitution can do that; nor can it decide for itself whether a purported exercise of a power is valid; and if an exercise of a power involves any legal consequences prescribed by the Constitution it cannot exempt itself from any of those consequences. The question whether an Act of the Federal Parliament is valid, and if so, whether it involves any and what legal consequences, can be determined only by an exercise of the judicial power. . . . . ”

Similarly, in *Canada*, the Courts have assumed the power to determine the validity of enactments with reference to the powers conferred upon the Legislature concerned by the Constitution Act, *viz.*, the British North America Act<sup>6</sup> even though there is no express provision to this effect in the Constitution.

It is to be observed, however, that there being no Bill of Rights in either of these Constitutions, the scope of the Judiciary acting as the guardian of the Constitution has been much narrowed down in these countries than in America, and no doctrine of ‘judicial review’ in the American sense has ever developed under these Constitutions. The business of the Courts, in short, has been confined to the scrutiny of legislative *competence* of the Legislatures. As the Australian High Court<sup>7</sup> observed—

“ The problem for the Court is a legal problem which is unknown in countries with a unitary form of government and a supreme legislature. It arises only when legislative powers are *divided* between legislatures, so that the powers of a law-making agency are limited. That is the case in Australia, where the Commonwealth Parliament, unlike the Parliament at Westminster, depends for its existence and for its powers on a written Constitution. The Constitution says that the Commonwealth Parliament shall have power to make laws with respect to certain subjects. . . . . If either the Commonwealth Parliament or a State Parliament attempts to make a law which is not within its powers, the attempt fails, because the alleged law is unauthorized and is not a law at all. . . . . Common expressions, such as ‘the Courts have declared a statute invalid’, sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. . . . Thus the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any other Court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliaments and the people. . . . . ”<sup>8</sup>

Coming now to *our own* Constitution,—it is true, that there is no express provision in the Constitution, declaring the Constitution to be the supreme law of the land. Such a declaration was, however, deemed superfluous by the framers of our Constitution, since all the organs of the State are to derive powers from the Constitution and the Constitution cannot be altered save in the manner laid down in the Constitution for its amendment (Article 368). No organ within the Constitution has been given any unlimited authority to determine its own powers<sup>9</sup>. It is equally true that there is no express provision in the Constitution empowering the Courts to invalidate laws; but the Constitution has imposed definite limitations upon each of the organs, and any transgression of those limitations would make the act or law *void*; and the Courts would not apply void laws. Thus, Article 13 declares that any law of the Legislature or act of the Executive which contravenes any of the provisions of the Part on Fundamental Rights, shall be *void*. Similarly, Articles 251 and 254 say that in case of inconsistency between Union and States laws, in certain cases, the State law shall be *void*. Of course, there is no corresponding provision nullifying Union law with respect to a matter included in the State List (List II), but Article 246 (3) expressly provides that in these matters, the State Legislature has ‘exclusive’ powers, so any law of the Union Parliament

(5) *Australian Apple Board v. Tonking*, (1942) 66 C.L.R. 104.

(6) Clement, *Constitutional Law*, p. 373.

(7) *South Australia v. Commonwealth*, (1942) 65 C.L.R. 373 (408).

(8) *South Australia v. Commonwealth*, (1942)

65 C.L.R. 373 (408). For Canadian decisions to the same effect, see Clement, *Canadian Constitution*, p. 373; *A. G. for Ontario v. A. G. for Canada*, (1912) A.C. 571.

(9) See, however, Art. 249 (1), *post*.

directly legislating with respect to a matter included in this List will be beyond the powers of Parliament, and it will be the duty of the Courts, in interpreting the Constitution (Articles 131-3), to declare such law of Parliament to be void. As we have already said, the power of the Courts to avoid laws made in excess of the legislative powers of the Legislature is inherent in any Constitution which provides Government by defined or *limited* powers.

So, *our* Courts shall have the power to pronounce upon the validity of laws on the ground of excess of legislative powers as in any other federal country, but by reason of the provisions of Articles 228 and 131-6, the above function will be limited to the High Courts and the Supreme Court. The subordinate Courts have not been vested with any such power.

As to the power of invalidating laws on the ground of contravention of the Fundamental Rights guaranteed by the Constitution, our Courts will stand midway between the Courts of the United States and of the Dominions ; for, the latter have no guarantee of Fundamental Rights at all ; on the other hand, there is under *our* Constitution, no 'due process' and no doctrine of 'judicial supremacy' as in the American Constitution. Instead of 'judicial supremacy' we have the doctrine of 'legislative supremacy' subject to constitutional limitations.<sup>10-11</sup> Though the Supreme Court will nullify an Act which is in clear contravention of a constitutional limitation, it will not assume the role of supervising or correcting the laws passed by the Legislature, under any theory of 'natural rights or justice' or 'ideals of the Constitution'. In short, it would not, under the colour of interpretation, seek to amend the law. It will not question the reason 'reasonableness' of any law except where the Constitution itself has expressly authorised the Court to exercise that power [*e.g.*, Article 19, clauses (3)-(6) ; Article 304 (b)].

But though the Supreme Court of India would have no power to review legislative policy or to nullify Acts of the Legislature with reference to 'general principles of jurisprudence', a proper application of the Fundamental Rights would still give the Supreme Court enough power to nullify unconstitutional legislation, for as I have shown (p. 70), some of the 'Fundamental Rights' impose absolute limitations, while others leave it to the Court to determine the reasonableness of the restrictions imposed by the Legislature. It is worthy of note that during its very first session, the Supreme Court of India has invalidated particular provisions of one Union Act and two State Acts. Though these cases have not been reported by the time these pages are being printed, a short reference to the facts of these cases will illustrate the scope of the Supreme Court to avoid unconstitutional acts of the Legislature.

#### *Illustrations.*

(a) Sec. 14 of the Preventive Detention Act (IV of 1950), in short, prohibited the Court from allowing any statement to be made before it by the detenu as to the grounds upon which a detention order has been made and also prohibited the Court itself from making any enquiry in this respect from any officer. The majority of the Supreme Court held that this section of the Act was in contravention of the provisions of Article 32 of the Constitution as the prohibition substantially affected the right to move the Court, by rendering the Court powerless to give any relief ; also that it contravened clause (5) of Article 22, for, barring clause (6), there was no other limitation upon the communication required by that clause<sup>10-11</sup>

(b) Sec. 9 (1-a) of the Madras Maintenance of Public Order Act, 1947 and Sec. 7 (1-c) of the East Punjab Public Safety Act, 1949, have been held void<sup>12</sup> on the ground these provisions which empowered the Executive to impose precensorship or to restrict the movement of newspapers in the interests of public order, contravened clause (1) (a) read with clause (2) of Article 19 of the Constitution because the interests of public order did not necessarily relate to a matter under

(10-11) *Gopalan v. State of Madras*, (1950) S.C.J. 174 : (1950) 2 M.L.J. 42.

(12) *In re Crossroads* : *In re Organiser*,—*Statesman*, Calcutta, 28th May, 1950, p. 7.

mining the 'security of the State.' It was further observed that mere criticism of the Government or exciting disaffection or bad feelings towards it was not to be regarded ■ ■ ground for restricting freedom of expression, unless it was such as to undermine the security of the State. It was also observed that "the freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation."<sup>13</sup>

As against Executive excesses, on the other hand, the Supreme Court has been endowed with some powers which were not so amply possessed by its predecessor, the Federal Court. Apart from the jurisdiction over illegal acts in appeal, the Supreme Court will possess the revisional powers through the judicial writs of *certiorari*, *mandamus*, etc. (Article 32) as fully as the High Court of England. It is needless to estimate the value of these writs which have aptly been described as the 'bulwark of English liberty.' I can only repeat what Sir Alladi Krishnaswami Aiyar has said—

"With the expansion of the sphere of governmental activity, inevitable under modern conditions in spite of the strong criticism of the late Lord Chief Justice of England, the institution of Administrative Tribunals and Agencies invested with judicial or quasi-judicial functions will continue to be ■ feature of modern government and has almost become unavoidable. The only safeguard against the abuse of the powers vested in such tribunals and bodies is in the ultimate or revisory jurisdiction being vested in the higher Courts of the realm and in the Supreme Court."<sup>14</sup>

From all standpoints, thus, it has become clear that the Supreme Court of India "has more powers than any other Supreme Court in any part of the world", combining original, appellate, revisional and consultative<sup>15</sup> powers and functions in the same body, in a unique manner.

#### PRINCIPLES ACCORDING TO WHICH THE COURT MAY DECLARE AN ACT TO BE UNCONSTITUTIONAL

*U. S. A.*—The Supreme Court of the United States has laid down the following principles in accordance with which it would exercise its power to declare a law to be unconstitutional :

(i) The constitutionality of a law would be questioned by the Court only where it is raised as an issue in a *bona fide* litigation brought by an individual whose rights have been affected by the legislation in question. In other words, the Supreme Court has denounced suits brought in defence of vague political interests (or what are popularly called in *our* country as 'test suits'). In *Chicago ■d G. T. Ry. Co. v. Wellman*<sup>16-17</sup>, the Supreme Court observed—

"The theory upon which, apparently, this suit was brought is that the parties have an appeal from the Legislature to the Courts, and that the latter are given an immediate and general supervision of the constitutionality of the Acts of the former. Such is not true. Whenever in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented ■ question involving the validity of any act of any Legislature, State or Federal, the Court must, in the exercise of its solemn duties, determine whether the act be constitutional or not . . . . It is never the thought that, by means of a *friendly suit*, ■ party beaten in the legislature, could transfer to the Courts an enquiry as to the constitutionality of the legislative act."<sup>16-17</sup>

In a recent case<sup>18</sup>, the Supreme Court has observed—

"One of the greatest strength of our law is that it *adjudicates* concrete cases and does not pronounce principles in the abstract."

(13) It will thus be observed that though the word 'reasonable' does not appear in Cl. (2) of Art. 19, the Supreme Court shall still have ample scope for interfering with undue restrictions on the freedom of speech and expression, which includes freedom of the press, under its power to interpret the various expressions used in Cls. (1) (a) and (2) of Art. 19, with

reference to the facts of each particular case.

(14) Address by Alladi Krishnaswami Aiyar, A.I.R. 1949 Journ. 35.

(15) See under Art. 143: *post*.

(16-17) *Chicago ■d G. T. Ry. Co. v. Wellman*, 143 U.S. 249 (344).

(18) *New York v. U.S.*, (1946) 326 U.S. 572 (575).



The individual who challenges the constitutionality of a statute must show that his material interests will be, or have been, adversely affected by the enforcement of such law.<sup>19</sup> Thus only a person who has been discriminated against can complain against a law on the ground denial of equal protection of the laws.<sup>20</sup> On the other hand, a person who has received compensation for acquisition of his property under a statute, will not afterwards be allowed to challenge the validity of the statute.<sup>21</sup> But apart from such grounds, a party cannot be estopped from setting up the unconstitutionality of a statute.<sup>22</sup>

(ii) The Court will not proceed to declare a law to be unconstitutional if it is possible to dispose of the case upon some other ground.<sup>23</sup> In other words, the Court will not enter upon questions of constitutionality unless it is *necessary* for the ascertainment of the rights of the parties before it.<sup>24</sup> Nor will the Court consider the interpretation of the Constitution *further* than may be necessary for the disposal of the case<sup>25</sup>.

(iii) It is the first canon of judicial interpretation in the United States that "the Legislature must be considered innocent till it is proved guilty beyond reasonable doubt." Hence, all reasonable doubt of a statute's validity must be resolved in favour of a statute and it should not be pronounced to be unconstitutional unless it is clearly proved to be so.<sup>1-2</sup> A Court ought to adopt such a construction of a statute as will, without doing violence to the fair meaning of the words, harmonize it with the Constitution.<sup>3</sup>

The doctrine of 'reasonable doubt' however, does not mean that a Court cannot declare a law as unconstitutional unless its decision is unanimous.<sup>4</sup> It means that—

"There should be such ■ opposition between the Constitution and the law that the Judge should feel a clear and strong conviction of their incompatibility."<sup>5</sup>

"As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."<sup>6</sup>

In other words, when the language of the statute is ambiguous, the Court will always assume that the Legislature did not intend to exceed its powers and will construe the ambiguous expressions in such a manner as to maintain the constitutionality of the statute.<sup>7</sup> Nevertheless, the Court cannot save the constitutionality of a legislation by giving to its words a meaning which they cannot reasonably bear.<sup>8</sup>

(iv) The presumption of constitutionality attaching to a statute is increased when it has been acted upon for a very long period or is supported by the construction of men who were contemporary to the formation of the Constitution.<sup>9</sup> But the Court is not absolutely bound by a legislative or executive construction however long it may have been acquiesced in. The rule which gives determining weight to contemporaneous construction applies only in cases of ambiguity and doubt as to any expression in the statute.<sup>10</sup> Where the meaning is perfectly clear, no practice inconsistent with the meaning can have any effect.<sup>11</sup>

(v) In the exercise of its power to declare the unconstitutionality of a law, the Courts will not usurp the proper functions of the Legislature or the Executive [see pp. 204-6, ante].

(19) *Yazoo Ry. Co. v. Jackson Co.*, 226 U.S. 217.

(20) Willoughby, *Constitutional Law*, Vol. I, p. 19.

(21) *Embury v. Connor*, 3 N. Y. 511.

(22) *South Ottawa v. Perkins*, 94 U.S. 260; Cooley, *Constitutional Law*, 6th Ed., p. 222.

(23) *Shepherd v. Wheeling*, 30 W. Va. 479.

(24) Cf. *Bruce v. Commonwealth Association*, (1904) C.L.R. 1569.

(25) Cf. *Citizens' Assurance v. Parsons*, 7 A.C. 96 (109).

(1) Brogan, *Government of the People*, p. 26.

(2) *Ogden v. Saunders*, 12 Wheat 213 (270).

(3) *Grenada v. Brogden*, 112 U.S. 261.

(4) Willoughby, *Constitutional Law*, Vol. I, p. 46.

(5) *Fletcher v. Peck*, (1809) 6 Cranch 87 (131).

(6) *United States v. Delaware*, 213 U.S. 366.

(7) *McLeod v. A. G. for N. S. W.*, (1891) A.C. 455.

(8) *Owners of S.S. Kalibia v. Wilson*, (1910) 11 C.L.R. 689 (707).

(9) *United States v. State Bank*, 6 Pet. 29; *Schell's Executors v. Fauche*, 138 U.S. 562.

(10) *Swift v. United States*, 105 U.S. 691.

(11) *United States v. Alger*, 152 U.S. 384; *Fairbanks v. United States*, 181 U.S. 283.

*Australia.*—It has already been observed that the principles above enunciated have been mostly followed in the interpretation of the Australian Constitution Act. As regards the presumption of innocence,<sup>12</sup> the Australian High Court has observed—

“No doubt if the Court is convinced that there has been a violation of the constitutional prohibition, it must give effect to the organic law, regardless of the consequences.”<sup>13</sup>

At the same time—

“... the Court should not exercise its undoubted power to declare a legislative enactment ... to be beyond its (of the Legislature) power, unless the invalidity of the enactment is clear beyond all reasonable doubt.”<sup>14</sup>

*Eire.*—The presumption of innocence of the Legislature has also been applied in *Eire*. Thus, it has been held that the Court should approach any Act of the Legislature with the assumption that it is within its constitutional powers, and that assumption should be maintained until the contrary is clearly shown.<sup>15</sup> But if it is *established* in any case that the Legislature has exceeded its powers, it is the duty of the Court (High Court or Supreme Court) so to declare.<sup>16</sup>

*India.*—It has been shown at the outset (see pp. 19-21) that many of these principles were followed by the Federal Court in interpreting the Government of India Act, 1935.<sup>17</sup> There is no reason to suppose that these broad principles will not be followed under the Constitution. It may be noted in this connection, that the doctrine of ‘severability’ has been expressly incorporated in Articles 13, clauses (1)-(2); 251; 254 (1), by the use of the words ‘to the extent of’. In other words, in case of repugnancy with the Constitution, only the repugnant provision of the impugned Act will be void, and not the whole of it. This shows that every attempt should be made to save as much as possible of the Act.

#### EFFECT OF AN UNCONSTITUTIONAL STATUTE

(A) *U. S. A.*—The general rule is that—

“An unconstitutional Act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it has never been passed.”<sup>18</sup>

The maxim is—“*defectus potestatis nullitas nullitatum*,”—an unconstitutional statute is a complete nullity.

An unconstitutional law cannot be held binding between the particular parties on the ground of estoppel.<sup>19</sup> It is void *ab initio*.

But there are certain *exceptions* to the above rule are—

(i) The Court does not annul or repeal the statute which it finds to be in conflict with the Constitution. It does not strike the statute off the statute book. The Court simply refuses to recognize it in the determination of the rights of the parties before it. If a new litigant brings a fresh suit upon the same statute, the Court is free, subject to the law of precedents, to change its opinion<sup>20</sup>. When the Supreme Court thus changes its opinion and declares a statute to be valid which it had earlier held to be unconstitutional, the later opinion will prevail, and the statute will be considered as having been constitutional from the beginning.<sup>21</sup>

(ii) Though the effect of adjudging a law of taxation or of crimes as unconstitutional is as a rule retrospective, as if that law had never been passed, it is

(12) See also Kerr, *Law of the Australian Constitution*, p. 21.

(13) *Osborne v. Commonwealth*, (1911) 12 C.L.R. 321.

(14) *Waterside Workers' Federation v. Commonwealth Steamship Owners' Association*, (1920) 28 C.L.R. 209 (219).

(15) *In re Art. 26 of the Constitution*, (1940) I.R. 470 (1943) I.R. 334.

(16) *National Union v. Sullivan*, (1947) I.R. 77 (100).

(17) In particular, see the following cases—*In re C. P. Motor Spirit Taxation*, (1938) 1 F.L.J. 6; *United Provinces v. Atiqa Begam*, (1940) F.C.R. 110; *Shyamakanta v. Rambhajan*, A.I.R. 1939 F.C. 74; *Subrahmanyam v. Mutluswami*, A.I.R. 1941 F.C. 47.

(18) *Norton v. Shelby Co.*, (1885) 118 U.S. 425 (442).

(19) *South Ottawa v. Perkins*, 94 U.S. 260.

(20) *Shepherd v. Wheeling*, 30 W. Va. 479.

(21) Cooley, *Constitutional Law*, p. 200.

not so retrospective in the case of laws creating a public office or to render public officials liable in civil suits for acts done under the statute which is declared unconstitutional.<sup>22</sup>

*India.*—It has been already pointed out (*see* p. 378, 382 *ante*), that our Constitution expressly provides, at some places that laws in contravention of the Constitution shall be *void* to the extent of such contravention of repugnancy. Hence, the invalidity of the law would not depend upon the declaration of the Court.<sup>22-a</sup> Upon the declaration of the Court, the law will be regarded as void *ab initio*, and no act done under the void law will have any validity. Though the public officers acting under such law may not be personally responsible, action may lie against the Government concerned,—Union or State,—if an action would have otherwise lay in respect of such illegal act. [As to precedents, *see* under Art. 141, *post*.]

**124.** (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

Establishment and constitution of Supreme Court.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years :

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted :

Provided further that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office ;

(b) a Judge may be removed from his office in the manner provided in clause (4).

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession ; or

(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession ; or

(c) is, in the opinion of the President, a distinguished jurist.

*Explanation I.*—In this clause “High Court” means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

*Explanation II.*—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

(22) Cooley, Constitutional Law, p. 200.

(22-a) This is the view also taken in Australia—“A pretended law made in excess of power is not and never has been a law at all . . . . The law is not valid until a Court

pronounces against it—and thereafter invalid. If it is beyond power it is invalid *ab initio*” [*South Australia v. Commonwealth*, (1942) 65 C.L.R. 373 (408)].



(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

CL. (1) :

#### OTHER CONSTITUTIONS

*U. S. A.*—The Judiciary Act of 1789 established the Supreme Court with the Chief Justice and five associate Judges. In 1837, the number has been raised to nine including the Chief Justice.

*Australia.*—Curiously, the Supreme Court of Australia is called the 'High Court of Australia' (while the highest court of a State is called the Supreme Court of that State). [Secs. 71, 73]. The High Court of Australia consists of seven Judges including the Chief Justice.

*Canada.*—The Supreme Court of Canada was established by an Act of the Imperial Parliament in 1875.

*Burma.*—The relevant provisions of the Burmese Constitution are—

" 136. (1) The Court of final appeal shall be called 'the Supreme Court'. (2) The head of the Supreme Court shall be called 'the Chief Justice of the Union'."

The number of Judges of the Supreme Court shall be regulated by law [Sec. 149 (1)].

*Government of India Act, 1935.*—See Sec. 200 of that Act.

#### INDIA

Cl. (1) : *Constitution of Supreme Court.*—The Supreme Court will stand at the head of the judicial system of India. The expression 'Union Judiciary' is to some extent a misnomer, because under our Constitution, the Union shall have no judiciary<sup>22-b</sup> separate from that of the State [see p. 30, ante]. Of course, the Constitution, organisation, jurisdiction and powers of the Supreme Court shall, subject to the Constitution be regulated by Union legislation [see Entry 77 of List I, Sch. VII]. The present clause, e.g., says that Parliament may, by law, prescribe a larger number of Judges than seven for the Supreme Court. Until Parliament legislates the number of judges shall be not more than 8, including the Chief Justice. No minimum number is prescribed. At the present moment, the Supreme Court consists of the Chief Justice and five other Judges only.

(22-b) See Art. 247, in the connection.

## CL. (2) :

## OTHER CONSTITUTIONS

*U. S. A.*—Federal Judges, including those of the Supreme Court, are appointed by the President with the consent of the Senate. There is no age of retirement, but on reaching 70, a Judge of the Supreme Court who has served for 10 consecutive years, may request release from active duties. But even then he continues to receive the full salary, in consideration of being subject to recall to duty in the lower federal Courts.

*England.*—Judges of the Superior Courts are appointed by the Crown, during good behaviour. There is no retiring age<sup>23</sup>.

*Australia.*—Judges of the High Court are appointed by the Governor-General in Council, for life.<sup>24</sup> They may be removed only on an address by Parliament, under Sec. 71 (ii).

*Canada.*—Judges of the superior Courts are appointed by the Governor-General and hold office during good behaviour, as in England.

*Ceylon.*—Sec. 52 of the Ceylon (Constitution) Order in Council, 1946 says—

“(1) The Chief Justice and Puisne Judges of the Supreme Court . . . . . shall be appointed by the Governor-General.

(2) Every Judge of the Supreme Court shall hold office during good behaviour and shall not be removable except by the Governor-General on an address of the Senate and the House of Representatives.

(3) The age of the retirement of Judges of the Supreme Court shall be sixty-two years : Provided that the Governor-General may permit a Judge of the Supreme Court who has reached the age of 62 years to continue in office for a period not exceeding 12 months . . . . .”

*Burma.*—Sec. 140 of the Burmese Constitution, 1948, provides—

“(1) The Chief Justice of the Union shall be appointed by the President by an order under his hand and seal, with the approval of both Chambers of the Parliament in joint sitting. (2) All the other Judges of the Supreme Court and all the Judges of the High Court shall be appointed by the President by an order under his hand and seal, with the approval of both Chambers of the Parliament in joint sitting.”

## INDIA

CL. (2) : *Appointment of Judges of the Supreme Court.*—The system of appointment of Judges of the Supreme Court as prescribed by the Constitution modifies the system of appointment by the Executive as obtains in England, in order to secure absolute independence of the Judiciary. It acknowledges that in the present state of the country, it would be dangerous to let the Executive alone in the matter of appointment of Judges, which would render the appointments made on a political basis, undermining considerations of merit in some cases. Hence, the Executive should be in consultation with persons who are well-qualified to give advice on these matters. On the other hand, it does not give sole power to the Chief Justice to make the appointment of his colleagues, recognising the failings and prejudices of a single person, notwithstanding his eminence.

In short, this clause provides that in the matter of appointment of the Chief Justice of India, the President shall consult such Judges of the Supreme Court and of the High Courts as he may deem necessary. And in the case of appointment of other Judges of the Supreme Court, consultation with the Chief Justice of India, in addition to the above, is obligatory. The above provision, thus, modifies the mode of appointment of Judges by the Executive as it obtains, for example, in England, by providing that the Executive should consult members of the Judiciary itself, who are well-qualified to give their opinion in this matter. The word ‘consultation,’ however, indicates that the President is *not bound* to follow the recommend-

(23) Keith, Constitutional Law.

(24) *Waterside Fed. v. Alexander*, (1918) 25 C.L.R.

ations of these persons. The last word will thus rest with the Prime Minister, but he will have the advantage of having the views of those who are competent to speak in the matter.

#### CLS. (4)-(5) :

#### OTHER CONSTITUTIONS

*U. S. A.*—Judges of the Supreme Court hold office during good behaviour (Sec. 1, Article III) and are removable, like other Federal civil officers, by the process of impeachment (Sec. 4, Article II). What is 'good behaviour' is not defined in the Constitution and is accordingly left to the Senate which tries the impeachment.

*England.*—Under the Act of Settlement, 1701, Judges of the Supreme Court hold office during 'good behaviour' and they can be removed by the Crown only<sup>25</sup> on a joint address moved by both Houses of Parliament.

An address to the Crown for the removal of a Judge must originate in the House of Commons. The procedure is judicial and the Judge is entitled to be heard. Such a motion is an extreme step, to be taken only in the event of "impropriety of the gravest kind."<sup>1</sup>

*Canada.*—Judges of the Superior Courts are removable on an address from both Houses praying for such removal, to the Governor-General (S. 99, Br. N. America Act).

*Australia.*—Judges of the Superior Courts are removable by the Governor-General in Council on an address from both Houses praying for such removal on the ground of 'proved misbehaviour or incapacity' [S. 72 (ii)].

*Eire.*—Art. 35 (4) of the Constitution of 1937 provides—

"(4) 1° A Judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dail Eireann and by Seanad Eireann calling for the removal.

2° The Taoiseach shall duly notify the President of any such resolutions passed by Dail Eireann and by Seanad Eireann, and shall send him a copy of every such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.

3° Upon receipt of such notification and of copies of such resolutions, the President shall forthwith, by an order under his hand and Seal, remove from office the Judge to whom they relate".

*Burma.*—Cls. (2)-(8) of S. 143 of the Burmese Constitution provide—

"(2) A Judge of the Supreme Court or of the High Court shall not be removed from office except for proved misbehaviour or incapacity.

(3) The charge shall be preferred by either Chamber of Parliament subject to and in accordance with the provisions of this section.

(4) A proposal to either Chamber of Parliament to prefer a charge under this section shall not be entertained except upon a notice of resolution signed by not less than one-fourth of the total membership of that Chamber.

(5) No such proposal shall be adopted by either Chamber of Parliament save upon a resolution of that Chamber, supported by a majority of the members present.

(6) Where the charge relates to a Judge of the Supreme Court it shall be investigated by a Special Tribunal consisting of the President or a person appointed by him in his discretion, the Speaker of the Chamber of Nationalities and the Speaker of the Chamber of Deputies.

Where the charge relates to a Judge of the High Court it shall be investigated by a Special Tribunal consisting of the Chief Justice of the Union, the Speaker of the Chamber of Nationalities and the Speaker of the Chamber of Deputies.

(7) The Judge against whom the charge is preferred shall have the right to appear and to be represented at the investigation of the charge.

(8) The Special Tribunal shall, after investigation, submit its report to the Chamber by which the charge was preferred. The finding of the Special Tribunal declaring that the charge has not been proved, if unanimous, shall be final. But in all other cases, the report of the Special Tribunal shall be considered by both Chambers of Parliament in joint sitting.

(25) See in this connection, Chalmers and Hood Phillips, Constitutional Law, p. 392.

(1) May, Parliamentary Practice.



If, after consideration ■ resolution be passed supported by a majority of the members present and voting at the joint sitting declaring that the charge preferred against the Judge has been proved and that the misbehaviour was, or incapacity is, such ■ to render him unfit to continue in office, the President shall forthwith by an order under his hand and seal remove from office the Judge to whom it relates."

## INDIA

*Cls. (4) - (5).—Removal of Supreme Court Judge.*—The Constitution does not prescribe any fixed tenure for the office of a Supreme Court Judge. Once appointed the office of a Judge of the Supreme Court may terminate only in one of three ways—  
(i) On attaining the age of 65 years. (ii) On resignation in writing addressed to the President. (iii) On removal by the President upon an address by each House of Parliament.

The address may be presented only on the ground of 'proved misbehaviour' or 'incapacity'.<sup>2</sup> The address must be presented by both Houses in the same session, and a special majority<sup>3</sup> is required in each House for the passing of the resolution. It must be passed by not less than a two-third of the members present and voting, which, again, must be a majority of the total membership of the House. The procedure for presentation of the address, investigation and proof of the misbehaviour and incapacity are left to legislation by Parliament. If the address of both Houses is in conformity with these clauses the President shall be bound to remove that Judge.

*Analogous Provisions.*—Art. 121 prevents discussion of the conduct of a Supreme Court Judge except upon a motion for address for removal under clause (4) of the present Article. Art. 218 extends the provision of cls. (4) - (5) of the present Article to High Court Judges.

*Cl. (7) : Ban on practice.*—This provision is ■ innovation of the Indian Constitution, but it is compensated by the provision in Art. 128, making it possible to invite a retired Judge to act as a Judge of the Supreme Court for some particular business or a period of time.

**125.** (1) There shall be paid to the Judges of the Supreme Court such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule :

Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

## OTHER CONSTITUTIONS

*U. S. A.*—Art. III, section 1 of the United States Constitution says—

"The Judges both of the Supreme and inferior Courts . . . shall receive for their services, a compensation, which shall not be *diminished* during their continuance in office."

The 16th Amendment to the Constitution declared—

"The Congress shall have power to lay and collect taxes on incomes, from *whatever sources* derived . . . ."

(2) These expressions are taken from sec. 72 of the Australian Constitution.

(3) No special majority is required by the 'Other Constitutions' noted above.

It has been held by the Supreme Court that notwithstanding the 16th Amendment, a tax on the income of a Judge is ■ *diminution* of his salary and hence *ultra vires*.<sup>4</sup> The salary of the Judges of the United States are thus not only guaranteed against any reduction during their tenure but are also exempt from income-tax. The immunity from income tax has, however, been denied to Judges appointed since the Revenue Act of 1932.<sup>5</sup>

*Australia*.—Sec. 72 (iii) of the Constitution Act says—

“The Justices of the High Court and of the other Courts created by the Parliament—

(iii) shall receive such remuneration as the Parliament may fix ; but the remuneration shall not be diminished during their continuance in office.”

*Canada*.—Sec. 100 of the British North America Act provides—

“The salaries, allowances and pensions of the Judges . . . . . shall be *fixed* and be provided by the Parliament of Canada.”

It has been held that a Province has the right to tax Judges appointed by the Dominion, under Sec. 96, though Sec. 100 says that their salary shall be ‘fixed’.<sup>6</sup>

*Ceylon*.—Cls. (4) & (6) of Sec. 52 of the Ceylon (Constitution) Order in Council, 1946, are—

“(4) The salaries of the Judges of the Supreme Court shall be determined by Parliament and shall be charged on the Consolidated Fund.

(6) The salary payable to any such Judge shall not be diminished during his term of office.”

*Burma*.—Sec. 149 (i) of the Burmese Constitution provides—

“Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law :—

(i) The number of Judges of the Supreme Court and of the High Court, the remuneration, age of retirement and pension of such Judges.”

Sec. 144, again, says—

“Neither the salary of ■ Judge of the Supreme Court or of the High Court nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment, unless he voluntarily agrees to any reduction in his salary in the event of general economy and retrenchment in relation to all the services of the Union.”

## INDIA

*Art. 25 : Salaries and allowances of Supreme Court Judges*.—The salaries of the Supreme Court Judges are fixed by the Constitution itself [Second Sch.]. Parliament shall have no power in this matter. But the President is empowered to reduce the salaries of the Judges during the period of ■ Proclamation of ‘financial emergency’, under Art. 360 (4) (b), *post*.

In the matter of privileges and allowances, however, the 2nd Schedule will remain in force only until Parliament legislates.

*Proviso : Safeguard against variation*.—Parliament is empowered to make laws from time to time to change the privileges, allowances, leave and pension of Judges, but this would not affect Judges who have been appointed before such changes are made. Once a Judge is appointed, his rights, in accordance with the terms of his appointment, cannot be changed by Parliament.

‘Salaries’ being fixed by the Constitution itself [cl. (1)], they cannot be varied [subject to Art. 360 (4) (b)] without amendment of the Constitution. But there is nothing to bar the levy of a tax on the income of ■ Judge.<sup>7</sup>

(4) *Evans v. Gore*, (1920) 253 U.S. 245; *Miles v. Graham*, (1925) 268 U.S. 501.

(5) *O'Malley v. Woodrough*, (1939) 307 U.S. 277.

(6) *The Judges v. A.G. for Saskatchewan*, (1937)

Wn. 109.

(7) *Cf. Judges v. A.G. for Saskatchewan*, (1937)

53 T.L.R. 464.

*Analogous Provisions.*—Under Art. 112 (3) (d) (i), the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court, and under Art. 146 (3), the administrative expenses of the Supreme Court, including salaries, etc., of its staff, are charged upon the Consolidated Fund of India.

Also cf. Art. 221 relating to salaries, etc., of High Court Judges, which is exactly similar to Art. 125.

**126.** When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

Appointment of acting Chief Justice.

**127.** (1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an *ad hoc* Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

Appointment of *ad hoc* Judges.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court.

**128.** Notwithstanding anything in this Chapter the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court:

Attendance of retired Judges at sittings of the Supreme Court.

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

INDIA

Arts. 127-8: *Ad hoc* Judges and employment of retired Judges.—Art. 127 appears to be based on Sec. 30 of the Canadian Supreme Court Act and Art. 128 follows Sec. 8 of the (English) Supreme Court of Judicature (Consolidation) Act, 1925.



Under both the Articles, the Chief Justice of India has the power to invite ■ person [other than a person appointed ■ Judge under Art. 124 (2)] to *act* as ■ Judge of the Supreme Court, for a temporary period. Under both Articles, however, the previous consent of the President must be obtained by the Chief Justice. Art. 127 enables the Chief Justice to invite a sitting Judge of a High Court to act as an *ad hoc* Judge of the Supreme Court (to decide any particular case or cases). He shall remain a High Court Judge and his duties at the Supreme Court may be additional, but during his attendance at the Supreme Court, he shall have all the jurisdiction, powers and privileges of a Supreme Court Judge. Art. 128 makes similar provisions in respect of a retired Judge of the Supreme Court or the Federal Court. But while absence of a quorum of the permanent Judges of the Supreme Court is ■ condition precedent for the exercise by the Chief Justice, of the power under Art. 127,—there is no such condition precedent under Art. 128.

‘*Quorum.*’—See Art. 145, Cls. (2)—(3), *post*,

**129.** The Supreme Court shall be ■  
 Supreme Court to be a court of record. court of record and shall have all the powers of such a court including the power to punish for contempt of itself<sup>f</sup>.

#### OTHER CONSTITUTIONS

*England.*—A Court of record is a Court whose acts and proceedings are enrolled for ■ perpetual memorial and testimony. These records are of such high authority that their truth cannot be questioned in any Court, though the court of record itself may amend clerical slips and errors. A court of record has the power to fine and imprison for contempt of its authority, so that any court possessing this power may be called a court of record.<sup>8</sup>

*Burma.*—The Supreme Court is a court of record [Sec. 148].

*Government of India Act, 1935.*—Sec. 203 of that Act was—

“The Federal Court shall be ■ court of record. . . .”<sup>9</sup>

#### INDIA

**Art. 129 : Supreme Court—a Court of Record.**—A Court of Record means a court whereof the acts and judicial proceedings are enrolled for ■ perpetual memory and testimony, and which has authority to fine and imprison for *contempt* of its authority<sup>10</sup>. This Article explains that the Supreme Court shall have the power, *inter alia*, to punish for contempt of itself. [As to ‘Contempt of Court’, see pp. 6-7, *ante*].

**130.** The Supreme Court shall sit in Delhi or in such other place or places as the Chief Justice of India may, with the approval of the President, from time to time, appoint.  
 Seat of Supreme Court.

**131.** Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute—  
 Original jurisdiction of the Supreme Court.

(a) between the Government of India and one or more States;  
 (b) between the Government of India and any State or States on one side and one or more other States on the other ; or

(8) Stephen's Commentaries, Vol. I, p. 59.

(9) *Cf. Gauba v. Chief Justice*, (1941) F.C.R.

54 (57).

(10) Stephen's Commentaries, Vol. I, p. 58.

(c) between two or more States.

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends ;

Provided that the said jurisdiction shall not extend to—

(i) a dispute to which a State specified in Part B of the First Schedule is a party, if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution and has, or has been, continued in operation after such commencement ;

(ii) a dispute to which any State is a party, if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which provides that the said jurisdiction shall not extend to such a dispute.

#### OTHER CONSTITUTIONS

U. S. A.—Under Art. III, Sec. 2 (2) of the Constitution, the original jurisdiction of the Supreme Court is limited to—

“(a) Cases affecting ambassadors and other public ministers and consuls ;

(b) controversies in which a State shall be a party.”

It is not possible to extend this original jurisdiction to any other cases.<sup>11</sup>

The following principles may be deduced from American cases relating to suits brought by a State against another State or the Union.

A State may sue either in its *sovereign* capacity or under its ordinary *proprietary* right. Different considerations would apply in the two cases :

(A) A suit by the State in its *sovereign capacity* can be maintained *without* showing any *special injury* to the State. Such a suit is brought by the State as the guardian of the rights and general interests of its citizens,—and in all matters in which they cannot act for themselves ;<sup>12</sup> e.g.,—

(i) to restrain the defendant State from creating a nuisance dangerous to the health of the inhabitants of the plaintiff State<sup>13</sup> ; or (ii) to restrain the defendant State from diverting the waters<sup>13-a</sup> of a river flowing through both States, as to deprive the inhabitants of the plaintiff State from an adequate supply of those waters<sup>14</sup> ; or (iii) to restrain another State to cause pollution of the waters of the complaining State, by discharge of sewage water<sup>15</sup>.

(a) But such controversy, in order to be justiciable must arise out of an act of the offending State which affects the people of the complaining State in such a manner that the complaining State may be said to have been affected in its sovereign or *corporate* capacity. It must be something more than that *particular* citizens of the complaining State are injured by the maladministration of the laws of another<sup>16</sup>. If the State is not, as a State, interested in a proprietary or other manner, and there is no agreement, the breach of which may create a controversy between the States,—the citizens of the complaining State must, in their individual capacity seek justice, but their State cannot make their case its case, in such circumstances<sup>16</sup>. But the health, comfort and welfare of its citizens constitute an interest which a State, as the representative of the public, is entitled

(11) *Marbury v. Madison*, (1803) 1 Cr. 137.

(12) Willoughby, *Fundamental Concepts of Public Law*, p. 488.

(13) *Missouri v. Illinois*, 180 U.S. 208.

(13-a) In India, the Supreme Court shall have

no jurisdiction over inter-State waters, if Parliament so legislates under Art. 262 (2), *post*.

(14) *Kansas v. Colorado*, 185 U.S. 125.

(15) *New York v. New Jersey*, 256 U.S. 296.

(16) *Louisiana v. Texas*, 176 U.S. 1.

to maintain by action against another State<sup>17</sup>. When ■ substantial portion of its citizens are affected in such matters, the State is entitled to sue<sup>17</sup>.

(b) The burden of proof of the complaining State is much greater than that imposed upon a complainant in an ordinary suit between private parties<sup>18</sup>. On the other hand, such suits are to be dealt with in an untechnical manner, apart from forms which are required from private suitors. They are in the nature of 'quasi-international' controversies, so that objections like multifariousness, laches, and the like should not be entertained<sup>19</sup>.

(B) On the other hand, suits by the State as an ordinary proprietor for the recovery or protection of money or property are governed by the ordinary rules applicable to suits by individuals, and cannot be maintained without proper averment and proof of title or ownership or interest in the subject matter as to authorise the bringing of a suit by it just as in a suit by an individual<sup>20</sup>. Disputes as to boundaries<sup>19</sup> fall within this class.

As to suits by or against the United States, however, it is settled that though the United States may sue a State without the latter's consent, a State cannot sue the United States without the latter's consent<sup>21-22</sup>. Such suits generally relate to questions as to title to land or boundaries<sup>23</sup>.

*Australia.*—Under Sec. 75 of the Commonwealth of Australia Constitution Act, the High Court has original jurisdiction in all matters—

- " (i) Arising under any treaty ;<sup>24</sup>
- (ii) Affecting consuls or other representatives of other countries ;
- (iii) In which the Commonwealth, or ■ person suing or being sued on behalf of the Commonwealth is a party ;<sup>25</sup>
- (iv) Between States, or between residents of different States, or between ■ State and ■ resident of another State ;<sup>1</sup>
- (v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth<sup>2</sup>."

Sec. 76 of the Constitution empowers the Commonwealth Parliament to confer additional original jurisdiction upon the High Court. By the Judiciary Acts, the High Court has, therefore, got original jurisdiction upon the following matters ■ well—

- " (1) All matters arising under the Constitution or involving its interpretation ;
- (2) Matters of admiralty or maritime jurisdiction ;
- (3) Trials of indictable offences against Commonwealth laws."

As regards suits by States, it has been held that a State cannot sue unless it can complain of an injury, or threatened injury, as ■ State<sup>3</sup>, e.g., trespass upon its territory<sup>4</sup> ; financial liability of the Commonwealth<sup>5</sup> or another State to the plaintiff State ; encroachment upon its taxing power<sup>6</sup> ; wrongful acquisition of its property.<sup>7</sup>

As regards encroachment upon its legislative powers, it has been held, that a State may sue the Union or another State, through its Attorney-General,

(17) *Ohio v. West*, 262 U.S. 553.

(18) *North Dakota v. Minnesota*, 263 U.S. 365.

(19) *Virginia v. West Virginia*, 220 U.S. 1.

(20) Willoughby, *Fundamental Concepts of Public Law*, p. 488.

(21-22) *Minnesota v. Hitchcock*, 185 U.S. 373 ; *Kansas v. United States*, 204 U.S. 331.

(23) *U. S. v. Texas*, 143 U.S. 621.

(24) No case under this power has so far been tried by the High Court (Nicholas, *Australian Constitution*, 1948, p. 262).

(25) *Heimann v. Commonwealth*, (1935) 54 C.L.R. 126.

(1) *N. S. W. v. Bardolph*, (1935) 52 C.L.R. 455.

(2) *Waterside Workers' Federation v. Gilchrist*, (1924) 34 C.L.R. 482.

(3) *A.G. for Victoria v. Commonwealth*, (1945) 71 C.L.R. 237.

(4) *South Australia v. Victoria*, (1911) 12 C.L.R. 667.

(5) *N.S.W. v. Commonwealth*, (1931) 46 C.L.R. 155.

(6) *S. Australia v. Commonwealth*, (1942) 65 C.L.R. 373.

7. *N.S.W. v. Commonwealth*, (1915) 20 C.L.R. 54.



representing the people of the State, only if the legislation purports to affect not the private rights of individuals but their rights as members of the general public<sup>8</sup>.

*Burma.*—The Supreme Court of Burma is *purely an appellate Court* having no original jurisdiction. The original jurisdiction in matters of the present nature is possessed exclusively by the High Court, under Sec. 135 of the Constitution which says—

“(1) The High Court shall have exclusive original jurisdiction—

(a) in all matters arising under any treaty made by the Union ;

(b) in all disputes between the Union and a unit or between one unit and another ;

(c) in such other matters, if any, as may be defined by law.”

*Government of India Act, 1935.*—Sec. 204 (1) of the Act was as follows :

“(1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States<sup>9</sup>, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends :

Provided that the said jurisdiction shall not extend to—

(a) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State ; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State ; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute ;

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.”

This section was not much tried, and we get only three reported decisions upon it—

1. The United Provinces brought a suit against the Government of India for a declaration that the Cantonments Act (II of 1924) was *ultra vires* since it affected the right of the Province to have the fines realised under the Act, credited to the Provincial revenues instead of to the Cantonment funds<sup>10</sup>.

2. The Governor-General in Council brought a suit against the Province of Madras, for a declaration that the Madras General Sales Tax Act, 1939, was *ultra vires*, being an encroachment upon Entry 45 of List I in Schedule VII of the Government of India Act, 1935. The Federal Court dismissed the suit on the ground that the Act fell within Entry 48 of List II<sup>11</sup>.

3. Ramgarh, an Indian State, brought a suit against the Province of Bihar for a declaration that it was an 'Acceding State' within the meaning of Sec. 204 of the Government of India Act, 1935, as adapted by the India (Provisional) Constitution Order, 1947, and that, accordingly, the Province of Bihar had no authority to legislate or exercise any powers of Government over the Ramgarh State. The suit was dismissed on the ground that Ramgarh was not an "Acceding State" within the meaning of Sec. 204, as amended above<sup>12</sup>.

## INDIA

*Art. 131 : Original Jurisdiction of the Supreme Court.*—The original jurisdiction of the Supreme Court is limited by the conditions of this Article. It is not a Court of ordinary original jurisdiction in all matters and between all parties. In order to invoke the original jurisdiction of the Supreme Court the two conditions must be satisfied,—(a) as to parties and (b) as to the nature of the dispute. If

(8) *A. G. for Victoria v. Commonwealth*, (1946) 71 C.L.R. 237 (277) ; *A. G. for Victoria v. Commonwealth*, (1935) 52 C.L.R. 533 ; *Tasmania v. Victoria*, (1935) 52 C.L.R. 157.

(9) These words were substituted by the words 'Acceding States', by the India (Provisional) Constitution Order, 1947.

(10) *United Provinces v. Governor-General in Council*, A.I.R. 1939 F.C. 58.

(11) *Governor-General in Council v. Province of Madras*, (1943) 47 C.W.N. (F.R.) 3.

(12) *Ramgarh State v. Province of Bihar*, A.I.R. 1949 F.C. 55.

these two conditions are not satisfied, ■ suit cannot be brought before the Supreme Court simply on the ground that there is no other court in the land which can try the questions<sup>13</sup> raised by the suit.

The Indian Supreme Court shall have no original jurisdiction over ■ involving ambassadors and public ministers or treaties [see pp. 391-92 *ante*] nor will it entertain suits to which citizens are ■ party<sup>13-a</sup>. Our Supreme Court will be a true Federal Court in its original jurisdiction,—a tribunal for the determination of “disputes between the constituent units of the Federation”<sup>14</sup>.

It will confine itself to disputes between either of the following sets of parties :

- (a) the Union and one or more States ;
- (b) the Union and any State or States on the one side and one or more other States on the other side ;
- (c) two or more States ■ against each other.

‘Subject to the provisions of this Constitution’.—The jurisdiction of the Supreme Court in disputes ■ to the existence of ■ legal right between the Union and the States or between the States *inter se* is *exclusive*, except in certain matters *excepted* by other provisions of the Constitution. The following matters appear to be excluded from the original jurisdiction of the Supreme Court and vested in other tribunals, by the Constitution :

- (i) Disputes specified in the Proviso to Art. 131.
- (ii) Complaints ■ to interference with inter-State water supplies, referred to the statutory tribunal referred to in Art. 262, if Parliament so legislates.
- (iii) Matters referred to the Finance Commission [Art. 280].
- (iv) Adjustment of certain expenses as between the Union and the States [Art. 290].

‘Legal right’.—The term ‘legal right’ in this Article means a right recognised by law and capable of being enforced by the power of the State, but not necessarily in ■ Court of law. It is ■ right of ■ party recognized and protected by ■ rule of law, the violation of which would be ■ legal wrong done to his interest and respect for which is ■ ‘legal’<sup>15</sup> duty, even though no action may lie. The only ingredients are legal recognition and a legal protection, and not enforceability by action in a Court of law<sup>16</sup>.

Thus, under the Government of India, Act, 1935, the Provinces could sue the Central Government for their legal rights accruing prior to the commencement of the Act of 1935, though at that time they had no right of action against the Central Government<sup>16</sup>. It was observed—

“Where a statute affords a new mode of suing, the cause of action need not arise subsequently to the period when the statute comes into operation. Where a statute creates a new jurisdiction, the new jurisdiction takes up all past cases, and there is not the slightest injustice in this, for although the circumstances may have occurred prior to the passing of the statute, the suit or action may have been commenced subsequently.”<sup>17</sup>

The expression ‘legal right’ suggests that the right must be founded on some rule of positive law as distinguished from *political* considerations with which Courts of justice have no concern.

“The test of a matter being justiciable is—can it be sustained ■ any principle of law that can be invoked as applicable? The expression ‘legal right’ would, it would seem, also include equitable rights<sup>18</sup>.”

(13) *Ramgarh State v. Province of Bihar*, A.I.R. 1949 F.C. 55.

(13-a) Suits by individuals against the Union or a State will be brought in the ordinary Courts, subject to Art. 228, *post*.

(14) Joint Parliamentary Committee on Indian Constitutional Reform, Vol. I, para. 322.

(15) As distinguished from ‘political’ matters

(see pp. 207-8, *ante*).

(16) Cf. *United Provinces v. Governor-General*, A.I.R. 1939 F.C. 58 (66).

(17) *United Provinces v. Governor-General in Council*, A.I.R. 1939 F.C. 58.

(18) *Dominion of Canada v. Ontario*, (1910) A.C. 637 (647).

Again, the law involved need not be only Union law. If the condition as to parties is satisfied, the Supreme Court will adjudicate the rights of the parties, whatever be the law applicable. The validity of a law, Union or State, is itself a question as to 'legal right'.<sup>19</sup>

From a survey of the American and Australian Constitutions and the Government of India Act [pp. 391-392, *ante*], it may be stated that the Union and the States may be parties to a suit as against each other in the following causes, *inter alia*,— (a) Questions relating to their respective legislative and taxing powers; (b) Questions relating to territory; (c) Injury to the health or property of the residents of one State by the action of another State; (d) Questions relating to respective revenue and property.

*Analogous provision.*—See Art. 147, *post*.

### JURISDICTION OVER STATES IN PART B

In order to properly appreciate this matter, the position under the Government of India Act, 1935, should be considered.

(A) *Under the Act of 1935.*—The federal scheme under the Act of 1935 having never come into operation, there was no scope for any 'Federated State' being a party before the original jurisdiction of the Federal Court, under Sec. 204 of the Act. But after the passing of the Indian Independence Act, 1947, amendments were made in Sec. 204 of the Government of India Act, 1935, by the India (Provisional Constitution) Order, 1947, substituting the words 'Acceding States' in place of the 'Federated States', with certain consequential provisions. As to 'Acceding States', Sec. 6 of the Order provided that

"an Indian State shall be deemed to have acceded to the Dominion if the Governor-General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof....".

So after the above amendment, a dispute to which an Acceding State was a party would come within the original jurisdiction of the Federal Court, but only if the dispute related to the following matters :

(i) Interpretation of the Constitution Act, Orders in Council, etc.; (ii) Agreement made between that State and the Dominion as to the administration of some Dominion law in that State; (iii) Some matter with respect to which the Dominion Legislature had power to make laws for that State; (iv) Agreement expressly providing that some particular dispute should be within the original jurisdiction of the Federal Court.

Disputes which were expressly excluded from the jurisdiction of the Federal Court by agreement between the Dominion and such State were excluded from the scope of Sec. 204.

(B) *Under the Constitution.*—Owing to the process of merger and integration some of the Indian States have merged into the States specified in Part A of the First Schedule, some have been included in the Centrally administered States in Part C, and the remaining have been specified in Part B. The Proviso to Article 131 provides that—

(a) In the case of the States in Part B, a dispute which arises out of any pre-Constitution agreement, covenant, etc., which is in force under the Constitution<sup>20</sup> shall come within the original jurisdiction of the Supreme Court under the present Article. But under Article 143 (2) *post*, such disputes may be referred to the 'opinion' of the Supreme Court, by the President.

(19) *United Provinces v. Governor-General in Council*, A.I.R. 1939 F.C. 58 (64).

(20) See Agreement with Nizam of Hyderabad; Agreement with Maharaja of Mysore; Covenant for formation of Madhya Bharat; Covenant for formation of Patiala and East Punjab States

Union; Rajasthan; Saurashtra; Travancore-Cochin [Appendices LVII; LVIII; XXXVIII; XXXIX; XL-XLI; XXXIV-XXXVI; XLII of the White Paper Indian States, M. S. 6].



(b) Whether in the case of a State in Part B, or in any other Part, if there is any agreement, covenant, etc., which expressly excludes the jurisdiction of the Supreme Court as regards any dispute, the original jurisdiction of the Supreme Court shall not extend thereto.

*Costs.*—Under the corresponding section (204) in the Act of 1935, the Federal Court would not ususally award costs.<sup>21</sup> Under the *Constitution*, it is entirely in the discretion of the Court.<sup>22</sup>

**132.** (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.

(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and with the leave of the Supreme Court, on any other ground.

*Explanation.*—For the purposes of this article, the expression “final order” includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

#### OTHER CONSTITUTIONS

*U. S. A.*—Unlike the Original Jurisdiction, the Appellate jurisdiction of the Supreme Court of the United States is completely subject to regulation by Congress. The present jurisdiction is regulated by the Jurisdictional Act of 1925, as amended in 1937, which lays down that the following classes of cases may come on appeal to the Supreme Court—

(i) cases in which the highest Court of the State having jurisdiction of the case has decided against the validity of some statute or treaty of the United States or decided in favour of some statute of the State which was alleged to be in violation of the United States Constitution, laws or treaties ;

(ii) cases in which a United States circuit court of appeals has held a State statute to be in violation of the Constitution, treaties, or laws of the United States ;

(iii) certain limited classes of cases from the district courts.

Apart from these cases of appeal as of right, the Supreme Court may, by issuing the writ of *certiorari*, bring up cases from the State Courts in certain specified cases (under Sec. 25), *e.g.*, when the construction of any provision of the Constitution or treaty is involved. But the Supreme Court would not exercise this jurisdiction unless the judgment or decree of the State Court in question be a ‘final judgment or decree’.<sup>23</sup>

(21) *G. G. in Council v. Province of Madras*, (1945) F.C.R. 194.

(22) See Order XXXIX of the Supreme

Court Rules, 1950, (1950) S.C.J., Supp., p. 22.  
(23) *Hohnston v. Moore*, 3 Wheat. 433; *Ablaman v. Booth*, 21 How. 506.

Under the above Act of 1925, the Supreme Court has ruled (1936), that legislation alleged to be unconstitutional would be reviewed by it only if loss or damage has resulted therefrom amounting to not less than 3,000 dollars. The Supreme Court has thus got rid of minor cases under the pressure of abnormal growth of litigation.

*Canada.*—The British North America Act, 1867, established no final Court of Appeal for Canada but Sec. 101 of the Act authorised the Dominion Parliament to—

“Provide for a general Court of appeal.”

In 1875, by a Canadian Act, the Supreme Court of Canada was established. The constitution, organization and functions of the Supreme Court of Canada are thus left out of the Constitution Act. The Supreme Court hears appeals in civil and criminal cases from the Provincial Courts. The Act, however, did not abolish the right of final appeal to the Judicial Committee of the Privy Council. As a matter of fact, under the Colonial Laws Validity Act, the Dominion Act could not affect the jurisdiction of the Privy Council which was founded on the British statute—Judicial Committee Act, 1833. So, even after the establishment of the Supreme Court, the Judicial Committee remained the final Court of appeal from Canada.

With the passing of the Statute of Westminster, 1931, the Dominions became competent to legislate in derogation of Imperial statutes, and in 1931, the Canadian Parliament *abolished criminal appeals* to the Judicial Committee, whether from the Provincial Courts or the Supreme Court, and this Act was upheld valid by the Judicial Committee itself.<sup>24</sup>

Civil appeals to the Judicial Committee continued.<sup>24</sup> In 1940, the Dominion Government referred to the Supreme Court the legislative competence of the Canadian Parliament to enact an Act to amend the Supreme Court Act, so as to abolish appeals to the Judicial Committee altogether. This case went up to the Judicial Committee, and the latter has held<sup>25</sup> that since the Statute of Westminster, it is competent for any Dominion Legislature to abolish appeals to the Privy Council. So, when the Canadian Parliament passes this Act,<sup>1</sup> the Supreme Court of Canada will be the final Court of appeal for Canada in all matters.

*Australia.*—The Federal Court is called the High Court of Australia, and in it is vested the judicial power of the Commonwealth (Sec. 71). The States have their own Courts headed by the Supreme Court for each State.

(a) But for a very narrow scope for appeal to the Judicial Committee, it may be said that the High Court of Australia is now the final Court of appeal for the Dominion, on *constitutional* questions.

(i) Under the Australian Commonwealth Judiciary Act, 1907, the right of appeal from State Courts to the Privy Council has been abolished, on *inter se* questions, i.e., questions regarding the constitutional powers of the Commonwealth and the States, or between two or more States.

(ii) Under Sec. 74 of the Constitution Act, appeals to the Privy Council from the High Court lie on ‘*inter se*’ cases only by certificate of the High Court, which is not granted as a matter of practice. But constitutional questions other than *inter se* matters, such certificate is sometimes granted.<sup>2</sup> On *inter se* questions, no appeal lies to the Privy Council without the certificate of the High Court, and the Privy Council has no right to grant special leave to appeal, in such cases.<sup>3</sup>

(24) *British Coal Corporation v. The King*, (1935) A. C. 500.

(25) *Attorney-General of Ontario v. Attorney-General of Canada*, (1947) 51 C.W.N. 886 (P.C.).

(1) The Canadian Minister of Justice has brought a Bill for abolishing Privy Council

appeals (*Statesman*, Calcutta, 31st January, 1949, p. 5).

(2) Cf. *Moran Proprietary v. Deputy Commissioner*, (1940) A.C. 838.

(3) *Australia v. Bank of N. S. W.*, (1949) All E.R. 755 (P.C.).

The following, *inter alia*, have been held to be *inter se* questions :

(i) An industrial dispute, extending the limits of one State.<sup>4</sup> (ii) The question how far a State Legislature could regulate the conduct of a Commonwealth officer.<sup>5</sup> (iii) A Commonwealth Act prohibiting the carrying on banking business in Australia, by private banks.<sup>6</sup>

(b) In other than constitutional cases—

(i) there is no appeal as of right from the High Court, but the Judicial Committee has the power to grant ■ special leave to appeal<sup>7</sup> ;

(ii) But persons aggrieved by decisions of the State Courts have the *option* to appeal to the High Court or *direct* to the Privy Council. But there is no right to appeal to the Privy Council where a State Court was exercising ■ Federal jurisdiction.

Australia has as yet no intention of abolishing Privy Council appeals altogether<sup>8</sup>.

**Burma.**—Sec. 136 of the Burmese Constitution, 1948, provides—

“(1) The Court of final appeal shall be called “ the Supreme Court ”.

(2) The head of the Supreme Court shall be called “ the Chief Justice of the Union ”.

(3) Without prejudice to the powers conferred upon the Supreme Court by any other provisions of this Constitution, the Court shall, with such exceptions and subject to such regulations ■ may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other Courts as may be prescribed by law.”

See also Sec. 137 quoted *ante*.

**Government of India Act, 1935.**—Sec. 205 of the Act provided—

“(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves ■ substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India ■ consider in every case whether or not any such question is involved and of its own motion to give or to withhold ■ certificate accordingly.

(2) Where such ■ certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question ■ aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave ■ His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.”

## INDIA

**ARTICLES 132-136 : APPELLATE JURISDICTION.**—These articles deal with the appellate jurisdiction of the Supreme Court which may be classified under the following heads—

(1) Appeals on constitutional questions : (a) By certificate of High Court [Article 132 (1)]. (b) By special leave of Supreme Court. [Article 132 (2)].

(2) Appeals involving no constitutional questions : (a) Civil [Article 133]. (b) Criminal [Article 134].

(3) Appeal by special leave of Supreme Court in any case other than the above [Article 136].

(4) Transitional jurisdiction under Art. 135.

**ARTICLE 132 : APPEALS INVOLVING CONSTITUTIONAL QUESTIONS.**—This Article deals with appeals involving interpretation of the Constitution, arising out of any proceedings in ■ High Court,—civil, criminal or otherwise.

(4) *Jones v. Commonwealth*, (1917) 24 C.L.R. 396 (P.C.).

(5) *Pirrie v. Macfarlane*, (1925) 36 C.L.R. 170.

(6) *Australia v. Bank of N. S. W.*, (1949) 2 All E.R. 755 (P.C.).

(7) Special leave to appeal from the High Court is not readily granted [*Daily Telegraph*

*v. McLaughlin*, (1940) A.C. 776; *Gratwick v. Johnson*, (1945) 70 C.L.R. 1; *R. v. Bromhead*, (1947) 73 C.L.R. 237].

(8) Dr. Evatt in the House of Representatives on 11th February, 1949 (*Statesman*, Calcutta, 12th February, 1949).



It says that an appeal shall lie to the Supreme Court from—any judgment, decree or final order of any High Court, in the territory of India in any civil, criminal or other proceeding,—provided it involves a substantial question of law to the interpretation of this Constitution, and—

(i) either the High Court certifies to the above effect ; or

(ii) the Supreme Court itself grants special leave on the above ground, where the High Court has refused such certificate.

#### CLAUSE (1)

'Judgment, decree or final order'.—These words occur in all the articles 132, 133, 134. In Article 136, the word 'order' is not qualified with the adjective 'final'.

'Judgment' is a determination by a Court of law, as the result of an action or proceeding upon the matter submitted for decision, that a legal duty does or does not exist<sup>9</sup>. In criminal cases, 'judgment' means a judgment of conviction or acquittal, distinct from other orders<sup>10</sup>.

The word 'judgment' includes a 'decree' which—

"is the formal expression of an adjudication which, so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."<sup>11</sup>

'Order' on the other hand, means the formal expression of any decision which is not a decree<sup>12</sup>.

Hence, where there is an adjudication or judicial determination of the rights of the parties, but a mere administrative order (e.g., fixation of price, etc., in the sale proclamation under Order 21, rule 11 of the Civil Procedure Code), there is neither a judgment, decree nor final order<sup>13</sup>.

The use of the word 'judgment' in conjunction with 'final order' indicate that the word 'judgment' does not include interlocutory orders<sup>14</sup>.

The test of 'finality' of an order is "whether the order finally disposes of the rights of the parties"<sup>15</sup>. The mere fact that the order 'has gone to the root of the suit, viz., the jurisdiction of the Court to entertain it,' or decides a vital issue<sup>16</sup> is not sufficient<sup>17</sup>.

"The finality must be finality in relation to the suit. If after the order, the suit is still a live suit, in which the rights have still to be determined, no appeal lies."<sup>18</sup>

Hence, as the *Explanation* says, an order on any particular issue which is sufficient for the final disposal of the case, is a final order.

Hence, the following are not 'final orders' within the meaning of Articles 132-4 :

(i) Order of remand of a suit for trial on the merits,—after reversal of a stay order<sup>17</sup>; or reversal of a dismissal on a preliminary issue, e.g., as to jurisdiction<sup>18</sup>; or setting aside an *ex parte* decree<sup>19</sup>; or reversing a dismissal on the ground that the suit is barred by limitation<sup>20</sup>; or

(9) *Shyamkant v. Rambhajan*, A.I.R. 1939 F.C. 74 (79).

(10) *Hori Ram v. Emperor*, A.I.R. 1939 F.C. 43 (48).

(11) Sec. 2 (2) of the Code of Civil Procedure, 1908.

(12) Sec. 2 (14) of the Code of Civil Procedure, 1908.

(13) *Shyamkant v. Rambhajan*, A. I. R. 1939 F.C. 74 (80).

(14) *Hori Ram v. Emperor*, A.I.R. 1939 F.C. 43 (48).

(15) *Abdur Rahaman v. Cassim*, A. I. R. 1933 P.C. 58.

(16) *Kuppuswami v. King*, (1947) 52 C.W.N. (F.R.) 18 (24).

(17) *Ramchand v. Govardhandas*, A.I.R. 1920 P.C. 86.

(18) *Moolji v. Khandesh Co., Ltd.*, (1950) S.C.J. 51.

(19) *Radha Kishen v. Collector*, (1901) 28 I. A. 28.

(20) *Mahant v. Candasama*, (1884) 8 Bom. 548.

reversing an order of stay<sup>21</sup>. (ii) An order refusing to appoint a Receiver or discharging an order of appointment of a Receiver<sup>22</sup>. (iii) The dismissal of a Criminal Revision petition by the High Court as a result of which the proceedings before the Magistrate have to go on<sup>23</sup>.

On the other hand, the following are 'final orders' :

(a) An order of remand directing enquiry on subsidiary matters, after deciding the cardinal issue involved in the suit, e.g., directing accounts to be taken, after determining defendants' liability to account<sup>24</sup>; directing trial on other issues after determining the validity of a disputed will upon which a suit for recovery of property was brought<sup>25</sup>. (b) An order setting aside or confirming a sale under Order 21, rules 90 and 92<sup>1</sup>. (c) An order in appeal from an order filing an award<sup>2</sup>. (d) An order reversing the dismissal of suit, reinstating a preliminary decree, restoring the suit for final decree<sup>3</sup>. (e) An order passed by a High Court in insolvency proceedings<sup>4</sup>.

i *Preliminary judgments and decrees.*—This Article uses the expression 'judgment, decree or final order', whereas clause 39 of the Letters Patent<sup>5</sup> uses the expression—'final judgment, decree or order', and it was held that the adjective 'final' therein qualified distributively all the words judgment, decree or order<sup>6</sup>.

But in the present clause 'final' qualifies only order. Hence, it seems that on constitutional questions appeal would lie to the Supreme Court also from preliminary judgments and decrees.

'A High Court in the Territory of India.'—'High Court' in this article includes both Single, Division or other Bench of a High Court properly constituted<sup>7</sup>. If there is a constitutional question involved in a judgment, decree or final order of a Single Judge, neither the Judge can refuse the certificate nor can the Supreme Court refuse to entertain the appeal from such decision, on the ground that appeal lies from the Single Bench decision to a Division Bench of the High Court itself<sup>7</sup>. [See contra, Article 133 (3)].

Each of the 17 States<sup>8</sup> in Parts A and B of Schedule I has a High Court (Article 214 (1)).

Besides, the Courts of the Judicial Commissioner of the States in Part C have been declared to be High Courts for the purposes of Articles 132-134 of the Constitution (i.e., for purposes of appeal), by the Judicial Commissioners' Courts (Declaration as High Courts) Act (XV of 1950), Sec. 3 of which says—

"Every Court in a Part C State known, at the commencement of this Act as the Court of the Judicial Commissioner for that State (hereinafter referred to as a Judicial Commissioner's Court), is hereby declared to be a High Court for the purposes of Arts. 132, 133 and 134."

[See in this connection, Article 366 (14) (b), which gives this legislative power to Parliament].

'Civil, Criminal or other proceeding.'—The addition of these words effects an improvement upon Sec. 205 of the Government of India Act, 1935. These words

(21) *Ramchand v. Govardhandas*, A.I.R. 1920 P.C. 86.

(22) *Benoy v. Satish* A.I.R. 1928, P.C. 49.

(23) *Rex v. Abdul Majid*, (1949) F.L.J. 133.

(24) *Rohimbhoy v. Turner*, (1891) 18 I.A. 6.

(25) *Muzhar v. Bodha* (1895), 22 I.A. 1.

(1) *Krishna v. Motichand*, (1913) 40 I.A. 140.

(2) *Ramlal v. Kishanchand*, A.I.R. 1924 P.C. 95.

(3) *Lachmi v. Balmukund*, A.I.R. 1924 P.C. 198.

(4) *Maung Ba v. Ma Pin*, A.I.R. 1934 P.C. 81.

(5) *Vide* App. II to the Code of Civil Procedure, 1908.

(6) *Tata Iron & Steel Co. v. Chief Revenue Authority*, 47 Bom. 724 (P.C.).

(7) *Cf. Lal Singh v. C.P. and Berar*, A.I.R. 1944 F.C. 61; *Iqbal Ahmad v. Allahabad Bench*, A.I.R.

1950 F.O. 71 (73).

(8) See in this connection, the High Court (Calcutta) Order, 1947, continuing the High Court in Calcutta for the Province of West Bengal; the High Courts (Punjab) Order, 1947, constituting the High Court of East Punjab as a result of the Partition. The Madras High Court (Extension of Jurisdiction to Coorg) Order, 1948 [(1949) F.L.J. Supp. 11], extending the jurisdiction of the Madras High Court to Coorg; the United Provinces High Court (Amalgamation) Order, 1948 [(1949) F.L.J. Supp. 12], amalgamating the Chief Court in Oudh with the High Court in Allahabad; the Orissa High Court Order, 1948 [(1949) F.L.J. Supp., 14], constituting a High Court for Orissa.

make it clear that the jurisdiction of the Supreme Court will embrace all proceedings wherever any question of constitutional interpretation shall arise. The object is to secure uniformity of decision in every case that involves a substantial question of law as to the interpretation of the Constitution<sup>9</sup>.

*When the certificate may be granted.*—The certificate shall be given only if the substantial question of law is 'involved' in the case. A case may be said to involve the constitutional question only if the decision *depends* upon it<sup>10</sup>. Thus, merely because the question of validity of a statute was discussed or debated at the hearing though it was not necessary for decision of the case, the certificate cannot be granted<sup>10</sup>. For the same reason, the mere expression of an *opinion* on a constitutional question is no ground for the certificate<sup>11</sup>. Nor would the mere *possibility* of such a question arising before the Supreme Court be a ground for the certificate<sup>11</sup>.

Where the question of interpretation of the Constitution has not at all been raised in the proceedings before the High Court, no certificate should be granted<sup>12</sup>. Nor will it be granted where the matter has already been decided by the Supreme Court<sup>13</sup>.

*Effect of Certificate.*—Once the certificate is granted by the High Court, the jurisdiction to hear the appeal is vested in the Supreme Court and the High Court has not, thereafter, any power to vacate it<sup>14</sup>. Nor is the jurisdiction of the Supreme Court divested by reason of some event happening subsequent to the granting of the certificate<sup>14</sup>. The Constitution does not say whether the Supreme Court itself shall have the power to rescind the leave to appeal which has been granted by the High Court. The Privy Council would entertain an application to rescind leave to appeal on the ground, for example, that the order against which the leave was granted is not a judgment or final order<sup>15</sup>, but this power to rescind is not readily exercised if there are good grounds of appeal<sup>15</sup>. The Federal Court of India<sup>16</sup>, similarly held that though the Federal Court would not ordinarily question a certificate granted by the High Court, it was the duty of the Federal Court to determine, if necessary, whether the order appealed against is really from a 'judgment, decree or final order' so as to ensure whether the Federal Court has jurisdiction to entertain the appeal<sup>17</sup>.

It seems that the position under the *Constitution* is the same, *viz.*, that the Supreme Court would have the power to refuse to entertain the appeal, notwithstanding the certificate of the High Court, if the Supreme Court finds that the order appealed from is not a final order, judgment or decree. Again, if it is found at the hearing that no question as to interpretation of the Constitution is involved, the appeal would ordinarily be dismissed, without hearing any other ground<sup>18</sup>.

*Form of Certificate.*—Under the corresponding provision of the Government of India Act, 1935, it has been held that no particular form of certificate is required for the purpose of appeal. A note in the judgment of the High Court that some substantial question of law as to the interpretation of the Constitution is involved, is sufficient<sup>19</sup>.

(9) *King-Emperor v. Shibnath*, (1945) 50 C.W.N. 25 (29) (P.C.).

(10) *Hafiz v. Shyam Lal*, A.I.R. 1944 All. 273.

(11) *Emperor v. Dantes*, A.I.R. 1941 Bom. 245.

(12) *Gaddam v. Pasupuleti*, A.I.R. 1943 Mad. 481; *Emperor v. Jagdam*, (1948) All. 55 (60).

(13) Cf *Krishnaswami v. Governor-General* (1947) 52 C.W.N. (F.R.) 1.

(14) *Subhanand v. Apurba*, A.I.R. 1940 F.C. 7.

(15) *Salisbury Gold Mining Co. v. Hathorn*, (1897)

A.C. 268.

(16) *J. K. Gas Plant v. Emperor*, A.I.R. 1947 F.C. 38 (47-48).

(17) *Kuppuswami v. King*, (1947) 52 C.W.N. (F.R.) 16; *Amin v. Dominion of India*, (1950) 5 D.L.R. (F.C.) 53.

(18) *R. v. Abdul Majid*, (1949) F.L.J. 133.

(19) *Secretary of State v. Lall*, A.I.R. 1945 F.C. 47 (49).



'Substantial question as to interpretation of this Constitution'.—Under the present article there is no scope for appeal unless there is some substantial question of law<sup>20</sup> as to the interpretation of some provision of the Constitution involved in the case. The constitutional question must arise upon the findings of either the High Court or the subordinate Court<sup>21</sup>.

The following may be cited as instances where a question of constitutional interpretation is involved—

(i) A suit by a dismissed Government servant against the Government for relief on the ground that his dismissal has been illegal owing to contravention of Article 282<sup>22</sup>.

(ii) A suit challenging a statute as *ultra vires* on the ground that the powers of the Legislature as conferred by the Constitution have been exceeded<sup>23</sup>. But the question whether an Act has been correctly applied to a particular case, is not such a question<sup>24</sup>. Similarly, the question whether an act or order of the Executive authority falls within the powers conferred by the provisions of a statute is not a question involving the interpretation of the Constitution itself<sup>25</sup>.

(iii) A conviction under a law which is challenged as *ultra vires*<sup>1</sup>.

(iv) Appeal from an order of rejection of an application by an Advocate under the Bar Councils Act, on the ground that provisions under which the rejection took place were *ultra vires*.<sup>2</sup>

(v) Cases directly involving the interpretation of some particular provision of the Constitution<sup>3</sup>, unless the point has already been settled by a previous decision<sup>4</sup>.

*Analogous provision.*—See Art. 147, *post* as to the meaning of 'this Constitution.'

#### CLAUSE (2)

*Clause (2) : Constitutional appeal by special leave.*—This clause effects another improvement upon the corresponding provisions of Sec. 205 of the Government of India Act, 1935. While under that section a certificate by the High Court was a condition precedent to appeal to the Federal Court<sup>5</sup>, and that in case of refusal of a certificate by the High Court, the Federal Court could neither enquire into the reasons of such refusal nor grant a special leave itself<sup>6</sup>, even though the certificate had been refused *perversely*<sup>7</sup>, the party who has been refused the certificate would not be so helpless under the Constitution as, notwithstanding such refusal, the Supreme Court shall have the power to grant special leave if it be satisfied that the case really involves a substantial question as to the interpretation of the Constitution.

Suppose, however, the High Court does not consider the question of certificate at all and makes no order either granting or refusing it. Would the Supreme Court then be entitled to entertain an application for special leave under Article 130 (2)? Such difficulty in fact arose under the Government of India Act, 1935, though, of course, under a different set of provisions<sup>8-9</sup>.

(20) As to the meaning of this expression, see under Art. 133 (1), *post*.

(21) *Sudhir v. The King*, (1948) 3 D.L.R. (F.C.) 4.

(22) Cf. *Durga Prasad v. Government of United Provinces*, (1949) F.L.J. 79; *Suraj Narain v. N.W.F.P.*, (1941) 4 F.L.J. 22.

(23) *Subramanyam v. Muttuswami*, 1940 F.C.R. 188; *Bank of Commerce v. Khulna*, 1944 F.C.R. 126; *Ralla Ram v. Province of East Punjab*, (1949) 12 F.L.J. 8; *Bata Shoe Co. v. Burdwan Municipality*, (1949) 12 F.L.J. 67; *Jatindra v. Province of Bihar*, (1949) 12 F.L.J. 225.

(24) *Rex v. Abdul Majid*, (1949) F.L.J. 133.

(25) *Emperor v. Tarachand* A.I.R. 1946 Sind 154.

(1) *Kishori v. The King*, A.I.R. 1950 F.C. 69.

(2) *Iqbal Ahmad v. Allahabad Bench*, A.I.R. 1950 F.C. 71.

(3) Cf. *Corporation of Calcutta v. St. Thomas School*, (1949) 12 F.L.J. 361.

(4) *Krishnaswami v. Governor-General*, A.I.R. 1947 F.C. 37.

(5) *Surendra v. Gajadhar*, A.I.R. 1940 F.C. 10 (14).

(6) *Kishorilal v. Governor, Punjab*, A.I.R. 1940 F.C. 4.

(7) *Gauba v. Chief Justice, Lahore*, (1941) 46 C.W.N. (F.R.) 7.

(8) *Mackay v. Forbes*, (1940) 67 I.A. 64.

(9) *Punjab Co-operative Bank v. Commissioner of Income-tax*, (1940) 45 C.W.N. 232 (P.C.).

But, in such a case, the Supreme Court may, under the Constitution, direct the application for special leave to stand over until the High Court had either given a certificate or refused it [as was suggested by the Judicial Committee<sup>10</sup>.]

### CLAUSE (3)

*Clause (3) : Other grounds in Appeal.*—Though the foundation of the present jurisdiction is the existence of some substantial question of constitutional interpretation, it is to be noted that once the right to appeal is granted, either by certificate or by special leave, the appellant will be at liberty to appeal to the Supreme Court not only on the ground that the constitutional question was wrongly decided by the High Court, but also on any other ground open to appeal in ordinary cases. In other words, though the existence of the constitutional question gives the right of appeal, merits of the decision can be challenged before the Supreme Court on all possible grounds. This provision is based on the same principle as contained in Sec. 205 (2) of the *Government of India Act, 1935*,—differing, however, on one point. While under Sec. 205 (2) of the *Government of India Act* special leave of the Federal Court was necessary to raise such questions as the party could not have raised in appeal to the Privy Council without special leave of that Board had there been no certificate as to the existence of a question of constitutional law involved<sup>11</sup>,—no further leave of the Supreme Court will be required under Art. 132 (3) of the Constitution, in order to raise any other ground, once the leave to appeal has been obtained on the ground of existence of a substantial question of constitutional interpretation. This Clause does not mean, however, that if the Supreme Court finds that no question as to interpretation of the Constitution is in fact involved in the case, the Court would nevertheless proceed to hear the appeal on other grounds<sup>12</sup>. On the other hand, though the only point upon which the certificate had been granted is without *merit* or is not pressed, the Supreme Court may nevertheless hear the appellant on other grounds, if they are serious<sup>13</sup>.

Another point of innovation upon the provisions of Sec. 205 of the *Government of India Act* is that while under that section a certificate by the High Court was a condition precedent to appeal to the Federal Court, and that in case of refusal of a certificate by the High Court, the Federal Court could neither enquire into the reasons of such refusal nor grant a special leave itself<sup>14</sup>, even though the certificate had been refused *perversely*<sup>15</sup>,—the party who has been refused the certificate would not be so helpless under the Constitution as, notwithstanding such refusal, the Supreme Court shall have the power to grant special leave if it be satisfied that the case really involves ■ substantial question ■ to the interpretation of the Constitution.

‘Any party’.—Art. 132 is principally concerned with the determination of constitutional questions though arising in litigation between private parties. The Government stands in ■ peculiar situation : it has no doubt pecuniary or proprietary interest in one sense, but in another aspect it is also the custodian and the protector of the interests of the public ; and the question of the *legality of a statute* is one in which it has ■ special interest. The words ‘any party’ in this clause are not used in the restricted sense in which it is used in Sec. 96 of the *Civil Procedure Code*. It does not say that ‘any party directly aggrieved by the judgment, decree or final order’ or ‘directly aggrieved by the decree actually passed’. Hence, an appeal lies on a constitutional question alone, without raising any other ground, by ■ Government concerned, at least where the Government was impleaded, rightly or wrongly, in the High Court<sup>16</sup>.

(10) *Punjab Co-operative Bank v. Commissioner of Income-tax*, (1940) 45 C.W.N. 232 (236) (P.C.).

(11) *Surendra v. Gajadhar*, A.I.R. 1940 F.C. 10 (14).

(12) *R. v. Abdul Majid*, (1949) F.L.J. 133.

(13) *Sudhir v. The King*, (1948) ■ D.L.R. (F.C.) 4 (7).

(14) *Kishorilal v. Governor, Punjab*, A.I.R. 1940 F.C. 4.

(15) *Gauba v. Chief Justice, Lahore*, (1941) 46 C.W.N. (F.R.) 7.

(16) *United Provinces v. Atiga*, A.I.R. 1941 F.C. 16 (29, 42), per Sulaiman and Varadachariar, JJ. Gwyer, C.J., ■ the other hand,

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.

**133.** (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law ; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value ; or

(c) that the case is a fit one for appeal to the Supreme Court ; and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

#### OTHER CONSTITUTIONS

*Burma.*—Sec. 136 of the Burmese Constitution leaves the appellate jurisdiction of the Supreme Court to legislation.

*Government of India Act, 1935.*—There was no provision in that Act itself, governing appeals to the Privy Council from the High Courts. Civil appeals were governed by Secs. 109-110 of the Code of Civil Procedure, 1908.

#### INDIA

*Art. 133 : Civil Appeals.*—While Art. 132 is confined to constitutional questions only, but comprises civil, criminal and other appeals, Art. 133 is confined to *civil* appeals only, on questions *other than the interpretation of the Constitution* [subject to Cl. (2)].

The position of the Supreme Court of India differs from that of the United States inasmuch it is the final court of law not only on federal and constitutional law, but also on matters of the ordinary law, civil, criminal or revenue.

held that even in such a case, the Government cannot appeal if neither of the private parties prefers to appeal against the decision ; in other words, the Government has no independent right of appeal. "It is impossible for this Court, at the instance of a third party who had no direct interest in the original suit, to order the High Court to vary the decree which it has given as between plaintiffs and defendant" (pp. 23, 26, *ibid.*). Gwyer, C.J., however, preferred to leave the question open, since

the appeal by the Government was dismissed on other grounds. It should be noted that notwithstanding this difference in opinion on the point, the framers of the Constitution has, in Art. 110 (3) reproduced the exact phraseology of Sec. 205 (2) of the Government of India Act, 1935—a fact which leads to the presumption that the opinion of the majority in the above Federal Court case is accepted by the Constituent Assembly.



This article substantially adopts the provisions of Secs. 109-110 of the Code of Civil Procedure, 1908, which governed appeals to the Privy Council in civil cases. One point of important difference is that the minimum limit of value has been raised from 10,000 to 20,000 in cases where appeal would lie ■ of right. But Parliament is empowered to vary this amount.

Another important difference is that while under Sec. 109 (c) of the Civil Procedure Code appeal lay to the Privy Council upon the certificate of fitness even though the order was not a 'final' <sup>17</sup> one, under Art. 133 (1) (c) of the Constitution, the certificate for appeal to the Supreme Court can be granted only if the order is ■ final one. There is no distinction in this respect between Sub-cl. (a), (b) and (c) of Art. 133 (1).

*Conditions of Civil Appeal.*—This Article lays down, that apart from appeal by special leave under Art. 136 and appeal on constitutional ground under Art. 132, appeal shall lie to the Supreme Court from a civil proceeding before any High Court in the territory of India, only on the following conditions :

(a) The subject of appeal is a 'judgment, decree or final order'.

(b) The High Court grants a certificate for such appeal—

(i) The certificate is obtained as of right, when the value of the subject-matter in dispute is not less than Rs. 20,000 (or such sum ■ may be fixed by Parliament) or some claim or question of like value is involved in such judgment, etc. But in cases where the decree sought to be appealed from is one of *affirmance* of the decree of the immediate lower Court, there is no right of appeal unless the High Court further certifies that some 'substantial question of law' is also involved in the appeal.

(ii) In other cases, *irrespective* of the *value* of the subject-matter or of the fact of *affirmance*, appeal would lie to the Supreme Court, if the High Court, in its discretion certifies that the case is ■ fit one for appeal to the Supreme Court (*e.g.*—by reason of its importance<sup>18</sup>).

#### CLAUSE (1)

'*Judgment, decree or final order.*'—As to the meaning of these words, see p. 399, *ante*. This Article is not confined to *suits* ■ distinguished from proceedings<sup>19</sup>. But the Article would not apply to orders in proceedings from which there is no provision for appeal under the law<sup>20</sup>. But when a special statute provides for only one appeal to the High Court, further appeal to the Supreme Court would lie, if the provisions of the present Article are satisfied<sup>21</sup>.

*Sub-clause (a) : Value of the subject-matter.*—Under Clause (a), the pecuniary value of the suit in the Court of first instance as well that of the subject-matter of appeal to the Supreme Court must be Rs. 20,000 or upwards<sup>22</sup>. Where the value of the claim in the plaint filed in the Court of first instance is less than the specified sum, the plaintiff cannot be allowed to increase that valuation at the time of applying for leave to appeal.<sup>23</sup>

Mesne profits and interest *subsequent* to the institution of the suit, though awarded by the decree or costs ■ cannot be added ■ computing the value of the suit in the Court of first instance.<sup>24</sup>

*Clause (b) : 'Question respecting property of like amount or value.'*—As in Clause (a), ■ is the value which governs the right of appeal, but while in Clause (a), the expres-

(17) Cf. *Kutoor v. Kutoor*, A.I.R. 1950 Mad. 215.

(18) Cf. *Banarasi v. Kashi Krishna*, (1901) 23 All. 227 (P.C.).

(19) *Pramatha v. Sanatkumar*, A.I.R. 1949 F.C. 60 (62); *Secretary of State v. Chellikani*, A.I.R. 1916 P.C. 21; *Hari Sankar v. Anath*, (1949) 12 F.L.J. 125.

(20) *Memakshi v. Subramaniya*, (1888) 14 T.A. 160.

(21) Cf. *Motichand v. Ganga*, (1902) 24 All. 174 (P.C.).

(22) *Rameshwar v. Siddeshwar*, A.I.R. 1927 Cal. 418; *Sri Krishna v. Purushotham*, A.I.R. 1939 All. 695.

(23) *E. I. Ry. v. Badri*, A.I.R. 1927 Pat. 328.

(24) *Mangamma v. Mahalakshamma*, (1930) 57 I. A. 56.

sion used is 'subject-matter', clause (b) uses the word 'property.' Clause (b) would apply where the claim itself is incapable of money valuation, e.g., easement<sup>26</sup> but the property to which it relates has a value of Rs. 20,000 or above. It would also apply where, whatever be the value of the actual subject-matter of the suit, the claim involves some question relating to property of the above value<sup>1</sup>. Value of the property refers to the value at the date of the decree or order.<sup>2</sup>

'Involves directly or indirectly.'—It is not easy to give a clear-cut answer to the question whether any claim or question to property is directly or indirectly involved in a suit, though it is obvious that the connection between the decree or order and the property must not be too remote.<sup>3</sup>

(A) In the following cases, it has been held that such a question was involved—

(i) A decree for mandatory injunction for demolition of property of the specified value, though the suit itself was valued at a nominal sum.<sup>4</sup>

(ii) A decree involving construction of a deed of gift or validity of award respecting property of the specified value, though the value of the subject-matter of the suit in which the decree was a lesser sum.<sup>5</sup>

(B) In the following cases, on the other hand, it has been held that such claim or question was involved—

(i) A decree refusing to set aside an award of lower value, though had the award been set aside, plaintiff could have proceeded with a suit for damages for breach of contract valued at above the specified sum.<sup>6</sup>

(ii) A decree refusing a right of irrigation of agricultural lands, where the injury resulting from such refusal is less than the specified value, even though the value of the property itself may exceed that sum.<sup>7</sup>

(iii) An order as to the lunacy of a person under Sec. 63 of the Lunacy Act even though the property of the person concerned was worth more than the specified sum.<sup>8</sup>

(iv) In a suit for partition, it is the value of the share claimed by the plaintiff, and not the value of the entire joint property, that determines the right of appeal under sub-clause (a) as well as (b).<sup>9</sup>

"A question as to the title of the plaintiff to the share which he claims in the joint property does not become a question respecting the whole of the joint family estate merely because if his title is established it will result in the joint family property being partitioned."<sup>9</sup>

**Decree of Affirmance.**—Under Cls. (a) and (b), if the decree of the High Court is one of affirmance, there is no appeal to the Supreme Court unless the High Court also certifies that the appeal involves a substantial question of law.

A decision is said to be 'affirmed' within the meaning of this clause when simply the decree (i.e., the result of the suit) of the Court below is affirmed; it is not necessary that the reasons or grounds of decision or the findings must all be affirmed<sup>10</sup>. In other words, the manner in which the affirmance is made or the person at whose instance it is brought about is immaterial in the present context<sup>11</sup>.

(25) *Manilal v. Banubhai*, A.I.R. 1921 Bom. 266; *Lallubhai v. Bhimbhai*, A.I.R. 1929 Bom. 541.

(1) *Subramania v. Sellammal*, (1916) 39 Mad. 843 (846); *Keshoprasad v. Shiva*, (1918) 44 I.C. 475 (Pat.); *Moola & Sons v. Leon Shain Sway*, (1925) 4 Rang. 92.

(2) *Surendra v. Dwaraka* (1917) 44 Cal. 119.

(3) *Udoychand v. Guzdar*, (1925) 52 I.A. 207.

(4) *Amar v. Shosi*, (1904) 31 Cal. 305 (P.C.).

(5) *Aliman v. Hasiba*, (1896) 1 C.W.N. 93n.; *Sri Kishan v. Kashmirao*, (1913) 25 All. 445.

(6) *Udoychand v. Guzdar*, (1925) 52 I.A. 207.

(7) *Appala v. Rangappa*, (1917) 40 I.C. 680 (Mad.).

(8) *Rukmani v. Ramkishan*, A.I.R. 1950 All. 242.

(9) *Shevanthibai v. Janardhan*, A.I.R. 1944 P.C. 65, reversing *Bhagwat v. Pashupati*, (1906) 10 C.W.N. 364; *Asghar v. Abida*, (1932) 54 All. 858.

(10) *Tassadug v. Kashiram*, (1903) 30 I.A. 35.

(11) *Mahadev v. Secretary of State*, (1932) 54 All. 390.

But if the decree is *varied*, though only as to amount, it is not an affirmance thereof<sup>12</sup>, whether such variation takes place ~~in~~ appeal or on cross-objection<sup>13</sup>.

*What is a question of law.*—'Law' in this context means the *general* law and not merely statute law<sup>14</sup>.

A question of law is to be distinguished from a question of 'fact'. But questions of law and of fact are sometime difficult to disentangle<sup>15</sup>, and we may properly appreciate what is a question of law for the present purpose, only with reference to illustrations.

Thus, the following questions have been held to be questions of law :

- (a) The proper legal effect of a proved fact<sup>16</sup>.
- (b) Whether any evidence has been offered on the one side or the other<sup>15</sup>.
- (c) Misdirection on a point of law in dealing with the evidence<sup>16</sup>, *e.g.*, ~~■~~ to onus of proof<sup>17</sup>.
- (d) The nature of the plaintiff's title<sup>18</sup>.
- (e) The construction of ~~■~~ document<sup>19</sup>.
- (f) The legal inference from a document<sup>20</sup>.
- (g) The admissibility of any piece of evidence<sup>20, 21</sup>, provided it is such as to materially affect the finding<sup>22</sup>.
- (h) Whether there is or is not evidence to support a finding <sup>22, 23</sup>.

On the other hand, the following have been held to be questions of fact and not of law :

(i) Whether a fact has been proved when evidence for and against has been properly received.

(ii) Whether ~~■~~ statutory presumption has been rebutted<sup>24, 25</sup>.

(iii) The *effect* to be given to ~~■~~ document is a question of fact, where there is no question as to the construction thereof<sup>1</sup>. Here, a distinction has been made ~~■~~ between documents of *title* and other documentary evidence. If the deed is the very foundation of the suit, ~~■~~ mistake ~~■~~ to its meaning has been held to involve a question of law<sup>2</sup>; but not so if it is a mere piece of evidence<sup>3</sup>, even though such document may be a historical document<sup>4</sup>.

(iv) The existence or prevalence of ~~■~~ custom is a question of fact (*i.e.*, the finding as to the things that are actually done in pursuance of the alleged custom); but the finding whether the facts proved satisfy the requirements of law in order to establish ~~■~~ valid custom, is ~~■~~ question of law.<sup>5</sup> In other words, it is a question of law whether a custom is to be recognised or not; but the facts upon which the question is to be decided cannot be ~~■~~ matter of appeal beyond the first appellate Court.<sup>6</sup>

(12) *Annapurnabai v. Ruprao*, (1924) 51 I.A. 319.

(13) *Abdur Samad v. Ayasha*, A.I.R. 1948 Oudh 76 (F.B.).

(14) *Rangopal v. Shamskhaton*, (1893) 19 I.A. 228.

(15) *Nafar v. Shukur*, (1918) 45 I.A. 183.

(16) *Midnapur Zemindary v. Umacharan*, A.I.R. 1923 P.C. 187.

(17) *Jogesh v. Emdad*, A.I.R. 1932 P.C. 28.

(18) *Secretary of State v. Krishna*, A.I.R. 1945 P.C. 165.

(19) *Katch Chand v. Kishan*, (1912) 39 I.A. 247.

(20) *Choudhuri v. Kishori*, (1919) 46 I.A. 197.

(21) *Nafar v. Shukur*, (1918) 45 I.A. 183.

(22) *Bibhabati v. Ramendra*, (1946) 51 C.W.N. 98 (107) (P.C.).

(23) *Harendra v. Haridasi*, (1914) 41 I.A. 116.

(24-25) *Wali Mahammad v. Mohammad*, A.I.R. 1930 P.C. 91.

(1) *Shahebrao v. Jaiwantrao*, (1933) 60 I.A. 231.

(2) *Amiruddi v. Makkan*, A.I.R. 1930 P.C. 83.

(3) *Wali Mahammad v. Mohammad*, A.I.R. 1930 P.C. 91.

(4) *Midnapur Zemindari v. Umacharan*, A.I.R. 1923 P.C. 187.

(5) *Palaniappa v. Devasikamony*, (1917) 44 I.A. 147.

(6) *Lakshmidhar v. Rangalal*, A.I.R. 1950 P.C. 56 (59).



(v) A controversy relating to ordinary items in the taking of accounts between ■ principal and an agent<sup>7</sup>. But questions of *principle* relating to accounts would be entertained as questions of law.<sup>8</sup>

A 'substantial question of law.'—It is not a mere question of law but a substantial question of law that is required for the purpose of the certificate in case of ■ decree of affirmance. In order to be 'substantial', it must be such that there may be some doubt or difference of opinion. Thus if the law is well-settled by a final Court of Appeal or by a overwhelming consensus of judicial opinion, the mere application of it to a particular set of facts does not constitute a substantial question of law.<sup>9</sup>

The word 'substantial' does not however imply that the question of law must be of interest to the public in general or to any person other than the parties to the litigation<sup>10</sup>. A question of law is substantial if the *decision turns one way or the other* on the particular view taken of the law, *e.g.*, whether a judgment would operate as *res judicata* in a case,—though the decision may be unimportant to others. Nor can it be argued that there is no substantial question of law since the decision is 'obviously right'<sup>10</sup>. A question which comes before the Courts frequently, may be said to be 'substantial.'<sup>11</sup>

And for the same reason, if the question does not arise on the findings of either Court, no certificate on the present ground can be granted<sup>12</sup> merely because the question raised affects a large number of people<sup>13</sup>.

*Certificate not conclusive as to right to appeal.*—When a certificate has been granted by the High Court under Article 133, the Supreme Court would not be precluded from entertaining a preliminary objection that appeal does not lie under that Article. In other words, it is open to the Supreme Court to see whether the case fulfils the requirements of the Article, and to refuse to entertain the appeal if it does not lie under the Article in spite of the certificate.<sup>14</sup>

Of course, under Art. 136 (see *post*), the Supreme Court may entertain an appeal by special leave even when the certificate granted by the High Court is defective, but exceptional grounds must exist for the granting of such special leave.<sup>14</sup>

*Sub-Cl. (c) : Certificate as to fitness.*—The question of 'fitness' under Cl. (c) has no connection with the question of a substantial question of law being involved. This jurisdiction is very wide and it is neither possible nor desirable to crystallise the rules relating to the High Court's discretion in the matter.<sup>15</sup> Thus, the fact that the decision in the case would affect the interests of a large number of people and the controversy must arise again and again, makes the case ■ fit one for appeal to the Supreme Court.<sup>15</sup>

Nor is the pecuniary value of the subject-matter any consideration for the certificate under Art. 133 (c). This clause is intended to meet special cases, where the point in dispute *cannot be measured in money*, but is still one of great public importance<sup>16</sup>; for example—

(i) Dispute regarding religious rites and ceremonies<sup>17</sup>; caste and family rights.<sup>17</sup>

(7) *Kapur v. Murlaidhar*, A.I.R. 1944 P.C. 87.

(8) *Raghunatha v. Nagappa*, A.I.R. 1949 P.C. 25.

(9) *Ghiara v. C. P. Syndicate*, (1949) 4 D.L.R. 20 (Bom.).

(10) *Raghunath v. Deputy Commissioner*, 2 Luck. 93 (P.C.).

(11) *Chhail Behari v. Municipal Board*, A.I.R. 1948 All. 189.

(12) *Sudhir v. The King*, (1948) 3 D.L.R. (F.C.) 4.

(13) *Hulas Narain v. Deen Mohammad*, A.I.R. 1944 F.C. 24.

(14) *Moolji v. Khandesh Spinning Mills*, (1950) S.C.J. 51 (68); *Amin Bros. v. Dominion of India*, A.I.R. 1950 F.C. 77.

(15) Cf. *Jagannath v. United Provinces*, A.I.R. 1944 (F.C.) 23 (24).

(16) *Banarasi v. Kashi Krishna*, (1901) 23 All. 227 (P.C.).

(17) *Radhakrishna v. Swaminatha*, (1921) 44 Mad. 293 (P.C.).

- (ii) Control or management of some religious shrine or endowment.
- (iii) A matter relating to some ceremony of wide public importance.<sup>25</sup>
- (iv) The right of ■ community to take out a religious procession along the highway.<sup>18</sup>
- (v) Such matters as the reduction of the capital of companies.<sup>25</sup>

At the same time, a certificate of fitness to appeal to the Privy Council was not readily granted in cases of small value where the cost of litigation would be oppressively expensive to the other party.<sup>19</sup> The question to be determined under sub-cl. (c) is not the propriety of the order against which the leave is sought, but the importance of the question raised.<sup>20</sup> Thus,—

(a) Though the certificate may be granted against an order of suspension of an Advocate from practice under the Legal Practitioners Act<sup>21</sup>, it would not be granted where the leave is sought by the lawyer, in whose favour the order had been made, merely for the purpose of getting certain remarks expunged from the judgment.<sup>22</sup>

Though sub-cl. (c) primarily concerns cases where the claim or dispute cannot be valued in money, it does not follow that this sub-cl. cannot be applied to cases where the subject-matter may be so valued but the value falls below that specified in sub-cl. (a),-(b). The High Court has ■ discretion in the matter of granting the certificate in such cases as in other cases,<sup>23</sup> having regard to the general importance of the question involved.

*Certificate must give reasons.*—If the High Court refuses the certificate, under this clause, it should state the grounds of such refusal<sup>24</sup>. On the other hand, if it grants it, the grounds upon which it is granted should be clearly shown in the certificate.<sup>25</sup> Without the grounds, it would not appear that the judicial mind of the Court has been applied to the question under the present sub-cl. (c)<sup>1</sup>. Again,—

“The certificate and not the *order* for the certificate, is the document which they (the Supreme Court) ■ bound to consider and act upon ; and unless the certificate upon which the leave to appeal is in such a form as to justify that leave, they ought to hold that leave had not been properly given.”<sup>1</sup>

Hence, where the certificate under sub-cl. (c) is dubious or defective, the Supreme Court would dismiss the appeal if it is discovered that the appeal does not come under sub-cl. (a) or (b) of Art. 133<sup>2</sup>, or the case is not exceptional enough to justify the granting of special leave under Art. 136.<sup>3</sup>

“The objection based on the inadequacy of the certificate is more than a technical objection and constitutes a serious obstacle to the entertainment of the appeal, since it is of great importance not to allow litigants who have succeeded in the High Court to be harassed by further appeal and also not to affect the rights acquired by them by acting contrary to the principles laid down in the articles which govern the right of appeal to this (Supreme) Court.”<sup>2</sup>

*The case is a fit one*.—It is to be noted that in Sec. 109 (c) of the Code of Civil Procedure, the expression used was—‘decree or order’ ; hence, for the purpose of that clause it was not necessary that the order in question should be a ‘final’ one<sup>4</sup>. But that expression is omitted from the present Cl. (c) of Art. 133 (1) of the Constitution. In the result, no certificate of fitness will lie unless the order against which appeal is sought is a final one. In this respect, there is no difference between the three sub-cl. of Art. 133 (1).

(18) *Manzur v. Zaman*, A.I.R. 1925 P.C. 36.

(19) *Rajeswara v. Tiruneelkantan*, A.I.R. 1923 Mad. 232 (F.B.) ; *Sankari v. Milkha*, A.I.R. 1947 Lah. 304 (F.B.).

(20) *Musaji v. Musaji*, 18 C.L.J. 507 ; *Kutoor v. Kutoor*, A.I.R. 1950 Mad. 215.

(21) *An Advocate v. High Court of Allahabad*, A.I.R. 1934 All. 898 ; *A Plunder v. High Court of Allahabad*, A.I.R. 1937 All. 167.

(22) *In re Ram Lal*, A.I.R. 1949 Lah. 83 (F.B.).

(23) *Udaychand v. Guzdar*, (1925) 52 I.A. 207 ; *Shankari v. Milkha*, A.I.R. 1947 Lah. 307 (F.B.).

(24) *Venganat v. Cheraunath*, 33 I.A. 67.

(25) *Radhakrishna v. Swaminatha*, (1921) 48 I.A. 31 (93).

(1) *Radhakrishna v. Raikrishna*, (1901) 18 I.A. 182.

(2) *Banarsi v. Kashi Krishna*, (1900) 28 I.A. 111 ; *Radhakrishna v. Rai Krishna*, (1901) 28 I.A. 182 ; *Radhakrishna v. Swaminatha*, (1920) 48 I.A. 31.

(3) *Moolji Jaitha v. Khandesh Spinning Mills*, (1950) S. C. J. 51 (68).

(4) *Shiva v. Rani Prayag*, A.I.R. 1922 Cal. 479.

## CLAUSE (2)

*Cl. (2) : Constitutional ground.*—Though the right to appeal under Art. 111 is not founded on the existence of any question of constitutional interpretation, nevertheless, once the appeal has been entertained by the Supreme Court, the appellant would be at liberty to attack the judgment also on the ground that any constitutional question has been wrongly decided.

## CLAUSE (3)

*Cl. (3) : Single Judge decisions.*—While under Art. 132, appeal lies to the Supreme Court in constitutional cases even from decisions of Single Judges, under the present Article no appeal will lie from the decision of a single Judge of the High Court to the Supreme Court, unless Parliament provides for such appeals, by legislation.<sup>5</sup>

*'Legislation by Parliament.'*—Sec. 4 of the Judicial Commissioners' Courts (Declaration as High Courts) Act (XV of 1950), has provided that—

"An appeal shall lie to the Supreme Court under the provisions of Art. 133 from any judgment, decree or final order of a Judicial Commissioner's Court notwithstanding that such judgment, decree or final order is that of a single Judge."

#### PRINCIPLES ACCORDING TO WHICH SUPREME COURT WOULD EXERCISE ITS APPELLATE JURISDICTION

Since the Supreme Court is going to be the direct successor of the Judicial Committee in the matter of the present jurisdiction, it is expected that it would follow the practice developed by the Judicial Committee during the course of a century.<sup>6</sup> It would therefore be useful to summarise the principles according to which the Judicial Committee used to exercise its civil appellate jurisdiction under Secs. 109-110 of the Civil Procedure Code :

(i) When the question is one of *discretion* of the High Court, the Judicial Committee would not interfere with the way in which the discretion was exercised, unless it appears that the High Court *did not apply its mind* at all to the question, or acted *capriciously* or in disregard of any legal principles or was influenced by some *extraneous considerations* wrong in law. If there be no legal objection to the way in which the discretion has or has not been exercised, the Judicial Committee or the Federal Court would not substitute its own discretion for that of the High Court<sup>7-8</sup>.

But if the trial Court has *failed* to give *proper weight* to the considerations which should be decisive in determining whether the discretionary relief should or should not be granted, it is competent to the final appellate Court to interfere specially when the judgment does not contain sufficient finding of fact to support the conclusion<sup>9</sup>.

On the other hand, the Federal Court would not for the first time exercise a discretion which the High Court could have been, but was not asked to exercise<sup>8</sup>.

(ii) The Court of final appeal, should be very chary of entertaining an argument which has not been sifted in the Courts below<sup>10,11</sup>; or a point which was not taken in the grounds of appeal before it<sup>12</sup>.

(5) Cf. Sec. 111 (a) of the Civil Procedure Code, 1908.

(6) Cf. *Gangadara v. Subramania*, (1949) F.L.J. 90.

(7) *Rehamatunissa v. Price*, A.I.R. 1917 P.C. 116.

(8) *Jaigobind v. Lachmi*, A.I.R. 1940 F.C. 20 (22).

(9) *Klein v. Heiman*, (1948) 3 D.L.R. (P.C.) 14.

(10) *Secretary of State v. Jyotiprasad*, A.I.R. 1926 P.C. 41 (42).

(11) *Brijlal v. Govindram*, A.I.R. 1947 P.C. 192.

(12) *Jwaleshwari v. Parchand*, A.I.R. 1945 P.C. 13.



But where the order appealed against is without jurisdiction, it is never too late to give effect to the plea that it is ■ *nullity*<sup>13</sup>. Again, ■ pure point of law, even though abandoned in the High Court, may be raised before the Judicial Committee, if it is not *unfair* to raise it<sup>14</sup>.

(iii) Neither the Judicial Committee<sup>15</sup> nor the Federal Court<sup>16</sup>, would entertain appeals which have ■ relation to *existing rights* created or purported to be created, or to express opinions on subjects which are no longer of any *practical interest*.

But the Federal Court held that if the High Court grants a certificate of fitness on the question of validity of any statutory provision and thereafter the provision concerned is replaced by another statutory provision with retrospective effect, the appellant is entitled to impugn the new provisions, though the new provision was not referred to in the proceedings before the High Court<sup>16</sup>. It should be noted, in this connection, that under Art. 132 (3) of the Constitution, once the appeal is before the Supreme Court, no further leave of the Supreme Court would be necessary to introduce 'any other ground' (as was required under the Government of India Act, 1935).

(iv) Where the question depends not upon any question of law but upon the general conclusion that is to be drawn from many minute portions of the *evidence*, the Privy Council would not disturb the judgment of the Court below unless there were brought before them the *particular* instances where the Court below had gone wrong<sup>17</sup>.

(v) In short, the Judicial Committee would not disturb findings of *fact* of the Court below, unless it is clearly satisfied that there has been ■ miscarriage of justice in the reception or in the appreciation of the evidence.<sup>18</sup>

(vi) The Judicial Committee would not, ordinarily, interfere with the *concurrent findings of fact* of the two Courts below<sup>19</sup>: the reason being that when facts have been fairly tried by two Courts and the ■ conclusion has been reached by both, it is not in the public interest that the fact should be again examined by the ultimate Court of Appeal.<sup>20</sup>

But the practice of non-interference in a case of concurrent findings of fact "is not a cast-iron rule and there may occur cases of such ■ unusual nature ■ will constrain the Board to depart from the practice"<sup>21</sup>.

Thus, if there has been ■ *miscarriage of justice* or the violation of some principles of law or procedure, the Board might interfere with concurrent findings of fact.<sup>22</sup>

'Miscarriage of justice' in this context means—

(a) Such ■ departure from the rules which permeate *all* judicial procedure as to make that which happened not in the proper ■ of the word 'judicial procedure' at all; or (b) That the finding of one of the Courts is so based ■ ■ erroneous proposition of *law*, that if that proposition be corrected, the finding of fact disappears<sup>23</sup>. In short, the rule would not apply if, underlying the findings of fact there are questions of law, on which the findings proceeded and on which the Courts misdirected themselves.<sup>24</sup>

(13) *Asante v. Tawia*, A.I.R. 1949 P.C. 171.

(14) *Lingangowda v. Basangowda*, (1927) 45 G.L.J. 504 (P.C.).

(15) *Attorney-General of Alberta v. Attorney-General of Canada*, A.I.R. 1939 P.C. 53 (55).

(16) *Subhanand v. Apurba*, A.I.R. 1940 F.C. 7 (8).

(17) *Dasaraju v. Suryanarayana*, A.I.R. 1925 P.C. 91.

(18) *Richardson v. Government*, (1864) 1 W.R. (P.C.) 47.

(19) *Malikarjuna v. Subbaya*, A.I.R. 1925 P.C. 174.

(20) *Satgur v. Harnarain*, A.I.R. 1925 P.C. 122.

(21) *Bibhabati v. Ramendra*, (1946) 51 C.W.N. 98 (107) (P.C.).

(22) *Rani v. Khagendra*, (1904) 31 Cal. 871 (P.C.).

(23) *Robbins v. National Trust Co.*, (1927) A.C. 515 (517).

(24) *Tilakdhari v. Keshoprasad*, A.I.R. 1925 P.C. 122.

On the other hand, miscarriage of justice does not include—

(a) Objections as to weight of evidence <sup>25</sup>; or the appreciation of any piece of evidence <sup>1</sup>,—having no question as to *admissibility* of evidence <sup>2</sup>. (b) On the other hand, concurrent findings of fact would not be disturbed on the ground that inadmissible evidence was received, if the findings cannot on any reasonable view be based or *dependent upon* the inadmissible evidence <sup>3</sup>.

(vii) In case of *divergent* findings on a question of fact, on the other hand, the Court of second or final appeal would ordinarily attach great weight to the finding of the Judge of first instance who sees and hears the witnesses and is in a position to assess their credibility from his own observation.<sup>4</sup> It is true that a Judge of first instance can never be treated as infallible in determining on which side the truth lies and like other tribunals he may go wrong on questions of fact, but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the appeal Court should not lightly interfere with that judgment.<sup>5</sup> If, however, the finding of the Court of first instance is not based on the impression made by the witnesses in the witness-box, but on inferences and assumptions founded on a variety of facts and circumstances, the right of the Appellate Court to review that inferential process cannot be denied.<sup>6</sup>

(viii) A Court of final appeal would not readily unsettle a rule of law which has been established for a long time.<sup>7</sup>

**134.** (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

Appellate jurisdiction of Supreme Court in regard to criminal matters.

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death ; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death ; or

(c) certifies that the case is a fit one for appeal to the Supreme Court :

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

(25) *Thakur Harihur v. Thakur Uman*, (1886) 14 I.A. 7.

(1) *Robins v. National Trust Co.*, (1927) A.C. 515.

(2) *Bibhabati v. Ramendra*, (1946) 51 C.W.N. 98 (P.C.).

(3) *Keolapati v. Amarkrishna*, (1939) 44 C.W.N. 66 (P.C.).

(4) *Bank of India v. Chinoy*, A.I.R. 1950 P.C. 90 (94).

(5) *Madholal v. Official Assignee*, A.I.R. 1950 F.C. 21 (30).

(6) *Bank of India v. Chinoy*, A.I.R. 1950 P.C. 90 (94).

(7) *Gilmour v. Coats*, (1949) 1 All. E.R. 848 (864) (H.L.).

*Art. 134 : Criminal Appeals.*—Prior to the Constitution, there was no Court of Criminal appeal over the High Courts. No doubt, the Privy Council would entertain appeals in criminal cases, within a very limited range, but in the exercise of this jurisdiction, the Judicial Committee would not sit ■ a Court of appeal, ■ it would (to hear appeals in civil cases) under Secs. 109-110 of the Civil Procedure Code, just discussed. It is by special leave of the Judicial Committee that such appeals in criminal cases lay (as will be shown under Art. 136, *post*), and it is only in exceptional cases that the Judicial Committee interfered, in the exercise of the prerogative of the Sovereign to review the course of criminal justice. Secondly, there was no provision for a second appeal in criminal proceedings, in any case (Secs. 404, 430 of the Criminal Procedure).

Though with a limited jurisdiction at the outset, the Constitution for the first time sets up a Court of Criminal appeal over the High Court, and also creates a right of second appeal, at least in one case. I say, 'at the outset', because the provisions of Art. 134 (1), by which this jurisdiction is created, are left to be supplemented or extended by Parliamentary legislation [Cl. (2)].

The Constitution itself empowers the Supreme Court to hear appeals from any judgment, final order or sentence in criminal proceedings of ■ High Court, in three cases :

(i) If the High Court, on appeal, reverses the decision of acquittal of the accused person and sentences him to *death*. This will be the case of second appeal in a criminal case,—referred to above. [Under the existing law, there was no right of appeal when the High Court reversed the order of acquittal made by the Sessions Judge and itself sentenced the accused to death. In such case, the accused had in fact, no right of appeal at all, though the sentence is ■ capital one. Similar is the case where there was a sentence of death by the Appellate Side of the High Court, reversing the order of acquittal by the High Court Sessions.]

(ii) If the High Court has withdrawn for trial (Sec. 526 of the Criminal Procedure Code) to itself any case from a Subordinate Court and, after trial, sentences him to death. [In this case, too, there was no appeal to the accused at all, under the existing law].

(iii) Besides the above cases of sentence of death by the High Court, the High Court shall have the power, subject to rules to be framed by the Supreme Court, to certify any criminal case ■ fit for appeal to the Supreme Court, and appeal shall lie under such certificate.

*Legislative power.*—See Entry 77, List I, in connection with Cl. (2) of this Article.

**135.** Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.

**136.** (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree or determination, sentence or order in any cause or matter passed or made by ■ Court or tribunal in the territory of India.

Special leave to appeal by the Supreme Court.



(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces.

#### OTHER CONSTITUTIONS

*England.*—The Judicial Committee of the Privy Council possesses the power to exercise the Crown's prerogative to grant special leave to appeal. The power is now founded on statute viz. the Judicial Committee Act, 1844. This power extends over all British territories, colonies, Dominions, etc.,<sup>8</sup> outside the United Kingdom, unless excluded by valid legislation. A petition for special leave lies where the Court below lacks the power to grant leave to appeal, or, possessing that power, has declined to exercise that power<sup>9</sup>.

(a) In *Criminal* cases, the leave is granted only sparingly 'unless some substantial or gross injustice has been done'<sup>10</sup>. (b) In *Civil* cases, the leave is usually granted on question of general interest or public importance, unless the questions are of fact only<sup>11</sup>. [see pp. 415—7, *post*].

But the Judicial Committee does not grant special leave—(i) in the matter of election petitions<sup>12</sup>; (ii) from special tribunals exercising discretionary authority<sup>13</sup>; (iii) from courts-martial<sup>14</sup>.

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*Art. 136: Appeal by special leave.*—Notwithstanding provision for regular appeals from proceedings before the High Courts, in arts. 132-4, there may still remain some cases, where justice might require the interference of the Supreme Court, with decisions not only of the High Courts outside the purview of the foregoing articles, but also of any other Court or tribunal of the land. The power of the Supreme Court to grant special leave to appeal from the decision of any Court or tribunal, save military tribunals, is not subject to any constitutional limitation, and is left entirely to the discretion of the Supreme Court. Broadly speaking, the Supreme Court would exercise this power to give relief to the aggrieved party in cases where the principles of natural justice have been violated, even though the party may have no footing to appeal as of right.

Under this Article the Supreme Court shall have the power to grant special leave to appeal—

- (a) from any judgment, decree or final order,—
- (b) in *any cause or matter*,—
- (c) passed or made by *any Court or tribunal*, within the territory of India.

#### CL. I

'*Cause or matter*'—It is to be noted that while the word 'proceeding' is used in the preceding Arts. 132-4, Art. 136 uses the words 'cause or matter'. The difference of words is not without meaning. There is no definition of these words in the Constitution itself. As to 'cause' it was observed in *Gr v. Lord Penzance*<sup>14-a</sup>—

"'Cause' is *not* a technical word signifying one kind or another; it is *causa jurisdictionis*, any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular Court."

(8) Also India—until the passing of the Abolition of Privy Council Jurisdiction Act (V) of 1949.

(9) *Davis v. Shaughnessy*, (1932) A.C. 106.

(10) *Falkland Islands v. R.*, (1892) 1 Moo. (P.C.) 422; *Clifford v. R.*, (1914) 83 L.J. (P.C.) 452; *Mohindar v. K. E.*, (1932) 59 I.A. 233; *Sutton v. R.*, 1933 A.C. 348; *Knowles v. R.* (1930) A.C. 482; *Sheo Swarup v. K. E.*, (1934)

61 I.A. 398; *Renouf v. A. G. for Jersey*, (1936) A.C. 445.

(11) *Prince v. Gagnon*, (1882) 8 A.C. 103; *Canada Central Ry. v. Murray*, (1883) 8 A.C. 574.

(12) *Theberge v. Landry*, (1876) 2 App. Cas. 102; *Strickland v. Grima*, (1930) A.C. 285.

(13) *Moses v. Parker*, (1896) A.C. 245.

(14) *Tilonko v. A. G. for Natal*, (1907) A.C. 93.

(14-a) (1881) 6 App. Cas. 657 (671).

We may also get some light from section 3 of Australian Judiciary Act, 1903, where a 'suit' is defined as including 'any action or original proceeding', while a 'matter' is defined as including 'any proceeding<sup>15</sup> in a court whether between parties or not, and also any incidental proceeding in a cause or matter' and 'cause' is defined as including 'any suit as well as criminal proceedings'.

So, the words 'cause or matter' in Art. 136 (1) of our Constitution are very comprehensive, and would include any proceeding taking place before any Court or tribunal.

'Court' or 'tribunal'.—As to the meaning of these words see pp. 181-2, *ante*. Any authority exercising judicial or quasi-judicial power would be a tribunal within the meaning of Art. 136. Hence, an appeal would lie to the Supreme Court under the present Article, from the decision or award of the Industrial Tribunal administering the Industrial Disputes Act<sup>16</sup>.

*Cases where special leave might be granted.*—Though the power of the Supreme Court in the matter of granting special leave may in fact be wider than those of the Privy Council in view of the difference in the composition and status of the two bodies (e.g. the personnel of the Supreme Court will be purely Indian and it will not have, like the Privy Council, to deal with other than cases arising out of India), generally, the Supreme Court, in granting special leave, would follow the principles which were followed by the Judicial Committee in this matter.<sup>16-a</sup> These may be discussed under different heads:

### I. IN CIVIL CASES

In civil cases, where the High Court refuses the certificate required by Art. 133 (1) (c), or it is found that the High Court has wrongly granted a certificate<sup>17</sup> so that the appeal is otherwise liable to be dismissed<sup>18</sup> the Supreme Court would still be entitled to grant a special leave, provided, of course, there is some substantial question of law or general interest involved in the case<sup>18-a</sup>.

But special leave is not available unless the case is of some gravity involving public interest, or some important question of law affecting property of considerable amount<sup>19, 20</sup>. Nor would such leave be granted where the judgment appealed against is plain right or is unattended with sufficient doubt, even though the case is of substantial importance<sup>21</sup>. On the other hand, conflict of opinion amongst the High Courts on a point of law, may be a ground for special leave, for it is one of the functions of the Supreme Court to settle conflict of judicial opinion, if suitable opportunity arises<sup>22</sup>.

The Judicial Committee has, thus, refused special leave in the following cases—

(i) Where the question of law is purely academic<sup>23</sup>, or where the question is merely speculative<sup>24</sup>. (ii) Where the question is a pure question of fact not raising any substantial question of law, or any question of public importance, e.g., questions of measurement, payment of revenue<sup>25</sup>, the construction of a private agreement<sup>1</sup>. (iii) Points not properly raised at the trial are not points which, would in ordinary circumstances deserve much consideration as grounds for special leave<sup>2</sup>.

(15) Thus, a 'civil matter' would comprise civil actions, suits, or proceedings, while a 'criminal matter' would mean criminal prosecution and proceedings [cf. Sec. 91 (27) and Sec. 92 (14) of the British North America Act, 1867].

(16) *Bharat Bank Case*, *Statesman*, 28th May, 1950, p. 7.

(16-a) Cf. *Kapildeo v. The King*, A.I.R. 1950 C. 80.

(17) *Sorabjee v. Dwarkadas*, (1932) 59 I.A. 366.

(18) *Feroz v. Hira Singh*, A.I.R. 1995 P.C. 116.

(18-a) *Motichand v. Gangaprasad*, (1902) 29 I.A. 40.

(19) *Daily Telegraph v. Lairghin*, (1904) A.C.

776.

(20) *Prince v. Gaguon*, 8 A.C. 103.

(21) *La Cite De Montreal v. Montreal*, (1889) 14 A.C. 660.

(22) *Moolji Jaitha v. Khandesh Spinning Mills*, (1950) S.C.J. 51 (95).

(23) *Rajendra v. Commissioner of Income tax*, A.I.R. 1940 P.C. 158.

(24) *A.G. for Ontario v. Hamilton St. Ry.*, (1903) A.C. 520.

(25) *Shankar v. Balwant*, 27 Cal. 333 (335 (P.C.)).

(1) *Albright v. Hydro Electric Power Commissioner*, (1923) A.C. 167.

(2) *Barendra v. Emperor* A.I.R. 1925 P.C. 1 (4).

## II. IN CRIMINAL CASES

The Judicial Committee would grant special leave to appeal in cases involving the sentence of death,—but only in cases of grave miscarriage of justice<sup>3</sup>.

Thus, it would not act as a fully fashioned Court of Criminal appeal<sup>4</sup>, to interfere in cases like the following :

(a) Admission of improper evidence, not leading to injustice of a grave character<sup>4</sup> ; or on the ground that a wrong view has been taken of the evidence admitted<sup>4</sup> ; or because a section of the Evidence Act has been wrongly interpreted<sup>5</sup>.

(b) On the ground of error or irregularity in the matter of procedure where there has been in all substance a fair trial and the prisoner has got every opportunity of understanding the charge and making his defence<sup>6</sup>.

(c) On the ground of a wrong construction of some provision of the Indian Penal Code, not resulting in ■ miscarriage of justice<sup>7</sup> ; but it granted leave where there was a pronounced difference of opinion of the High Courts with reference to a section of the Code of Criminal Procedure which is of vital importance to the accused<sup>8</sup>.

(d) On the ground of a misdirection by the Judge to the jury, where no miscarriage of justice has resulted<sup>7</sup>.

But the Judicial Committee would interfere where the conviction of the appellant has been in violation of the principles of natural justice, or, otherwise, 'substantial and grave injustice has been done'<sup>9</sup> e.g.,—

(a) Where the appellant has been convicted for an act which is authorised by law and is therefore no offence<sup>10</sup>.

(b) Where evidence as to prior offence by, or the criminal character of the accused has been admitted, in the absence of a substantial issue to which such evidence might be relevant at law<sup>11</sup>.

(c) Where there is something in the case which has deprived the accused the substance of a fair trial<sup>12</sup>.

(d) Where there are no grounds on the evidence taken as a whole, upon which any tribunal could properly, as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty, and any conclusion on the available materials would be, and is, a mere conjecture or guess, which are not, in law or justice, permissible grounds on which to base a verdict<sup>13</sup>.

(e) Where evidence given in one trial has been improperly imported into a quite separate trial<sup>14</sup>.

(f) Where a person has been convicted on 'suspicion' rather than proof, or where the evidence is not such that the only legitimate inference that can be drawn from it is the guilt of the accused<sup>15</sup>.

(g) Where the Court had no jurisdiction to try the case for want of proper sanction to prosecute<sup>16</sup>.

In short, in a criminal appeal brought on special leave, though the Privy Council would not interfere on grounds of mere formal defect<sup>17</sup>, it would

(3) *Bugga v. K. Emperor*, A.I.R. 1920 P.C. 23.  
 (4) *Dal Singh v. Emperor*, A.I.R. 1917 P.C. 25 ;  
*Suka v. The King*, A.I.R. 1950 P.C. 72.  
 (5) *Mohindar v. Emperor*, A.I.R. 1932 P.C. 234.  
 (6) *Atta Mohammad v. Emperor*, A.I.R. 1930 P.C. 57.  
 (7) *Macrea v. Emperor*, (1893) 20 I.A. 90 ;  
*George v. The King*, A.I.R. 1943 P.C. 211.  
 (8) *Nazir Ahmad v. Emperor*, (1936) 17 Lah. 629 (P.C.).  
 (9) *In re Dillet*, (1887) 12 A.C. 459.  
 (10) *Alexander v. The King*, A.I.R. 1945 P.C.

46.  
 (11) *Noor Mohammad v. R.*, (1949) 1 All.E.R. 365 (P.C.).  
 (12) *Ibrahim v. The King*, (1914) A. C. 599.  
 (13) *Seneviratne v. King Emperor*, (1936) 39 Bom.L.R. 1 (P.C.).  
 (14) *Madat Khan v. K. Emperor*, (1926) 45 C.L.J. 418 (P.C.).  
 (15) *Brij Bhusan v. Emperor*, A.I.R. 1946 P.C. 38.  
 (16) *Gokulchand v. King*, A.I.R. 1947 P.C. 82.  
 (17) *Easwarmurhi v. Emperor*, A.I.R. 1944 P.C.



interfere where justice had gravely and injuriously miscarried causing an unjust invasion of liberty of the citizen, though the proceedings were unobjectionable in form<sup>18</sup>. Though the Supreme Court is not bound by the Privy Council practice and precedents, the Supreme Court is likely to follow the ~~same~~ principles in interfering with the course of criminal justice dispensed in the subordinate Courts<sup>19</sup>.

*Scope of appeal on special leave.*—In granting special leave to appeal, the Court may impose special limitation upon the subject-matter of appeal<sup>20</sup>; or the materials to be used at the hearing<sup>21</sup>. But in the absence of any such limitation, it is open to the appellant to rely on any ground which would have been open to him in a case of regular appeal<sup>22</sup>. But at the final hearing of the appeal, only those points can be urged which are fit to be urged at the preliminary stage when special leave is asked for.<sup>19</sup> In granting the special leave, the Court may, in proper cases, order the appellant to give an undertaking to pay all costs and charges, etc., which might be incurred on behalf of both parties, appellant and respondent<sup>22</sup>.

#### CL. 2.

*Cl. (2) : Courts-martial excepted.*—The words 'any tribunal' in Cl. (1) are wide enough to suggest inclusion even of Courts-martial. But they are excepted by the present clause, so that there will be no appeal to the Supreme Court from decisions of Courts-martial constituted under the Army, Navy and Air Force Acts. This maintains the pre-existing position<sup>23</sup>. The Privy Council also refused to grant special leave to appeal against sentences of a Court-martial<sup>24</sup>.

*Analogous Provision.*—There is similar provision in Art. 227 (4), excepting Courts-martial from the superintendence of High Courts. The present clause, however, does not affect the power to issue the judicial writs [see pp. 184-5, ante].

Review of judgments or orders by the Supreme Court.

**137.** Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

#### OTHER CONSTITUTIONS

*Burma.*—Sec. 138 of the Burmese Constitution says—

"The decisions of the Supreme Court shall in all cases be final."

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*Art. 137 : Review by Supreme Court.*—The Federal Court made no rules for review of its own judgments. Hence the practice of the House of Lords and the Judicial Committee was taken ■ ■ guide<sup>25</sup>.

O. XXXVIII of the Supreme Court Rules, 1950, reproduced below, expressly provides that the Supreme Court would be governed by the provisions of Or. 47, r. 1 of the Code of Civil Procedure, in this matter<sup>1</sup>. Hence, an application for review of a Supreme Court judgment or order will lie on any of the following grounds, but not on any other—

(18) *Lanier v. The King*, 18 C.W.N. 98 (P.C.).

(19) Cf. *Kapildeo v. The King*, A.I.R. 1950 F.C. 80; *Pritam v. The State* (1950) S.C.R. 228.

(20) *Annapurnabai v. Ruprao*, (1924) 51 I.A. 319.

(21) *Soniram v. Tata Co.*, (1927) 45 C.L.J. 633 (P.C.).

(22) *Gill v. The King*, (1948) ■ D.L.R. 832 (P.C.).

(23) *Yakub v. Emperor*, A.I.R. 1947 P.C. 87.

(24) *Tilonko v. A.-G. for Canada*, (1907) A.C. 93.

(25) *Prithwichand v. Sukraj*, (1940) F.C.R. 78.

(1) The Supreme Court will thus be in a better position than the Federal Court or the Privy Council, in this matter.

(a) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order made. Such new evidence must, however, be of such a character that if it had been given at the hearing it might possibly have altered the judgment.<sup>2</sup> 'New matter' does not include subsequent legislation<sup>3</sup>.

(b) Mistake or error apparent on the face of the record. This may be an error of law, *e.g.*, a failure to apply the law of limitation which is applicable to the facts found by the Court<sup>4</sup>; or an error of fact, *e.g.*, dismissal of a suit where a part of the claim had been admitted by the defendant<sup>5</sup>.

(c) Any other sufficient reason.—This expression means a ground which is analogous to the two preceding grounds<sup>6</sup>. Hence, the following are not sufficient grounds for review—

(i) Absence of the Counsel or his refusal to take part in the argument<sup>7</sup> or omission to raise a point<sup>8</sup>, or inability to engage counsel<sup>9</sup>.

(ii) Incorrect exposition of law in the judgment<sup>6</sup>.

On the other hand, the following are instances of sufficient reason—

(a) Though error of law is no ground for review, when a Court disposes of a case without adverting to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record<sup>10</sup>.

(b) A hearing without notice to the party aggrieved<sup>11</sup>.

*Rules made by the Supreme Court.*—O. XXXVIII of the Supreme Court Rules, 1950, provides—

"1. The Court may review its judgment or order, but no application for review will be entertained except on the grounds mentioned in Order XLVII, rule 1, of the Code.

2. An application for review shall be filed with the Registrar, within thirty days after judgment is delivered in the appeal, cause or matter. It must briefly and distinctly state the grounds for review, and be accompanied by a certificate of counsel that it is supported by proper grounds."

The above rules shall not, however, preclude the Court from exercising its inherent powers to make such orders as may be necessary in the ends of justice [O. XLV, r. 5 of the Supreme Court Rules, 1950]<sup>12</sup>, or to rectify mistakes introduced into its judgments through inadvertence<sup>13</sup>.

**138.** (1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

Enlargement of the jurisdiction of the Supreme Court.

(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India

(2) *In re Appa Rao*, (1887) 13 I.A. 155.  
 (3) *Gyanaji v. Ningappa*, (1928) 52 Bom. 434.  
 (4) *Debi Sahai v. Basheshar*, A.I.R. 1928 Lah. 919.  
 (5) *Probhas v. Nithar*, A.I.R. 1924 Cal. 1054.  
 (6) *Chhajju Ram v. Neki*, A.I.R. 1922 P.C. 112; *Harishankar v. Anath*, (1949) 4 D.L.R. 70 (F.C.).  
 (7) *Abdul Wajid v. Viswanathan*, (1950) 5 D.L.R. 1 (Mysore) F.B.

(8) *Kamlaprasad v. Kunja*, (1920) 57 I.C. 11 (Pat.).  
 (9) *Hebbert v. Purchas*, (1871) 3 P.C. 664.  
 (10) *Harishankar v. Anath*, (1949) 4 D.L.R. 70 (F.C.).  
 (11) *Ghansham v. Lal Singh*, (1887) 9 All. 61 (F.B.).  
 (12) (1950) S.C.J. Supplement, p. 21.  
 (13) *Rajinder v. Bijai*, (1836) 1 Moo. P.C. 117.

and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

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*Cl. (1) : Enlargement of jurisdiction by Parliament as regards matters in the Union List.*—Besides the jurisdiction conferred by Arts. 132-6 of the Constitution itself, the Supreme Court may have additional jurisdiction as Parliament may confer while legislating in respect of any of the matters included in the Union List (*i.e.* List I, 7th Sch.). This power follows from the power of Parliament to legislate with respect to such matters.

“If the Union Legislature is competent to legislate on a certain matter, it is obviously competent to confer judicial power in respect of that matter on a tribunal of its own choice; and if it chooses the Supreme Court for the purpose, the Court will have the jurisdiction conferred.”<sup>14</sup>

*Cl. (2) : Enlargement of jurisdiction by agreement and Parliamentary legislation.*—This is also another mode of enlargement of jurisdiction of the Supreme Court by legislation by Parliament. Such legislation under the present clause must be with respect of any matter regarding which the Governments of India and of a State have made a special agreement that the matter should be decided by the Supreme Court.

*Analogous Provisions.*—This article should be read with Arts. 139 and 140.

**139.** Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for any purposes other than those mentioned in clause (2) of article 32.

Conferment of the Supreme Court of powers to issue certain writs.

## INDIA

*Art. 139 : Power of Supreme Court to issue writs for purposes other than enforcement of fundamental rights.*—While the power of the Supreme Court to issue the writs of *habeas corpus*, etc., for the enforcement of fundamental rights is conferred by the Constitution itself and is guaranteed by it as against legislative interference [Art. 32 (1), *ante*],—the power of the Supreme Court to issue these writs for other purposes will depend on legislation by Parliament and will, consequently, be subject to regulation by Parliament [see p. 158, *ante*]. As to ‘other purpose’, see under Art. 226, *post*.

*Analogous Provisions.*—The powers of the High Courts to issue these writs for the purpose of enforcement of fundamental rights as well as for other purposes, are both given by the Constitution itself [Art. 226 (1), *post*].

**140.** Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

Ancillary powers of Supreme Court.

(14) Report of the ad hoc Committee on Supreme Court (Constituent Assembly Debates, Vol. IV, no. 6, p. 755.)



## OTHER CONSTITUTIONS

*Burma.*—Sec. 153 of the Constitution of Burma, 1948, is exactly similar to Art. 140 of our Constitution.

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*Art. 140 : Supplemental and Ancillary powers.*—Though the Constitution itself lays down the original and appellate powers of the Supreme Court it imparts some elasticity to those provisions by permitting legislation to supplement these provisions with the only limit that such legislation must not be inconsistent with any of the provisions of the Constitution.

Law declared by Supreme Court to be binding on all courts.

**141.** The law declared by the Supreme Court shall be binding on all courts within the territory of India.

## OTHER CONSTITUTIONS

*Burma.*—Sec. 152 of the Burmese Constitution says—

“The law declared by the Supreme Court shall, so far as applicable, be recognised as binding on, and shall be followed by, all Courts within the territories subject to the jurisdiction of the Union.”

*Government of India Act, 1935.*—Art. 141 of our Constitution corresponds to Sec. 212 of the Government of India Act, 1935, with the omission of the words “so far as applicable”.

## INDIA

*Art. 141 : Binding force of Supreme Court decisions.*—This article, read with Art. 144, secures the supreme position of the Supreme Court in the territory of India. A question would necessarily arise as to the weight of old Privy Council decisions. There is no doubt that such decisions shall have a ‘persuasive’ authority<sup>15</sup> of great weight, having regard to the eminence of that judicial body, which has been acknowledged in many Indian decisions. So, in so far as there is no conflict with any Indian decision, the Privy Council judgments will prevail. In case there is a Supreme Court decision contrary to that of the Privy Council, that of the Supreme Court will prevail, under the present article. Privy Council decisions will also prevail against the High Court decisions made prior to the commencement of the Constitution, because, the Privy Council was then the final appellate Court from India. The question would be different where a High Court decision made after the commencement of the Constitution is contrary to a Privy Council decision. In that case, it is submitted, a Court subordinate to that High Court would be bound to follow that High Court decision simply because, the Privy Council is no longer a tribunal superior to that High Court.

‘*Law declared*’.—What is given binding force by the present article is not merely the ‘decision’ of the Supreme Court, but ‘the law declared’ by it. Hence, it would cover ‘the principles enunciated’ by the Supreme Court<sup>16</sup> including even *obiter dicta*, when they are stated in clear terms<sup>17</sup>.

On the other hand, the arrangement of the articles as well as the use of the words ‘opinion’ and ‘report’ in Art. 143, make it clear that the opinion given under Art. 143 is not binding upon any Court in India.<sup>18</sup>

*Whether the Supreme Court would be bound by its own decisions.*—In England, the decisions of the House of Lords are pronounced in the form of judgments and are binding on the House as precedents<sup>19</sup>. The Judicial Committee of the Privy Council, however, deliver its decisions as ‘advice’ to the Crown, and it is free to

(15) Cf. *Brown v. Holloway*, 10 C.L.R. 89.

(16) *Mata Prasad v. Nageswar*, A.I.R. 1925 P.C. 272.

(17) *Kisho-i Lal v. Debiprasad*, A.I.R. 1950 Pat. 50 (61) F.B.

(18) Cf. *Umayal v. Lakshmi*, A.I.R. 1945 F.C. 25 (36).

(19) *Street Tramways v. London County Council*, (1898) A.C. 375 (378); *Radcliffe v. Ribble Motor Services*, (1939) A.C. 215.

differ from its own decisions or from those of the House of Lords<sup>20</sup>. But even the Judicial Committee would hesitate long before disturbing a solemn decision by a previous Board, though it possesses the legal competence to do so<sup>20</sup>,—particularly on constitutional questions<sup>21</sup>.

The expression 'all courts' in Art. 141 obviously refers to Courts other than the Supreme Court<sup>21-a</sup>. Hence, it follows that our Supreme Court would be free to overrule<sup>22</sup> its previous decisions; but then it would be slow to take that step.

**142.** (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India

Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—The Federal Court established under Government of India Act, 1935, could not pronounce any judgment other than in a *declaratory* form. Sec. 204 (2) of the Act contained this provision as regards the original jurisdiction of the Federal Court. Sec. 209 (1) of the Act, on the other hand, provided—

"The Federal Court shall, where it allows an appeal, remit the case to the court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against and the Court from which the appeal was brought shall give effect to the decision of the Federal Court."

One of the reasons for this was that Federal Court had no machinery for enforcing its judgments.

(20) In re Compensation to Civil Servants, A.I.R. 1929 P.C. 84 (87); *Phanindra v. The King*, (1949) 4 D.L.R. (P.C.) 87.

(21) *A. G. for Ontario v. C. T. Federation*, A.I.R. 1946 P.C. 88 (91).

(21-a) Const. Assembly Debates, Vol. VIII, p. 386.

(22) In the *United States*, the Supreme Court usually follows the rule of *stare decisis*, but in constitutional matters it has refused to be bound by its previous judgments ■ ■ inflexible rule (Willoughby, *Constitutional Law*, Vol. I, p. 75 and the cases cited therein). Particularly, when the decisions supposed to be erroneous are recent decisions and 'have not created a rule of property around which vested interests have clustered,' the Court will not hesitate to correct its error (*State of Washington v. Dawson*, 264 U.S. 219), ■ the ground that while error in the construction of an ordinary statute may be corrected by ■ Act of the Legislature, the Constitution cannot be changed so easily (*Smith v. Allright*, (1944) 321 U.S. 649 (665)). So, the

Supreme Court has declared—"the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." (*Graves v. N. Y.*, 306 U.S. 466). Of course, before overruling a precedent, the Court would make it certain that more harm will not be done in rejecting rather than in retaining a rule of dubious validity (*Helvering v. Griffiths*, 318 U.S. 371). In the recent Insurance case (*U. S. v. S. E. Underwriters Association*, (1944) 322 U.S. 533), however, the court had no hesitation in overruling its 75 year old dogma that insurance is not 'commerce'. (*Paul v. Virginia*, (1869) ■ Wall. 168; *Hooper v. California*, (1894) 155 U.S. 648; *N. Y. Life Insurance Co., v. Deer Lodge*, (1913) 231 U.S. 495.).

In *Australia*, similarly, though the High Court usually follows the rule of *stare decisis*, (*James v. Commonwealth*, (1914) 18 C.L.R. 54), it is not bound by its previous decisions and has ■ fact departed from in important matters (*Amalgamated Soc. of Engineers v. Adelaide Steamship Co.*, (1920) 28 C.L.R. 129.)

## INDIA

Cl. (1) : *Form of decree of Supreme Court.*—Neither of the above provisions of the Act of 1935 has been adopted in the Constitution. Under the Constitution, the Supreme Court is free to pass *executable* decrees, or to pass any order as may be necessary for “doing complete justice in the cause”. The mode of execution of such decrees, has been left to the Union Parliament to make provisions for the direct enforcement of the decrees and orders of the Supreme Court, by law. Until such law is passed, rules will be provided by order of the President.

Under the present Cl., the President has made the Supreme Court (Decrees and Orders) Enforcement Order, 1950<sup>22-a</sup> which provides as follows :

“Notwithstanding anything contained in any other law in force at the commencement of this Order, any decree passed or order made by the Supreme Court in the exercise of its appellate jurisdiction, including any order as to the costs of, and incidental to, any proceedings in the exercise of such jurisdiction, whether such decree was passed or made before or after the commencement of this Order, shall be enforceable in accordance with the provisions of law for the time being in force relating to the enforcement of decrees or orders of the Court or Tribunal from which the appeal to the Supreme Court was preferred or sought to be preferred”

Cl. (2) : *Powers of Supreme Court for discovery, etc.*—This clause corresponds to Sec. 210 (2) of the Government of India Act, 1935. This clause has nothing to do with causes of action. It gives plenary powers to the Supreme Court, subject to legislation by Parliament, with regard to certain procedural matters, *viz.*,—

(a) Securing the attendance of any person before it ; (b) discovery or production of any documents<sup>22-b</sup> ; (c) investigation or punishment of contempt of the Supreme Court itself.

**143.** (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in clause (1) of the proviso to article 131, refer a dispute of the kind mentioned in the said clause to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

CL. (1).

## OTHER CONSTITUTIONS

*U. S. A.*—There is no provision in the American Constitution for seeking advisory opinion from the Supreme Court and the Supreme Court has steadily refused to pronounce any opinion save as to the legal rights of litigants in actual controversies<sup>23</sup>. All judicial interpretation of the Constitution or the decision of constitutional problems has therefore to be made in the ordinary course of litigation between the parties. The Court will not express any opinion as to the validity or wisdom of any proposed legislation or of any proposed executive or administrative action<sup>24</sup>.

*Australia.*—The Australian High Court has also refused to give advisory opinions on the ground that the essential function of the judiciary is the decision of matters *inter partes* and not the consideration of abstract legal questions. Even the Legislature cannot require the Court to exercise any such function<sup>25</sup>.

(22-a) C.O. 14=S.R.O. 49=Gaz. of India, Extraordinary, dated 12-5-1950.

(22-b) As to discovery and inspection, see O. XXVII of the Supreme Court Rules, 1950 [(1950) S.C.J. Supp. 19].

(23) Cf. *A.-G. for British Columbia v. A.-G. for*

*Canada*, (1914) A.C. 153 (162).

(24) *Muskat v. United States*, (1911) 219 U.S. 346.

(25) *In re Judiciary and Navigation Acts*, (1921) 29 C.L.R. 257.



*Canada.*—Sec. 60 of the Canadian Supreme Court Act, 1906, empowers the Governor-General in Council to refer important questions of law touching certain matters to the Supreme Court for hearing and consideration. The Supreme Court is *bound* to entertain and answer the reference.<sup>1</sup>

But though it is obligatory on the part of the Canadian Supreme Court to pronounce advisory opinion, the dangers of such advisory opinion expressed by the Court, has been the subject of vehement criticism, on general principle, by the Judicial Committee, on appeal from such opinions from Canada, in cases more than one :

“ They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given on such questions at all. When they arise, they must arise in concrete cases, involving private rights ; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of the particular words when the concrete case is not before it<sup>2</sup>. ”

“ Under this procedure questions may be put which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without reference or relation to actual facts but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied.<sup>3</sup> ”

“ It is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it or touching matters of such a nature that its answers must be wholly ineffectual, with regard to parties who are not and who cannot be brought before it, *e.g.*, foreign Government<sup>4</sup>. ”

Nevertheless, since its establishment in 1875, the Canadian Supreme Court has so far pronounced advisory opinions in some thirty-five cases. In most of these cases, the Government, seeking to introduce a Bill has sought judicial opinion, being doubtful of its constitutional powers, *e.g.*, as to marriage, liquor, fisheries<sup>5</sup>. These references have saved much litigation at the instances of private parties. The latest reference has been upon the very competence of the Canadian Parliament to abolish appeals to the Privy Council altogether.<sup>1</sup>

The opinion of the Supreme Court upon such reference is not ■ “ judgment ” and has no binding effect than the opinion of the law officers of the Crown<sup>6</sup>.

*England.*—Sec. 4 of the Judicial Committee Act, 1833, provides that His Majesty may refer to the Privy Council—

“ any such other matter whatsoever as His Majesty shall think fit ”.

Under this provision, the Crown has power to refer to the Judicial Committee any legal issue on which it desires advice. Use of this provision has been made mostly on issues outside the United Kingdom<sup>7</sup>.

The House of Lords has refused to give any such advisory opinion<sup>8</sup>.

*Burma.*—Sec. 151 (1) of the Burmese Constitution is identical with Art. 143 (1) of our Constitution.

(1) Cf. *A.-G. of Ontario v. A.-G. of Canada*, (1947) 51 C.W.N. 886 (P.C.).

(2) Cf. *A.-G., of Ontario v. Hamilton Street Ry.*, (1903) A.C. 524 (529).

(3) *A.-G. of British Columbia v. A.-G. of Canada*, (1914) A.C. 153 (162), per Lord Haldane.

(4) *In re Regulation and Control of Aeronautics*, (1932) A.C. 54 (66).

(5) Cf. *A.-G. for Canada v. A.-G. for Provinces*, (1898) A.C. 700 ; *A.-G. for British Columbia v. A.-G. for Canada*, (1914) A.C. 153 ; *A.-G. for Ontario v. A.-G. for Canada*, (1896) A.C. 348 ; *In re Marriage Legislation*, (1912) A.C. 880.

(6) Clement, *Law of the Canadian Constitution*, 1916, p. 596.

(7) As an instance of such reference on judicial

matters in recent years, may be mentioned: *In re Compensation to Civil Servants*, A.I.R. 1929 P.C. 84 (on the Irish Free State Agreement). Amongst other cases may be mentioned—*In re Bedard*, (1849) 7 Moo.P.C. 115 ; *In re Belson*, (1850) 7 Moo.P.C. 114 ; *In re Nawab of Suret*, (1854) Moo.P.C. ■ ; *D'Allain v. Le Breton*, (1857) 11 Moo.P.C. 64 ; *In re Bishop of Natal*, (1865) 3 Moo.P.C. 115 ; *Cloete v. R.*, (1854) 8 Moo.P.C. 484 ; *In re States of Jersey*, (1853) 9 Moo.P.C. 185 ; *In re Jersey Jurats*, (1866) L.R. 1 P.C. 94 ; *In re Samuel*, (1913) A.C. 514 ; *Re Ontario v. Manitoba*, (1927) 43 T.L.R. 289 ; *Re Piracy Jure Gentium*, (1934) A.C. 586.

(8) Keith *Constitutional Law*, (1939), p. 286.

*Government of India Act, 1935.*—Sec. 213 (1) of the Act of 1935 was exactly similar to Cl. (1) of Art. 143 of our Constitution.

#### INDIA

Cl. (1) : *Consultative Function of the Supreme Court.*—The present clause adopts the provisions of Sec. 213 (1) of the Government of India Act, 1935, to confer an advisory function upon the Supreme Court as was possessed by the Federal Court under the Act of 1935. I do not call it a 'jurisdiction' because jurisdiction of ■ Court means—

"the authority or power of ■ Court to hear and determine a cause or complaint presented in a formal way for its decision".

But the authority conferred by Art. 119 is not the authority to hear any cause or complaint referred to the Supreme Court in the formal manner, but the *discretionary* power of the Supreme Court to give its opinion on any question of public importance that may be referred to it by the President. Herein the provisions of our Constitution differ from those of Sec. 4 of the Judicial Committee Act, 1833, and Sec. 60 of the Canadian Supreme Court, 1906.

Since the present clause of the Constitution practically reproduces Sec. 213 of the Government of India Act, 1935, the principles laid down by the Federal Court relating to the exercise of this advisory power would be good also ■ regards the Supreme Court. These are—

(i) Though it is not obligatory upon the Court to give an opinion, it will be unwilling to decline a reference except for good reasons<sup>10</sup>.

(ii) On the other hand, the advisory opinion is not binding upon the referring authority. The procedure merely constitutes consultation between the Executive and the Judiciary<sup>11</sup>. Conversely, the opinion would not prevent the Supreme Court from giving a contrary decision, if the validity of the measure, after its enactment, is impeached before the Court in a proper case<sup>12</sup>. When the question referred relates to proposed legislation, the reference should append a draft Bill, and, where a notification is necessary, a draft notification.<sup>13</sup>

(iii) The chief utility of an advisory judicial opinion is to enable the Government to secure an authoritative opinion as to the validity of a measure before initiating it in the Legislature. For this purpose, it is essential that the questions referred to should be as precise and specific as possible. A reference as to the validity of an entire Act, wholesale, should accordingly be avoided.<sup>13</sup>

"The Board has no desire, nor do they conceive it to be part of their function to act as *draftsman* for Canadian Acts of Parliament. Their Lordships cannot conceive it to be the wish of anybody that Acts of Parliament passed by the Senate and Commons of Canada should be referred wholesale to this Board in order to determine without reference to particular facts whether or not it was competent for Parliament to pass upon the hundred and one matters for which they have legislated."<sup>13</sup>

(iv) The advisory opinion pronounced under the above provisions is not a judicial pronouncement.<sup>14-15</sup> Hence, no advisory opinion given under the present provision can furnish a good root of title such as might spring from a judgment of the Supreme Court.<sup>16</sup>

'*Such hearing as it thinks fit*'.—The Supreme Court has made the following rules<sup>17</sup>, laying down the procedure for hearing ■ reference under the present article—

"1. On the receipt by the Registrar of the order of the President referring a question of law or fact to the Court, the Registrar shall give notice to the Attorney-General for India to appear

(9) Halsbury, Laws of England.

(10) In re Allocation of Lands and Buildings, A.I.R. 1943 F.C. 13.

(11) In the matter of Duty on Non-Agricultural Property, (1946) 49 C.W.N. (F.R.) 9 (20).

(12) Cf. Umayal v. Lakshmi, A.I.R. 1945 F.C. 25 (36).

(13) A.-G. of Canada v. A.-G. of Ontario, A.I.R.

1932 P.C. 36 (39).

(14-15) In the matter of Duty on Non-Agricultural Property, (1946) 49 C.W.N. (F.R.) 9 (20).

(16) In re Allocation of Lands and Buildings, A.I.R. 1943 F.C. 13.

(17) O. XXXVI of the Supreme Court Rules, (1950) (S.C.J. Supp. p. 21).

before the Court on a day specified in the notice to take the directions of the Court as to the parties who shall be served with notice of the Special Reference, and the Court may, if it considers it desirable, order that notice of the Special Reference shall be served upon such parties as may be named in the order.

2. The notice shall require all such parties served therewith as desire to be heard at the hearing of the Special Reference to attend before the Registrar on the day fixed by the order to take the directions of the Court with respect to statements of facts and arguments and with respect to the date of the hearing.

3. Subject to the provisions of this Order, the procedure on a Special Reference shall follow as nearly as may be the procedure in proceedings before the Court in the exercise of its original jurisdiction, but with such variations as may appear to the Court to be appropriate and as the Court may direct.

4. After the hearing of the Special Reference, the Registrar shall transmit to the President the Report of the Court thereon.

5. The Court may make such order as it thinks fit as to the costs of all parties served with notice under these Rules and appearing at the hearing of the Special Reference."

*Analogous Provisions.*—Cls. (3)-(5) of Art. 145 are to be read in connection with Art. 143. Cl. (3) requires that at least five Judges must sit for hearing a reference under Art. 143; Cl. (4) requires that the opinion must be delivered in open Court; Cl. (5) requires that the report must be the opinion of the majority of the Judges present at the hearing.

#### CL. (2)

Cl. (2) : *Reference as to Agreements with States in Part B.*—Proviso (i) to Art. 131, *ante*, excludes disputes arising out of agreements to which a State in Part B of the First Schedule is a party, from the original jurisdiction of the Supreme Court. But the present clause authorises the President to refer such dispute to the Supreme Court and to get its 'opinion'. The difference between the two courses lies in this that the opinion of the Supreme Court under Art. 143 would not be *binding* upon the President; nor would it be executable under Art. 142 (1).

Civil and judicial authorities to act in aid of the Supreme Court.

**144.** All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 144 of our Constitution is a reproduction of Sec. 210 (1) of the Government of India Act, 1935, with verbal alterations.

**145.** (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including—

Rules of Court, etc.

(a) rules as to the persons practising before the Court ;  
(b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered ;

(c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III ;

(d) rules as to the entertainment of appeals, under sub-clause (c) of clause (1) of article 134 ;

(e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the



procedure for such review including the time within which applications to the Court for such review are to be entered ;

(f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein ;

(g) rules as to the granting of bail ;

(h) rules as to stay of proceedings ;

(i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay ;

(j) rules as to the procedure for inquiries referred to in clause (1) of article 317.

(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five :

Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

CL. (1).

CL. (1) : *Rules made by the Supreme Court.*—The Supreme Court has (with the approval of the President) made the Supreme Court Rules, 1950,<sup>18</sup> relating to the various clauses of the present Article. The word 'including' in Cl. (1) indicates that the enumeration is not exhaustive.

'*Practice and procedure*'.—These words denote "the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right".<sup>19</sup>

*Sub-Cl. (a).*—See Order IV of the Supreme Court Rules, 1950.<sup>20</sup>

*Sub-Cl. (b).*—See Part II of the Supreme Court Rules, 1950.<sup>20</sup>

*Sub-Cl. (c).*—See Part IV of the Supreme Court Rules, 1950.<sup>20</sup>

*Sub-Cl. (e).*—See under Art. 137, pp. 417-8, *ante*.

*Sub-Cl. (f).*—See Part VIII of the Supreme Court Rules, 1950.<sup>20</sup>

*Sub-Cl. (h).*—Order XX, rule 1 of the Supreme Court<sup>20</sup> says—

"The filing of an appeal shall not prevent execution of the decree or order appealed against, but the Court may, subject to such terms and conditions as it may think fit to impose, order a stay of execution of the decree or order, or order a stay of proceedings in any case under appeal to the Court."

*Sub-Cl. (i).*—Order XX, rule 2 of the Supreme Court Rules, 1950<sup>20</sup>, provides—

"A respondent may apply for the summary determination of appeal on the ground that it is frivolous or vexatious or brought for the purpose of delay, and the Court may make such order thereon as it thinks fit."

*Sub-Cl. (j).*—See under Art. 317 (1), *post*.

**INHERENT POWERS OF THE SUPREME COURT.**—Though the present article empowers the Supreme Court to frame rules with the approval of the President, relating to the practice and procedure of the Court, it cannot be imagined that the highest tribunal of the land would find itself rigidly bound by the rules, once they are framed, when even the inferior Courts are endowed with an inherent power of doing justice [Sec. 151, C.P. Code]. Hence, Order XLV of the Supreme Court Rules expressly saves the inherent powers of the Supreme Court. But in this respect, the powers of the Supreme Court are much wider than of the inferior Courts. While an ordinary Court has no power to dispense with the requirement of any provision of the Code of Civil Procedure, the Supreme Court shall have the power to dispense with the requirements of the Rules framed by itself, in fit cases. Order XLV of the Supreme Court Rules, 1950,<sup>21</sup> says—

"1. The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as it shall consider just and expedient.

2. An application to be excused from compliance with the requirements of any of the Rules shall be addressed in the first instance to the Registrar, who shall take the Instructions of the Court thereon and communicate the same to the parties, but if in his opinion it is desirable that the application should be dealt with in open Court, he may direct the applicant to lodge it in the Registry, and to serve the other parties with a notice of motion returnable before the Court.

3. The Court may enlarge or abridge any time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any enlargement may be ordered, although the application therefor is not made until after the expiration of the time appointed or allowed.

4. The Court may at any time, either of its own motion or on the application of any party, make such orders as may be necessary or reasonable in respect of any of the matters mentioned in rule 8 of Order . . . . . of the Rules, may issue summonses to persons whose attendance is required either to give evidence or to produce documents, or order any fact to be proved by affidavit.

5. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

#### CLAUSES (2)-(3).

*Cls. (2)-(3) : Constitution of Benches.*—By Cl. (3) the Constitution itself provides that not less than five Judges<sup>22</sup> shall sit for—(a) deciding any case involving ■

(19) *Poyser v. Merriers*, 7 Q.B.D. 329 (333) ;  
A.-G. v. *Sullem*, 10 H.L.C. 704.

(20) (1950) S.C.J. Supplement.

(21) (1950) S.C.J. Supp. p. 26.

(22) In the absence of quorum, the Chief Justice may use his power under Art. 127, *ante*.

question of Constitutional interpretation ; (b) hearing ■ reference under Art. 143. Again, if an ordinary Bench, in hearing an appeal finds that ■ question of constitutional interpretation is involved, it shall refer that question for the opinion of Bench of five.

Cl. (2), on the other hand, leaves it to the rule-making power of the Supreme Court itself to determine the constitution of Benches for hearing cases, not directly involving questions of constitutional interpretation. Under this clause, the Supreme Court has made the following rules :—

“ 1. Subject to the other provisions of these Rules, every cause, appeal or matter shall be heard by a Bench consisting of not less than three Judges nominated by the Chief Justice.

2. Where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it.”<sup>23</sup>

As to powers of single Judges, the following provisions of the Supreme Court Rules, 1950<sup>23</sup>, should be referred to—Order V, rules 2-4 ; Order XIII, rule 5.

*Analogous Provision.*—If the quorum required by Cl. (2) or (3) of the present article is not available at any time owing to illness, absence or the like, the Chief Justice may exercise his power to appoint *ad hoc* Judges, under Art. 127.

#### CLAUSES (4)-(5).

#### OTHER CONSTITUTIONS

*U. S. A.*—It is the opinion of the majority that decides the case and becomes the law. But dissenting opinions are freely prepared and read. Though dissenting opinions do not form part of the law for the time being, in the United States dissenting opinions have got ■ powerful influence in moulding the future course of the law and very often earlier decisions have been reversed in the light of dissenting opinions. Since many cases are decided by a narrow majority of five to four, a slight change in the composition of the Supreme Court sometimes gives the dissentient Judges the majority in the Court.

*England.*—There is no scope for any dissentient opinion in the Judicial Committee, for one judgment is delivered in the form of ■ Report to the Crown. But in the House of Lords, the majority view prevails and dissenting Lords may deliver separate judgments.

*Burma.*—Art. 151 (2) of the Burmese Constitution provides—

“ No report [under Art. 151 (1)] shall be made under this section save in accordance with an opinion delivered in open Court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.”

*Government of India Act, 1935.*—Sec. 214 (4) of the Government of India Act, 1935, which was as follows :

“ No judgment shall be delivered by the Federal Court save in open Court and with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment.”

#### INDIA

*Cl. (4) : Delivery in open Court.*—Judgments as well as opinions (under Art. 143) are to be delivered in open Court.

*Cl. (5) : Dissenting Judgments.*—This provision follows the provision in Sec. 214 (4) of the Government of India Act,<sup>24</sup> 1935 and prefers the practice in the House of Lords to that in the Judicial Committee of the Privy Council.

In the Supreme Court of India, ■ dissenting Judge shall have the liberty of pronouncing a separate judgment though the decision of the majority shall be the judgment of the Court.

(23) O. XI, rr. 1-2 of the Supreme Court Rules, 1950. [(1950) S.C.J., Supp., p. 8.]

(24) Cf. *Subrahmanyam v. Muttuswami*, (1940) 45 C.W.N. (F.R.) 1 (8).



A 'dissenting' judgment should be distinguished from a 'concurring' judgment. A Judge who agrees with the decision of the majority, but bases his conclusions on other grounds, is free to give his reasons separately even on points on which he concurs with the majority.<sup>24-a</sup>

Officers and servants and the expenses of the Supreme Court.

**146.** (1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct :

Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose :

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

#### INDIA

*Cl. (3) : Administrative Expenses of the Supreme Court.*—While the administrative expenses and salaries of staff of the Supreme Court shall be charged on the Consolidated Fund [see Art. 112 (3) (g), at p. 346, ante], the fees or other moneys taken by the Supreme Court shall form part of that Fund.

**147.** In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed ■ including references to any substantial question of law ■ to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or of any Order in Council or order made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder.

#### INDIA

*Art. 147 : Interpretation of the expression 'interpretation of this Constitution'.*—This Article serves as an interpretation of the words 'this Constitution' in the expression 'substantial question of law' ■ to the interpretation of this Constitution, which occurs in Arts. 132 (1)-(2) ; 133 (2), ante, ■ well as in Art. 228, post.

(24-a) Cf. *Subrahmanyam v. Muttuswami*, (1940) 45 C.W.N. (F.R.) 1 (8).

## CHAPTER V.—COMPTROLLER, AND AUDITOR-GENERAL OF INDIA

**148.** (1) There shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as ■  
Comptroller and Auditor-General of India.
 Judge of the Supreme Court.

(2) Every person appointed to be the Comptroller and Auditor-General of India shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(3) The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule :

Provided that neither the salary of a Comptroller and Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(4) The Comptroller and Auditor-General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.

(5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

(6) The administrative expenses of the office of the Comptroller and Auditor-General, including all salaries, allowances and pensions payable to or in respect of persons serving in that office, shall be charged upon the Consolidated Fund of India.

### OTHER CONSTITUTIONS

*England.*—The Comptroller and Auditor-General stands at the centre of the system of Parliamentary control over the appropriation of the national moneys. He is a high official, absolutely independent of the Cabinet, and is not allowed to join politics. He is appointed by a patent under the Great Seal, holds office during good behaviour, and can be removed only on an address from both Houses of Parliament. His salary is charged on the Consolidated Fund. He must not hold any other office under the Crown, nor be a member of either House of Parliament.

*U. S. A.*—Under the Budget and Accounting Act, 1921, the Comptroller General is appointed by the President with the advice and consent of the Senate for a term of 15 years and is not eligible for re-appointment. Unlike other administrative officers, the Comptroller is not removable by the President. He may be removed only by impeachment or by joint resolution of Congress for just cause

after notice, and a hearing. He has been removed from the control of the President since it is the duty of the Auditor-General to — that expenditure of money by any authority in the United States is made in accordance with law passed by the Congress.

*Burma.*—The relevant provisions of the Constitution of Burma, 1948, are—

“ 129. The Auditor-General shall be appointed by the President with the approval of both Chambers of Parliament and shall only be removed from office in the like manner and on the like grounds as a judge of the High Court. The Auditor-General shall not be a member of either Chamber of Parliament nor shall he hold any other office or position of emolument. He shall not be eligible for further office in the service of the Union or the States after he has ceased to hold office.

130. Neither the salary of the Auditor-General nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment, unless he voluntarily agrees to any reduction in his salary in the event of general economy and retrenchment in relation to all the services of the Union.

132. Subject to the foregoing provisions, the terms and conditions of the office of the Auditor-General shall be determined by law.”

*Ceylon.*—Sec. 70 of the Ceylon (Constitution) Order in Council, 1946, provides—

“(1) There shall be an Auditor-General who shall be appointed by the Governor-General, and who shall hold office during good behaviour.

(2) The salary of the Auditor-General shall be determined by Parliament, shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(3) The office of the Auditor-General shall become vacant—(a) by his death ; or (b) by his attaining the age of fifty-five years or such higher age as the Governor-General may determine ; or (c) by his resignation in writing addressed to the Governor-General ; or (d) by his removal by the Governor-General on account of ill-health or physical or mental infirmity in the like circumstances and subject to the same conditions as a public officer in receipt of similar pensionable emoluments ; or (e) by his removal by the Governor-General upon an address from the Senate and the House of Representatives praying for his removal.”

*Government of India Act.*—Sub-Secs. (1), (2) and (4) of Sec. 166 of the Act of 1935 were as follows :—

“(1) There shall be an Auditor-General of India, who shall be appointed by the Governor-General and shall only be removed from office in like manner and on the like grounds as a judge of the Federal Court.

(2) The conditions of service of the Auditor-General shall be such as may be prescribed by Order of the Governor-General, and he shall not be eligible for further office under the Crown in India after he has ceased to hold his office :

Provided that neither the salary of an Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(4) The salary, allowances and pension payable to or in respect of an Auditor-General shall be charged on the revenues of the Dominion, and the salaries, allowances and pensions payable to or in respect of members of his staff shall be paid out of those revenues.”

## INDIA

**ART. 148 : THE COMPTROLLER AND AUDITOR-GENERAL OF INDIA.**—The Comptroller and Auditor-General is the most important officer under the Constitution, his duty being to be the guardian of the purse and to see that not a farthing of it is spent without the authority of Parliament. In order to discharge this function properly, it is highly essential that this officer should be independent of any control by the Executive. This independence has been secured by the following provisions :—

(a) Though appointed by the President, the Auditor-General may be removed only on an address from both Houses of Parliament, on the grounds of, (i) ‘proved misbehaviour’ or (ii) ‘incapacity’ [Art. 148 (1), read with Art. 124 (4)].

(b) His salary and conditions of service shall be statutory (i.e., as laid down by Parliament by law) and shall not be liable to variation to his disadvantage during his term of office [Art. 148 (3)].

(c) He shall be disqualified for any further Government office after retirement,—so that he shall have no inducement to please the Executive of the Union or of any State [Art. 148 (4)].



(d) The salaries, etc., of the Auditor-General and his staff and the administrative expenses of his office shall be charged upon the revenues of India and shall thus be non-votable [Art. 148 (6)].

Upon the above points, thus, the position of the Comptroller and Auditor-General shall be similar to that of a Judge of the Supreme Court.

**149.** The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

Duties and powers of the Comptroller and Auditor-General.

#### OTHER CONSTITUTIONS

*England.*—The full name of this official (Comptroller and Auditor-General) indicates his two main functions : Comptroller-General of the Receipt and Issue of His Majesty's Exchequer and the Auditor-General of the Public Accounts.

(a) As Comptroller, his duty is to see that no money leaves the Consolidated Fund without statutory authority. Thus no money can be obtained by the Treasury from the Bank of England except on his authority.

(b) As Auditor of the public accounts, it is his duty to see that the money so issued from the Consolidated Fund is spent in accordance with Parliamentary grants. He examines the accounts of the various departments, and presents his report to the Public Accounts Committee of the House of Commons. He insists on the observance not only of the statutes but also of the financial rules laid down by resolutions of the House of Commons, the reports of the Public Accounts Committee of the House, as well as of the Departmental regulations. He reports every irregularity of the Departments to the Public Accounts Committee, so that the financial administration of the Departments may be subjected to public criticism.

"If, in the course of his audit, the Comptroller and Auditor-General becomes aware of facts which appear to him to indicate an improper expenditure or waste of public money, it is his duty to call the attention of Parliament to them."<sup>25</sup>

The objects of his audit, in short, are to ascertain—(a) whether the money expended has been applied to the purpose or purposes for which the grants made by Parliament were intended to provide ; (b) whether there is legal authority for the expenditure ; (c) whether due forms, e.g., the requirement of Treasury sanction, has been obtained ; (d) whether the payments are supported by vouchers or proofs of payment.

*Burma.*—S. 131 of the Burmese Constitution says—

"131. The Auditor-General shall submit to the Chamber of Deputies, at such periods as may be determined by law, reports relating to the accounts of the Union and the States."

*Ceylon.*—S. 71 (2) of the Ceylon (Constitution) Order in Council, 1946, says—

"The Auditor-General shall report annually to the House of Representatives on the exercise of his functions under this Order."

*U. S. A.*—It is the duty of the Comptroller-General of the U. S. A.—(a) to see that moneys collected by federal officers are deposited in the Treasury under correct accounts ; (b) to see that payments made out of the Treasury are made

under legal authority and to prevent any illegal expenditure ; (c) to supervise the accounting systems of the various services.

*Burma.*—Sec. 128 of the Burmese Constitution says—

" 128. There shall be an Auditor-General to control on behalf of the Union all disbursements and to audit all accounts of moneys administered by and under the authority of the Parliament and the State Councils."

*Ceylon.*—Sec. 71 (1) of the Ceylon (Constitution) Order in Council, 1946, provides—

" The accounts of all departments of Government, including the offices of the Cabinet, the Clerk of the Senate, the Clerk to the House of Representatives, the Judicial Service Commission and the Public Service Commission shall be audited by the Auditor-General who, with his deputies, shall at all times be entitled to have access to all books, records, or returns relating to such accounts."

*Government of India Act, 1935.*—The functions of the Auditor-General were laid down in the Government of India (Audit and Accounts) Order, 1936, made under Sec. 166 (3) of the Government of India Act, 1935, which may be summarised as follows :

(i) The Auditor-General was responsible for the keeping of the accounts of the Federation and of each Province (excepting Provinces which chose to appoint their own Auditors-General), other than accounts of the Federation relating to defence and railways.

(ii) It was the duty of the Auditor-General to prepare in each year accounts showing the annual receipts and disbursements for the Federation and ■ Province, and to submit the same to the respective Governments.

(iii) It was the duty of the Auditor-General to prepare and to submit to the Governor-General, ■ general Financial Statement relating to the accounts of each year, showing balances and outstanding liabilities and such other information as may be required by the Governor-General.

(iv) It was the duty of the Auditor-General—(a) to audit and report on all expenditure from the revenues of the Federation and of the Provinces and to ascertain whether moneys shown in the accounts as having been disbursed were *legally available* for and applicable to the purpose to which they had been applied and whether the expenditure conforms to the *authority* which governs it ; (b) to audit and report all transactions of the Federation and of the Provinces relating to debt, desposits, sinking funds, advances, suspense accounts and remittance business ; (c) to audit and report on all trading, manufacturing and profit and loss accounts etc. maintained by any Department of the Federation or of the Province ; the receipts of any Department, the accounts of stores and stock kept in any office or department ; (d) to give such information and assistance to the Federal Government or the Government of a Province ■ may be required for the preparation of their annual financial statements.

#### INDIA

ART. 149 : DUTIES AND POWERS OF THE AUDITOR-GENERAL.—The Comptroller and Auditor-General's duties and powers shall be such as may be prescribed by Parliament, but until Parliament so prescribes, these shall be such as exist under the existing law. The existing law on this subject is laid down in the Government of India (Audit and Accounts) Order, 1936, which has been summarised *above*.

Parliament shall also have the power to confer additional duties on the Auditor-General to audit the accounts of any other authority that might be created by Government, e.g., corporations like the Damodar Valley Corporation.

Shortly speaking, the department of the Comptroller and Auditor-General does three things—(a) it audits the Government's expenditure, i.e., it satisfies itself, in

as reasonably efficient a manner as possible that the expenditure incurred is a fact and that the taxpayer has obtained his money's worth ; it compiles the accounts of such audited expenditure in an elaborate manner—(b) It sees that the financial rules and orders, which have a bearing on Governmental expenditure, are obeyed. (c) It also satisfies itself that those who sanction expenditure have got the power to do so.

To ensure the above, the Comptroller and Auditor-General will audit the accounts of the Union and State Governments, prepare their respective accounts, and submit the same with his reports to the President or Governor, as the case may be.

*Adaptation.*—During the period of two years from 26th January, 1950, Art. 149 shall have effect subject to the following adaptations<sup>1</sup> :

“(1) Article 149 shall be renumbered as clause (1) of that article and the following clauses shall be added thereto, namely :—

“(2) Nothing in clause (1) shall apply in relation to the accounts for the period beginning on the twenty-sixth day of January, 1950, and ending on the thirty-first day of March, 1950, of any State specified in Part B of the First Schedule, and the provisions relating to the audit of the accounts of such State in force immediately before the commencement of this Constitution shall continue to have effect in relation to the accounts for the said period of such State.

(3) In its application to the Patiala and East Punjab States Union, clause (2) shall have effect as if for the reference therein to the thirty-first day of March, 1950, there was substituted a reference to the twelfth day of April, 1950.”

**150.** The accounts of the Union and of the States shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe.

Power of Comptroller and Auditor-General to give directions as to accounts.

**ART. 150 : CENTRALISED AUDIT AND ACCOUNTS FOR THE STATES.**—The Comptroller and Auditor-General of India will be in charge of the audit and accounts not only of the Union but also of the States. The present article perpetuates the centralised and combined system that existed prior to the Constitution, notwithstanding the change in the set-up. Further, there is no provision in the Constitution corresponding to Sec. 167 of the Government of India Act, 1935, under which a Provincial Legislature had the power to create the office of an Auditor-General for that Province. In the result there is no scope under the Constitution, for the appointment of a Provincial Auditor-General. The keeping of the accounts of the States and the audit thereof will be performed by the staff of the Comptroller and Auditor-General of India. The advantages of this centralised system are uniformity as well as economy.

**151.** (1) The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

(2) The reports of the Comptroller and Auditor-General of India relating to the accounts of a State shall be submitted to the Governor or Rajpramukh of the State, who shall cause them to be laid before the Legislature of the State.

<sup>(1)</sup> The Constitution (Removal of Difficulties) Order No. III (Cl. O. 6 of 26-1-50), republished in *Calcutta Gazette*, 16-2-50, Part-I-A, p. 50.



## OTHER CONSTITUTIONS

*England.*—*The Public Accounts Committee* is a standing Committee of the House of Commons, presided over by a member of the Opposition. This Committee receives the annual report of the Comptroller and Auditor-General of his examination of the accounts of the Government departments (see p. 432, *ante*). He draws attention to any unauthorised or unnecessarily extravagant expenditure. The Committee, in its turn, reports to the House of Commons. Though this is not debated by the House, it assists control by the treasury over expenditure by the departments. The very existence of this Committee tends to check extravagant expenditure in the Departments.<sup>2</sup>

## INDIA

ART. 151 : REPORTS TO PARLIAMENT AND THE STATE LEGISLATURE.—There was no provision in the Government of India Act, 1935, requiring the Auditor-General's reports to be laid before the Legislature, but in practice this came to be done. The present article requires that the Comptroller-General shall submit his reports relating to the accounts of the Union to the President and of the States to the Governor or the Rajpramukh (as the case may be), and the President shall cause such reports to be laid before each House of Parliament and the Governor or Rajpramukh shall cause it to be laid before the Legislature of the State.

*'Relating to the accounts.'*—These words make it clear that the report of the Comptroller and Auditor-General is to be confined to comment on the accounts, viz. whether the accounts are properly kept, whether the financial provisions of the Constitution, laws and regulations have been duly observed, and that it is not the business of the audit report to criticise the *policy* followed by the Government or "to decide whether the country is receiving value for its worth."<sup>3</sup>

*The Committee of Public Accounts of each House of Parliament.*—When the reports of the Comptroller and Auditor-General are laid before each House of Parliament, under Art. 151 (1), they shall be scrutinised by the Committee on Public Accounts of each House. The Constitution and functions of the Committee of Public Accounts of the provisional Parliament are laid down in Rules 143-4 of the Rules of Procedure and conduct of business in Parliament, which are as follows—

"143. *Committee on Public Accounts.*—(1) As soon as may be after the commencement of the first session of Parliament, a Committee on Public accounts shall, subject to the provisions of this rule, be constituted.

(2) The function of the Committee shall be to examine the accounts showing the appropriation of the sums granted by Parliament to meet the expenditure of the Government of India and such other accounts laid before Parliament as the Committee may think fit.

(3) The Committee on Public Accounts shall consist of not more than fifteen members, who shall be elected by Parliament from amongst its members according to the principle of proportional representation by means of the single transferable vote.

(4) The term of the office of the Committee shall be one year.

(5) Casual vacancies of the Committee shall be filled as soon as possible after they occur by election in the manner aforesaid, and any person elected to fill such vacancy shall hold office for the period for which the person in whose place he is elected would, under the provisions of this rule, have held office.

(6) In order to constitute a meeting of the Committee the quorum shall be four.

(7) (a) The Chairman of the Committee shall be appointed by the Speaker from amongst the members of the Committee. Provided that if the Deputy Speaker is a member of the Committee he shall be appointed Chairman of the Committee.

(b) If the Chairman is for any reason unable to act, the Speaker may similarly appoint another Chairman in his place.

(2) Chalmers and Hood Phillips, p. 139; Keith, Constitutional Law, p. 116.

(3) Jennings, Constitution of Ceylon, pp. 109, 212. [This is not, however, strictly observed in England, and the Auditor-General, sometimes

comments on 'unwise' as opposed to illegal expenditure [Keith, Constitutional Law, p. 116; Finer, Modern Government, Vol. II, pp. 839-840].

(c) If the Chairman is absent from any meeting, the Committee shall choose another member to act as the Chairman of the meeting.

(8) In the case of an equality of votes on any matter, the Chairman shall have a second or casting vote."

" 144. *Control of Committee on Public Accounts.*—(1) In scrutinising the Appropriation Accounts of the Government of India, and the report of the Comptroller and Auditor-General thereon, it shall be the duty of the committee on Public Accounts to satisfy itself—

(a) that the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have been applied or charged ;

(b) that the expenditure conforms to the authority which governs it ; and

(c) that every re-appropriation has been made in accordance with the provisions made in this behalf in the Appropriation Act, or under rules framed by competent authority under the provisions of the said Act : Provided that the provision made in cl. (c) above shall not apply to any accounts prior to the year 1950-51.

(2) It shall also be a duty of the Committee on Public Accounts—

(a) to examine such trading, manufacturing and profit and loss accounts and balance sheets, as the President may have required to be prepared, and the Comptroller and Auditor-General's report thereon ;

(b) to consider the report of the Comptroller and Auditor-General in cases where the President may have required him to conduct an audit of any receipts or to examine the accounts of stores and stock."

*Committee of Public Accounts in the State Legislature.*—Similarly, the reports of the Comptroller and Auditor-General relating to the accounts of a State shall be scrutinised by the Public Accounts Committee of that State Legislature, before being discussed by the House. Rules 107—112 of the West Bengal Legislative Assembly Rules, 1950,<sup>4</sup> will illustrate the procedure in the State Legislature :

" 107. The accounts of the State and the reports of the Comptroller and Auditor-General thereon shall, as soon as they are laid before the Assembly, stand referred to the Committee on Public Accounts constituted under rule 110.

108. When the accounts of the State and the reports of the Comptroller and Auditor-General thereon have been laid before the Assembly, the Secretary shall cause them to be published, and a copy of the accounts and the reports shall be made available for the use of each member.

109. No discussion of the accounts of the State and the reports of the Comptroller and Auditor-General thereon shall take place in the Assembly until the report of the Committee on Public Accounts on such accounts and reports has been presented to the Assembly under rule 112.

112. The report of the committee on Public Accounts on the accounts of the State and the reports of the Comptroller and Auditor-General thereon shall be presented to the Assembly by the Chairman of the said Committee."

[Rules 110—111 are similar to rules 143—4 of the Rules of Procedure in Parliament, quoted above.]

## PART VI

### THE STATES IN PART A OF THE FIRST SCHEDULE

#### CHAPTER I.—GENERAL

**152.** In this Part, unless the context otherwise requires, the expression "State" means a State specified in Part A of the First Schedule.

Definition.

ART. 152 : *APPLICABILITY OF PART VI.*—The provisions of Part VI of the Constitution embody the Constitution of the 9 States in Part A which were called the 'Governors' Provinces' before the commencement of the Constitution, viz. Madras, Bombay, Bihar, Assam, Orissa, Madhya Pradesh (representing the old Province of C. P. & Berar), Uttar Pradesh (representing the old Province of the United Provinces) West Bengal and the Punjab (the latter two representing the partitioned provinces,—

(4) *Calcutta Gazette Extraordinary*, dated 1-2-50, p. 117.

referred to as West Bengal and East Punjab in the Indian Independence Act). The territories of these Provinces have, of course, been enlarged by the merger of contiguous Indian States, under the Patel scheme.<sup>5</sup>

Broadly speaking, the system of Government prescribed by Part VI of the Constitution follows the system prescribed for the Provinces by Part III of the Government of India Act, 1935, with changes which are indicated in proper places, below.

*Analogous Provision.*—The provisions of Part VI will also apply to the States in Part B,—subject to the modifications specified in Art. 238, *post*.

## CHAPTER II.—THE EXECUTIVE.

### *The Governor.*

Governors of States.

**153.** There shall be a Governor for each State.

**154.** (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

Executive power of State.

(2) Nothing in this article shall—

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority ; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 49 (1) of the Act was as follows—

“(1) The executive authority of a Province shall be exercised on behalf of His Majesty by the Governor either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal or the Provincial Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor any functions conferred by any existing Indian law on any Court, judge, or officer or any local or other authority.”

## INDIA

*Source of Art. 154.*—This Article substantially reproduces Sec. 49 (1) of the Government of India Act, 1935.

*Analogous Provision.*—Art. 154 exactly reproduces Cls. (1) and (3) of Art. 53, *ante*. For comments upon the present Article, therefore, see pp. 214 *et seq*.

A BRIEF SUMMARY OF THE POWERS OF THE GOVERNOR—Shortly speaking, the powers of the Governor of a State are analogous to those of the President [see pp. 215 *et seq*], excepting that the Governor has no ‘diplomatic’, ‘military’ or ‘emergency’ powers. Thus, the Governor shall be the head of the executive power of the State,—the executive power of the State being ‘vested’ in the Governor, to be exercised by him either directly or through officers subordinate to him, and according to the Constitution<sup>6</sup>. All executive action of the State must be expressed to be taken in the name of the Governor, and the Governor shall make (a) rules providing how orders and instruments executed in his name shall be ‘authenticated’ ; (b) rules for the convenient transaction of the business of the Government of the

(5) See further, under the First Schedule, *post*.

(6) Art. 154 (1).



State and for allocation of business among the ministers.<sup>7</sup> The Ministers shall be appointed by the Governor and they shall hold office during the Governor's pleasure.<sup>8</sup>

As regards the *legislative* powers, the Governor is a part of the State Legislature<sup>9</sup> just as the President is a part of Parliament. Again, he has a similar right of 'opening address', of addressing and sending messages<sup>10</sup> to and of summoning, proroguing and dissolving,<sup>11</sup> the Legislature just as the President has. He also possesses a similar power of causing the annual financial statement before the State Legislature<sup>12</sup> and of making demands for grants and recommending 'Money Bills.'<sup>13</sup> He has a similar power of making Ordinances during recess of Legislature<sup>14</sup>, and a power of vetoing State Bills, with the additional power of reserving them for consideration of the President.<sup>15</sup>

The Governor also possesses a pardoning power.<sup>16</sup>

**155.** The Governor of a State shall be appointed by the President by warrant under his hand and seal.

Appointment of Governor.

#### OTHER CONSTITUTIONS

*U. S. A.*—The Governor of a State in the United States of America is directly, elected by the people of the State.<sup>17</sup> The Federal Government has nothing to do in the matter.

*Australia.*—The Governor of an Australian State is appointed by the Crown on the advice of the British Cabinet who, however, in practice, consult the Prime Minister of the State concerned.<sup>18</sup>

*Canada.*—Sec. 58 of the British North America Act takes away the prerogative of the British Crown to appoint Lieutenant-Governors of the Canadian Provinces with the advice of the British Cabinet [*cf.* Australia], and instead, provides for such appointment by the Governor-General in Council, *i.e.* by the Governor-General acting with the advice of the Dominion Ministry.

But though the Lieutenant Governor of a Canadian Province is appointed by the Union Government, it has been held by the Court<sup>19</sup> that the Lieutenant-Governor is not the executive servant of the Dominion for the passive instrument of the Dominion Cabinet. Once appointed, he is the full representative of the Crown having complete authority for carrying on the Government of the Province. So, the mode of appointment of the Provincial executive head does not impair the federal principle in Canada.<sup>20</sup>

*Government of India Act, 1935.*—Sec. 48 (1) of that Act provided—

"The Governor of a Province is appointed by His Majesty by a Commission under the Royal Sign Manual."

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*Art. 155 : Appointment of Governor.*—It has been pointed out at the outset (p. 30, *ante*) that *our* Constitution departs from the federal principle underlying the Constitution of the United States of America and follows the *Canadian* precedent in providing for appointment of the Governor of the State by the executive head of the Union.

No doubt, our President will make the appointment with the advice of the Union Cabinet. But, as Sir Krishnaswami Aiyar observed<sup>21</sup>,—it may be expected

(7) Art. 166.

(8) Art. 164.

(9) Art. 168 (1).

(10) Arts. 175-6.

(11) Art. 174.

(12) Art. 202 (1).

(13) Art. 207 (1).

(14) Art. 213.

(15) Arts. 200-1.

(16) Art. 161.

(17) *Murray*, Government of the United States, pp. 674-5.

(18) Nicholas, Australian Constitution, p. 20.

(19) *Liquidators of Maritime Bank v. Receiver-General*, (1892) A.C. 437 (443).

(20) *Cf.* Kennedy, Some Aspects of Constitutional Law, p. 79; Clement, Canadian Constitution, p. 27.

(21) Constituent Assembly, Debates, Vol. VIII p. 432.

that a convention would grow that the Government of India would consult the Ministry of the State concerned in making the appointment.

*Arguments for and against the principle of appointment of Governor.*—Though it is slightly beside the scope of the present work, the arguments which led to the rejection in the Constituent Assembly of the original plan of choice of Governor by election, may be briefly referred to in order to appreciate the constitutional position of the Governor in the State.

(A) *Arguments for appointment of Governors by the President.*<sup>22</sup>—(a) It would save the country from the evil consequences of still another election, run on personal issues. To sink every province into the vortex of an election with millions of primary voters but with no possible issue other than personal, would be highly detrimental to the country's progress, for in the absence of clear-cut issues based on policies or principles, the election of Governors, it is held, is bound to be degraded to vulgar personal levels.

(b) The crux of the matter was what type of Government India was going to have. If she was going to have a parliamentary system of government, then the method of direct election of the Governor was inappropriate. If the Governor were to be elected by direct vote, then he might consider himself to be superior to the Premier, who was merely returned from a single constituency, and this might lead to frequent friction between the Governor and the Premier.

But under the Parliamentary system of government prescribed by the Constitution for the States, the Governor was to be the constitutional head of the Province,—the real executive power being vested in the Ministry responsible to the Legislature.

“When the whole of the executive power is vested in the Council of Ministers, if there is another person who believes that he has got the backing of the province behind him and, therefore, at his discretion he can come forward and intervene in the governance of the province, it would really amount to a surrender of democracy.”

(c) The expenses involved and the elaborate machinery of election would be out of proportion to the powers vested in the Governor who was to act as a mere constitutional head.

(e) A Governor elected on adult franchise to be at the top of the political life in the province would soon prefer to be the Prime Minister or a Minister with effective powers. The party in power during the election would naturally put up for Governorship a person who was not an outstanding member of the future Prime Minister with the result that the Province would not be able to get the best man of the party. All the process of election would have to be gone through only to get a second rate man of the party elected as Governor. Being subsidiary in importance to the Prime Minister, he would be the nominee of the Prime Minister of the Province, which was not a desirable thing.

(f) Through the procedure of appointment by the President, the Union Government would be able to maintain in tact its control over the States.

(g) The method of election would encourage separatist tendencies. The Governor would be the nominee of the Government of that particular province to stand for the Governorship. He might be some kind of a rival in that particular majority group which for the moment remained in control of the province.

“He should be a detached figure acceptable in the province, otherwise he could not function, and yet may not be a part of the party machine of the province. On the whole it would probably be desirable to have people from outside, eminent in something, education or other fields of life who would naturally co-operate fully with the Government in carrying out the policy of the Government and yet represent before the public something above politics.”

The stability and unity of the governmental machinery could be achieved only by adopting the system of nomination.

(B) *Arguments against nomination.* (i)—A nominated Governor would not be able to work for the welfare of a State because he would be a foreigner to that State and would not be able to understand anything about it.

(ii) There is chance of friction between the Governor and the Prime Minister of the State no less under the system of nomination, if the Premier of the State did not belong to the same party as the nominated Governor.<sup>23</sup>

(iii) An appointed Governor under the instruction of the Centre might like to run the administration in a certain way contrary to the wishes of the Cabinet. In this tussle, the Cabinet would prevail and the President-appointed Governor would have to be recalled. The system of election, therefore was far more compatible with good, better and efficient government plus the right of self-government.

*President's control over Governor.*—It is natural that through the power of appointment and removal, the President will secure more control over the Governors of States than was possessed by the Governor-General under the Government of India Act, 1935, for, under that Act, the Governors were appointed by the Crown without even consulting the Governor-General [Sec. 48 (1)]. Nevertheless, it seems that the Governor under the Constitution being thoroughly a constitutional head, the President's control in the day-to-day administration of the state through the medium of the Governor will not be as effective under the Act of 1935. For, under that Act, a large sphere of the Provincial administration was taken out of the reach of ministerial advice, by requiring the Governor to act in the exercise of his 'individual judgment' or in his 'discretion.' And, in so far as the Governor was required 'to act in his discretion', or 'to exercise his individual judgment' he was under the general control of the Governor-General and had to comply with such particular directions as may from time to time be given by the Governor-General in his discretion [Sec. 54 (1)].

But, as we shall see [under Art. 163, *post*], the Constitution does not require the Governor to act in his individual judgment in any matter at all, and the scope of 'acting in his discretion' has been narrowed down to some matters in relation to the Tribal Areas of Assam, under the Sixth Schedule. So, the Governors of all other States, and the Governor of Assam in all other matters, can act only upon ministerial advice and the President shall not thus have any power of general superintendence over the State administration as was possessed by the Governor-General under Sec. 54 (1) of the Act of 1935.

Of course, the Constitution retains the power of the Central Government to give directions to the Government of the States [see Arts. 256-7, *post*]<sup>24</sup> But such directions shall be enforced not through the personal agency of the Governor, but by a different sanction [Art. 365, *post*].

*Analogous Provision.*—Contrast Art. 54, *ante*, providing election of President.

Term of office of Governor.

**156.** (1) The Governor shall hold office during the pleasure of the President.

(2) The Governor may, by writing under his hand addressed to the President, resign his office.

(3) Subject to the foregoing provisions of this article, Governor shall hold office for a term of five years from the date on which he enters upon his office :

Provided that Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(23) Constituent Assembly, Debates, Vol. VIII, p. 437, *et seq.*

(24) Sec. 126 of the Government of India Act, 1935.



## OTHER CONSTITUTIONS

*U. S. A.*—A State Governor may be removed by the process of impeachment by the State Legislature.

State Constitutions also provide for recall of a Governor by popular vote.

*Australia.*—Like the Governor-General himself, the Governor of a State holds office during pleasure of the Crown. The Governor cannot be removed by the Governor-General and has no responsibility to the latter.

"The Governors of the States are as much representatives of His Majesty for State purposes as the Governor-General of the Commonwealth is for Commonwealth purposes."<sup>25</sup>

*Canada.*—The Lieutenant-Governor of a Province may be removed by the Governor-General 'for cause assigned'.<sup>1</sup>

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*Art. 156 : Governor's office during pleasure of the President.*—'While the Constitution prescribes impeachment to be the mode of removal of the President, it provides for removal of a Governor by the President. This is another departure from the strict federal principle as obtains in the U.S.A.

*Analogous Provision.*—Contrast Art. 56, relating to term of office of President.

**157.** No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years.

*Analogous Provision.*—Contrast Art. 58, *ante*, relating to qualifications for election as President. Cls. (1) (c) and (2) of Art. 58 are not reproduced in the present article. In the result, eligibility for membership of the Legislature is not a necessary qualification for appointment as Governor nor is the holding of an office of profit under either the Union or a State Government, a disqualification. But after appointment, the Governor cannot hold any other 'office of profit,' not only under the Government but also under any other employer. [Art. 158 (2), *post*].

**158.** (1) The Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor.

(2) The Governor shall not hold any other office of profit.

(3) The Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the Governor shall not be diminished during his term of office.

(25) *N. S. W. v. Commonwealth*, (1932) 46 C.L.R. 155 (220).

(1) Chalmers and Hood Philips, p. 510.



Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

ART. 162 : EXTENT OF POWER OF THE EXECUTIVE POWER OF STATE.—The effects of this article read with Art. 73 [pp. 244-6, *ante*] are as follows—

(1) The executive authority of a State shall be exclusive in respect of the subjects enumerated in List II of Schedule VII.

(2) The executive authority of the State will also extend to matters included in List III, except as otherwise provided in the Constitution<sup>2</sup> or in any law made by Parliament [Art. 73 (1), Proviso, p. 245, *ante*].

(3) The State Executive shall have no authority over the subjects enumerated in List I. 'Executive power' includes the power of making ■ decision as to action ■ well as the carrying out of such decision<sup>2-a</sup>.

### *Council of Ministers*

**163.** (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not ■ matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court.

### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Cl. (1) of Art. 163 of the Constitution is ■ reproduction of sub-section (1) of section 50 of the Act of 1935, *minus* the Proviso relating to 'individual judgment'. Cl. (2) of the article reproduces sub-section (3) of section 50. Cl. (3) of the article reproduces sub-section (4) of section 51 of the Act. Sub-section (2) of section 50, which is *omitted* from the Constitution was—

"The Governor in his discretion may preside at meetings of the Council of Ministers."

The Governor of ■ State under the Constitution has no power to preside over or to be present at meetings of the Council of Ministers.

### INDIA

ART. 163 : THE GOVERNOR AND HIS COUNCIL OF MINISTERS.—It may be said that, ■ general, the relation between the Governor and his Ministers is the ■■■■ as that between the President and his Ministers [*see* p. 256-7, *ante*], with this difference that while the Constitution does not empower the President to exercise any function 'in his discretion,' it authorises the Governor (following the Government of India Act, 1935) to exercise ■■■■ functions 'in his discretion'. In the exercise of these functions, the Governor will not be required to act according to the advice of his Ministers or even to seek such advice. Again, if any question arises whether

(2) *see* Arts. 353 (b), 356 (1) (a).

(2-a) *Emp. v. Sibnath*, A.I.R. 1945 P.C. 156 (162).



any matter is or is not a matter as respects which the Governor is or is not required by the Constitution to act in his discretion, the decision of the Governor shall be final, and the validity of anything done by the Governor shall not be called into question on the ground that he ought or ought not to have acted in his discretion [Art. 163 (2)].

All this reproduction of the provisions of the Government of India Act, 1935, is, however, not of much value, for the Constitution (as finally passed) requires very little function to be exercised by the Governor in his discretion.

The only instances of such a function are to be found in para. 18 (3) of the 6th Schedule which provides that until a notification is issued under the paragraph, the Governor of Assam shall carry on the administration of a tribal area specified in Part B, as the 'agent' of the President, and acting 'in his discretion', and in para. 9(2) of the same Schedule which says that any dispute as to the share of mining royalties between the Government of Assam and a District Council shall be determined by the Governor 'in his discretion'. So, no Governor other than of Assam has any authority to act in his discretion and the discretionary authority of the Governor of Assam is also limited to the above matters only. To a certain extent therefore, the retention of the words 'in his discretion' in the present article may be said to be a drafting anomaly.

**CONSTITUTIONAL POSITION OF THE GOVERNOR.**—The Governor will be constitutional head of the State Executive as in Canada or Australia, barring the two limited spheres of discretionary action, specified above.

But the Governor is not going to be a mere figure-head. If the Governor was an active and good Governor, he could, by means of getting in touch with the opponents of the party in power, reconcile them to a good number of measures and generally make the administration run smoothly.

"The function of the Governor shall be to lubricate the machinery of Government, to see that all the wheels are going well by reason not of his interference, but of his friendly intervention."<sup>3</sup>

"... A time may come when there will be many parties, when the Premier might fail to bring about a compromise between the parties and harmonise policies during crisis. At that time the value of the Governor would be immense—most beneficial to the Ministers themselves, because they will be able to get confidential information and advice a person who has completely identified himself with them and yet is accessible to the other parties."<sup>4</sup>

As Dr. Ambedkar explained, in discussing the position of the Governor, the distinction should be borne in mind between 'functions' and 'duties'. While the Governor shall have no *functions* to discharge by himself, and would have no power to override the Ministry in any particular matter,—he would have the *duty* to advise the Ministry, not as the representative of any particular party, but of the people as a whole,—with the object of securing an impartial, pure and efficient administration<sup>5</sup>.

In relation to the Ministry, the Governor shall have a twofold duty—

One is that he has to retain the Ministry in office because the Ministry is to hold office during his pleasure. The second duty is to advise the Ministry and suggest an alternate method of dealing with a problem and ask them for reconsideration of decisions.<sup>6</sup>

Ultimately, of course, the Governor must take the advice given by his Ministers but the role of the Governor is not exactly that of a passive agent. Using the words of Mr. Asquith<sup>6</sup> (to describe the relation between the Crown and his Ministers, we may say—

"He is entitled and bound to give his Ministers all relevant information which comes to him . . . to point out objections which seem to him valid against the course which they advise; to suggest, if he thinks fit, an alternative policy. Such instructions are always received by Ministers with the utmost respect and considered with more respect and deference than if they proceeded from any other quarter. But, in the end, the Sovereign always acts upon the advice which Ministers after (if need be) reconsideration, feel it their duty to offer. They give that advice well knowing that they can, and probably will, be called upon to account for it by Parliament."

(3) Dr. P. K. Sen, Constituent Assembly Debates, Vol. VIII, p. 446.

(4) Munshi, Constituent Assembly Debates, Vol. VIII, p. 543.

(5) Dr. Ambedkar, Constituent Assembly Debates, Vol. VIII, p. 546.

(6) Constituent Assembly Debates, Vol. VIII, p. 542.

*Analogous Provisions.*—Cls. (1) and (3) of the present article correspond to Cls. (1) and (2) of Art. 74. So, for comments upon the present Clauses, see pp. 254, *et seq.*, *ante*.

**164.** (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the Governor :

Other provisions as to Ministers.

Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose on the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sub-sec. (2) of Sec. 51 of that Act was the same as Cl. (4) of Art. 164 of the Constitution ; while Sub-sec. (4) of that section has been adopted in Cl. (3) of Art. 163. The remaining Sub-sections of Sec. 51 were—

“(1) The Governor’s Ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure.

(3) The salaries of Ministers shall be such as the Provincial Legislature may from time to time by Act determine, and, until the Provincial Legislature so determine, shall be determined by the Governor :

Provided that the salary of a Minister shall not be varied during his term of office.

(5) The functions of the Governor under this section with respect to the choosing and summoning and the dismissal of Ministers, and with respect to the determination of their salaries shall be exercised by him in his discretion.”

It will be seen that the Proviso to Sub-sec. (3) of S. 51 of the Act has not been incorporated in the Constitution. Hence, Ministers’ salaries may be reduced under the Constitution while they could not be reduced under the Act.

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*Analogous Provision.*—This Article exactly corresponds to Art. 75, *ante*, with the addition of the Proviso to Cl. (1) which provides for a Minister for tribal welfare, scheduled castes and backward classes in the States of Bihar, Madhya Pradesh and Orissa. For comments upon the present article, therefore, see pp. 260-9, *ante*.

*The Advocate-General for the State*

**165.** (1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of ■ High Court to be Advocate-General for the State.

(2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 165 of our Constitution reproduces, *verbatim*, Sub-secs. (1)-(3) of Sec. 55 of the Act of 1935. Sub-sec. (4) of that section has not been adopted.

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**ART. 165 : ADVOCATE-GENERAL FOR THE STATE.**—The Advocate-General for ■ State shall have the same position in relation to that State as the Attorney-General for India has in relation to the Union. In fact, Art. 165 practically reproduces Art. 76, with the omission of Cl. (3) of that article. In the result, the Advocate General of a State shall have no *ex-officio* right of audience in Courts outside his State.

*Cl. (2) : Functions of the Advocate-General.*—As under the *Government of India Acts*, the State Advocate-General shall have the following functions<sup>7</sup> :

(a) To advise the State Government on any legal problem which may be referred to him.

(b) To represent the State in Original Causes in the High Court to which the State is a party.

(c) To represent the State in any criminal appeals in the High Court which are regarded as of special importance.

(d) To enter a *nolle prosequi* or to grant a fiat for review of verdict in criminal cases tried by the High Court in its Original jurisdiction.

(e) To protect public rights in such matters ■ public charities and public nuisances.<sup>8</sup>

*Cl. (3) : Status of the Advocate-General.*—Under the *Government of India Act, 1935*, the office of the Advocate-General had no connection with the political changes in the Provincial Government. He enjoyed a tenure during the pleasure of the Governor, acting in his individual judgment. The reasons behind this security of tenure were given thus :

“Our main object is to secure for the Provincial Governments legal advice from an officer, not merely well qualified to tender such advice but entirely free from the trammels of political or party associations, whose salary would not be votable<sup>9</sup> and who would retain his appointment for a recognised period of years irrespective of the political fortunes of the Government or Governments with which he may be associated during his tenure of office.”<sup>10</sup>

(7) Cf. J. P. C. Report, Vol. I, para. 400, p. 239.

(8) See Entries 8 and 28 of List III of the 7th Sch., *post*.

(9) S. 78 (3) (c), *Government of India Act, 1935*.

(10) J. P. C. Report, Vol. I, para. 401, p. 239.



Under Sub-sec. (4) of Sec. 55 of the Act of 1935, the Governor had to act in his individual judgment in the exercise of his following powers in relation to the Advocate-General,—(i) appointment : (ii) dismissal ; (iii) remuneration.

But under the *Constitution*, the position will be different. Sub-sec. (4) of Sec. 55 of the Act of 1935, has not been adopted. As a result, in all the above matters, the Governor is to act with the advice of Ministers.

Further, the salary of the Advocate-General is not charged upon the Consolidated fund of the State [*cf.* Art. 202 (3), *post*] and will thus be subject to vote of the Assembly. The Advocate-General will not thus be independent of the Government of the day, as he was under the Act of 1935.

### *Conduct of Government Business*

**166.** (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

Conduct of business of the Government of a State.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 166 of our Constitution reproduces Sub-secs. (1) and (2) and the main portion of Sub-sec. (3) of Sec. 59 of the Act of 1935.

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**ART. 166 : CONDUCT OF BUSINESS OF THE GOVERNMENT OF A STATE.**—For Comments, see Art. 77, (at. pp. 273-4, *ante*), to which the present article exactly corresponds.

**CL. (2) : 'Orders.'**—The word 'order' in this clause refers not only to executive orders but also to orders which are legislative in nature<sup>11</sup>.

**Rule made by Governor.**—The following rule, made by the Governor of West Bengal<sup>12</sup> will illustrate this clause :

"In exercise of the power referred by clause (2) of Art. 166 of the Constitution of India and in supersession of all previous rules made in this behalf, the Governor is pleased to make the following rules :—

(1) All orders or instruments made or executed by or on behalf of the Government of West Bengal shall be expressed to be made or executed in the name of the Governor.

(2) Save in cases where an officer has been specially empowered to sign an order or instrument of the Government of West Bengal, every such order or instrument shall be signed by either a Secre-

(11) *Harprasad v. Dt. Magistrate*, A.I.R. 1949 All. 403 ; *Kaliprasad v. Emperor*, A.I.R. 1945 Pat. 59.

(12) Note no. 191 A.R., dated 28-1-50, *Vide Calcutta Gazette*, 2-2-50, Part I, p. 144.

tary, a Joint Secretary, a Deputy Secretary, an Under Secretary or an Assistant Secretary to the Government of West Bengal, and such signatures shall be deemed to be the proper authentication of such orders or instruments.

*Explanation.*—In this rule the reference to a Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary and an Assistant Secretary shall include respectively references to an Additional Secretary, an Additional Joint Secretary, an Additional Deputy Secretary, an Additional Under Secretary and an Additional Assistant Secretary."

The Explanation to the above Rule adopts a Patna ruling<sup>13</sup> that 'Under Secretary' includes an 'Additional Under Secretary.'

*Bar to Judicial enquiry.*—This clause provides that the validity of an order or instrument which is authenticated according to rules made by the Governor, shall not be called in question on the ground that it is not made or executed by the Governor. Therefore, as soon as the order is tendered, and the order is expressed in the name of the Governor and duly authenticated, it is not open to a Court of law to question the authenticity of the order to the extent that it is an order of the Government of the State.<sup>14</sup>

But this provision makes the order, etc., immune from challenge on *one ground only*, viz., that "the order or instrument was not made or executed by the Governor".

(a) It does not oust the jurisdiction of the Court to examine the validity of the order or instrument on any other ground, particularly where there is a recital purporting to state as a fact the carrying out of a *condition necessary* for the valid making of the order. In such a case, the Court has got the power to enquire whether that condition precedent has in fact been carried out. Of course, in the normal case, the existence of such a recital in the order will lead to a presumption that the necessary condition was fulfilled, and the person who wants to challenge the validity of the order has got a very difficult onus, but the Court is not without power to determine the validity of the order, on taking proper evidence.<sup>15</sup>

(b) Similarly, the order shall have no validity, notwithstanding the authentication, if it is not 'expressed to be taken in the name of the President' (or the Governor as the case may be). The provisions of clause (1) of Arts. 77 and 166 must be construed as mandatory.<sup>16</sup> In *G. K. Gas Co. v. Emperor*<sup>17</sup>, the Federal Court had, of course, held an analogous provision in Sec. 40 (1) of the 9th Schedule to the Government of India Act, 1935. But that provision, as will appear from the judgment of the Federal Court, was of a different nature; further, the Federal Court appears to have taken into consideration the fact that in that section, the provisions as to 'expression' and 'signature' were coupled together in the same clause so that the provision as to 'expression' could not be held to be a separate mandatory provision by itself. Thus, the Federal Court said—

"We have to maintain that the provision as to the expression is completely separate and mandatory by itself . . . we cannot read it, placed as it is in close juxtaposition with the provision as to signature and its limited purpose, as a separate imperative provision . . ."

But in Arts. 77 and 166 of the Constitution, the provisions as to the 'expression' stand separate from Cl. (2) which bars the Courts from questioning the validity of a duly authenticated order on the ground that it was not 'made or executed' by the President. Again, under Cl. (2), authentication presupposes that the order has been 'made and executed' 'in the name of the President'.

(13) *Siddique Ali v. Province of Bihar*, A.I.R. 1949 Pat. 241. [The contrary decision in *Bilas Rai v. The King*, (1948) 4 D.L.R. 95 (Pat.) refers to a case where particular officers were specified by a statute.]

(14) *Rao v. Ahmad*, (1948) 3 D.L.R. 32 (84) (Bom.).

(15) *King-Emperor v. Shibnath*, (1945) 50 C.

W.N. 25 (32) P.C., approving *Emperor v. Shibnath*, A.I.R. 1943 F.C. 75 (92).

(16) I prefer to accept the view in *Shripad v. Divatia*, A.I.R. 1948 Bom. 21 (Bhagwati, J.) to *Emperor v. G. K. Gas Plant*, A.I.R. 1947 Bom. 361, if the latter directs to the contrary.

17. *G. K. Gas Co. v. Emperor*, A.I.R. 1947 F.C. 98.

*Analogous Provision.*—The provisions of Art. 166 are exactly similar to those of Art. 77, *ante*.

Duties of Chief Minister  
■ respects the furnishing of  
information to Governor, etc.

**167.** It shall be the duty of the Chief Minister of each State—

(a) to communicate to the Governor of the State all decisions of the Council of Ministers relating to the administration of the affairs of State and proposals for legislation ;

(b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for ; and

(c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

*Art. 167 : Duty of Chief Minister in relation to Governor.*—This article exactly corresponds to Art. 78. So, for comments, see pp. 274-5, *ante*. The object of this article is not to enable the Governor to interfere with the day-to-day proceedings of the Council of Ministers. Though the Governor was a mere constitutional head, and shall have no 'functions', he shall have certain *duties*, which include the responsibility to secure impartiality and purity in the administration. Hence,

"Although the Governor was bound to accept the advice of his Ministry he was nevertheless free to suggest reconsideration of certain decisions which he could not do unless information in regard to the conduct of administrative business ■ made available to him.

### CHAPTER III.—THE STATE LEGISLATURE

#### *General*

*Constitution of Legislatures in States.* **168.** (1) For every State there shall be a legislature which shall consist of the Governor, and

(a) in the States of Bihar, Bombay, Madras, Punjab, *Uttar Pradesh*<sup>18</sup> and West Bengal, two Houses ;

(b) in other States, one House.

(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

*Art. 168 : Constitution of State Legislatures.*—The Legislature of a State shall consist of two Houses, named the Legislative Assembly and the Council of States. in the States of Madras, Bombay, Uttar Pradesh, Bihar, West Bengal and the Punjab.

In the other States, such as Assam, Madhya Pradesh and Orissa, the Legislature will be unicameral, i.e., consisting of the lower House (Legislative Assembly) only. The Governor will be ■ part of the Legislature in either case.

(18) The name 'Uttar Pradesh' has been substituted for 'the United Provinces' by the Constitution (Amendment of the First and Fourth Schedule) Order, 1950 [C. O. 3,

dated 25-1-50]. See also the United Provinces (Alteration of Name) Order, 1950 [S. O. 32, dated 24-1-50].



*Analogous Provision.*—What distinguishes the State Legislature from the Union Parliament [Art. 79, p. 276, *ante*] is that three of the States shall have no second chamber and the other States shall also be free to abolish the second chamber, in the manner provided by Art. 169, *below*.

**169.** (1) Notwithstanding anything in Article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

(3) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

*Art. 169 : Abolition or Creation of Second Chamber in States.*—Though the Constitution itself provides a Second Chamber in six States<sup>19</sup> and leaves the others to be unicameral, it makes it possible either to abolish the Second Chamber in any of the above six States, or to create a Second Chamber in any of the remaining States<sup>19</sup> without the necessity of going through the process of constitutional amendment. The only requirement for such a change will be a resolution passed by a special majority of the lower House of the State Legislature itself, as provided in Cl. (1) of the present article followed by a law made by Parliament in the ordinary course of legislation, making consequential changes as may be necessary.

The word 'may' in Cl. (1) shows that Parliament is not bound to make such a law even if such resolution is passed by the Legislative Assembly of the State concerned. Apart from that, the Courts shall have no power to compel Parliament to perform its constitutional duty [see p. 21, *ante*].

**170.** (1) Subject to the provisions of article 333, the Legislative Assembly of each State shall be composed of members chosen by direct election.

(2) The representation of each territorial constituency in the Legislative Assembly of a State shall be on the basis of the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published and shall, save in the case of the autonomous districts of Assam and the constituency comprising the cantonment and municipality of Shillong, be on a scale of not more than one member for every seventy-five thousand of the population:

(19) Art. 168 (1).

Provided that the total number of members in the Legislative Assembly of a State shall in no case be more than five hundred or less than sixty.

(3) The ratio between the number of members to be allotted to each territorial constituency in a State and the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published shall, so far as practicable, be the same throughout the State.

(4) Upon the completion of each census, the representation of the several territorial constituencies in the Legislative Assembly of each State shall be readjusted by such authority, in such manner and with effect from such date as Parliament may by law determine :

Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly.

*Art. 170 : Composition of the Legislative Assembly.*—The Legislative Assembly of each State shall be composed of members chosen by *direct* election on the basis of adult suffrage<sup>20</sup>. The territorial constituencies shall be so arranged that there shall be not more than one representative for every 75,000 of the population, making a total number of members in the Legislative Assembly of a State,—not more than 500 nor less than 60. In other words, the size of the Legislative Assembly of any State shall depend upon its population and will be of any figure between 60 and 500, according to the population of that State.

Cls. (3) and (4) of the present article are a reproduction of cls. (1) (c) and (3) of Art. 81, *ante*.

*Cl. (2) : Legislation by Parliament.*—Parliament has power to legislate with respect to the present matter, under Entry 72 of List I of the Seventh Schedule, *post*. Parliament has provided for representation in the State Legislative Assemblies by secs. 7-9 and the Second Schedule of the Representation of the People Act (XLIII), 1950. Secs. 7-9 of the Act are as follows:—

“7. *Total number of seats in the Legislative Assemblies.*—The total number of seats in the Legislative Assembly of each State specified in the first column of the Second Schedule, to be filled by persons chosen by direct election, shall be the number specified in the second column thereof opposite to that State.

8. *Assembly constituencies.*—For the purpose of elections to a Legislative Assembly, there shall be the constituencies provided by order under section 9, and no other constituencies.

9. *Delimitation of Assembly constituencies.*—As soon as may be after the commencement of this Act, the President shall by order, determine—

(a) the constituencies into which each State shall be divided for the purpose of elections to the Legislative Assembly of that State ;

(b) the extent of each constituency ;

(c) the number of seats allotted to each constituency ; and

(d) the number of seats, if any, reserved for the scheduled castes or for the scheduled tribes in each constituency.”

Total number of seats in the Legislative Assemblies.  
Name of State.

Total num-  
ber of seats.

(1)

(2)

*Part A States.*

1. Assam	..	..	..	..	..	108
2. Bihar	..	..	..	..	..	330
3. Bombay	..	..	..	..	..	315
4. Madhya Pradesh	..	..	..	..	..	232
5. Madras	..	..	..	..	..	375
6. Orissa	..	..	..	..	..	140
7. Punjab	..	..	..	..	..	126
8. Uttar Pradesh	..	..	..	..	..	430
9. West Bengal	..	..	..	..	..	238

*Part B States.<sup>21</sup>*

1. Hyderabad	..	..	..	..	..	175
2. Madhya Bharat	..	..	..	..	..	99
3. Mysore	..	..	..	..	..	99
4. Patiala and East Punjab States Union	..	..	..	..	..	60
5. Rajasthan	..	..	..	..	..	160
6. Saurashtra	..	..	..	..	..	60
7. Travancore-Cochin	..	..	..	..	..	108

*Analogous Provision.*—Compare Art. 81, *ante*.

**171.** (1) The total number of members in the Legislative Council of a State having such a Council shall not exceed one-fourth of the total number of members in the Legislative Assembly of that State:

Composition of the Legislative Councils.

Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty.

(2) Until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in clause (3).

(3) Of the total number of members of the Legislative Council of a State—

(a) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards, and such other local authorities in the State as Parliament may by law specify ;

(b) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university ;

(c) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament ;

(d) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly ;

The Second Schedule of the above Act provides—

(21) Art. 170 is applicable to State in Pa

by reason of Art. 238, *post*.



(e) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5).

(4) The members to be elected under sub-clauses (a), (b) and (c) of clause (3) shall be chosen in such territorial constituencies as may be prescribed by or under any law made by Parliament, and the elections under the said sub-clauses and under sub-clause (d) of the said clause shall be held in accordance with the system of proportional representation by means of the single transferable vote.

(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely :—

Literature, science, art, co-operative movement and social service.

*Art. 171 : Composition of Legislative Council.*—The size of the Legislative Council shall vary with that of the Legislative Assembly,—the membership of the Council being not more than  $\frac{1}{4}$  of the membership of the Legislative Assembly but not less than 40. This provision has been adopted so that the Upper House (the Council) may not get ■ predominance in the Legislature. The system of composition of the Council as laid down in the Constitution is not final. The final power providing the composition of this Chamber of the State Legislature is given to the Union Parliament.

*Cl. (2) : Legislation by Parliament.*—Parliament has already made provisions under the present clause in Sec. 10 and the Third Schedule of the Representation of the People Act (XLIII), 1950.

Sec. 10 of that Act provides—

*"Allocation of seats in the Legislative Councils.*—The allocation of seats in the Legislative Councils of the States having such Councils shall be ■ shown in the Third Schedule.

(2) In the Legislative Council of each State specified in the first column of the Third Schedule, there shall be the number of seats specified in the second column thereof opposite to that State, and of these seats,—

(a) the numbers specified in the third, fourth and fifth columns shall be the numbers of seats ■ be filled by persons elected, respectively ; by the electorates referred to in sub-clauses (a), (b) and (c) of clause (3) of article 171 ;

(b) the number specified in the sixth column shall be the number of ■ to be ■ by persons elected by the members of the Legislative Assembly of the State from amongst persons who ■ not members of that Assembly ;<sup>22</sup> and

(c) the number specified in the seventh column shall be the number of ■ to be filled by persons nominated by the Governor ■ Rajpramukh, as the case may be, of the State in accordance with the provisions of clause (5) of article 171."

(22) That is, under Cl. (d) of Art. 171 (3).

The Third Schedule of the above Act is as follows :—

“ Allocation of seats in the Legislative Councils.

Name of State.	Total number of seats.	Number to be elected or nominated under article 171 (3).				
		Sub- clause (a).	Sub- clause (b).	Sub- clause (c).	Sub- clause (d).	Sub- clause (e).
(1)	(2)	(3)	(4)	(5)	(6)	(7)
<i>Part A States.</i>						
1. Bihar .. ..	72	24	6	6	24	12
2. Bombay .. ..	72	24	6	6	24	12
3. Madras .. ..	72	24	6	6	24	12
4. Punjab .. ..	40	13	3	3	13	8
5. Uttar Pradesh .. ..	72	24	6	6	24	12
6. West Bengal .. ..	51	17	4	4	17	9
<i>Part B State.</i>						
1. Mysore .. ..	40	13	3	3	13	8 "

It appears from the above, read with Cl. (3) of Art. 171, that the Council of States shall have a heterogenous composition, its members being drawn from various sources. Briefly speaking,  $\frac{5}{8}$  of the total number of members of the Council shall be indirectly elected, and  $\frac{1}{8}$  will be nominated by the Governor. Thus,—

(a)  $\frac{1}{3}$  of the total number of members of the Council shall be elected by electorates consisting of members of *local bodies* such as municipalities, district boards.

(b)  $\frac{1}{12}$  shall be elected by electorates consisting of *graduates* of three years' standing residing in the State.

(c)  $\frac{1}{12}$  shall be elected by electorates consisting of persons engaged for at least three years in *teaching* in educational institutions within the State, not lower in standard than secondary schools.

(d)  $\frac{1}{3}$  shall be elected by members of the Legislative Assembly from amongst persons who are *not members* of the Assembly.

(e) The remainder shall be nominated by the Governor from persons having special knowledge or practical experience in respect of such matters as literature, science, art, co-operative movement and social services.

Cl. (4) : *Delimitation of Council Constituencies.*—Sec. 11 of the Representation of the People Act (XLIII of 1950) provides—

“ As soon as may be after the commencement of this Act, the President shall, by order, determine—

(a) the constituencies into which each State having a Legislative Council shall be divided for the purpose of elections to that Council under each of the sub-clauses (a), (b) and (c) of clause (3) of Art. 171 ;

(b) the extent of each constituency ; and

(c) the number of seats allotted to each constituency.”

**172.** (1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years

Duration of State Legislatures.

from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly :

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

*Art. 172 : Duration of State Legislatures.*—The provisions of this article are exactly similar to those of Art. 83 [p. 288, *ante*].

Qualification for membership of the State Legislature.

**173.** A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he—

(a) is a citizen of India ;

(b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age ; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

*Art. 173 : Qualifications for membership of State Legislature.*—The provisions of this article are exactly similar to those of Art. 84 [p. 290, *ante*].

**174.** (1) The House or Houses of the Legislature of the State shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of clause (1), the Governor may from time to time—

(a) summon the House or either House to meet at such time and place as he thinks fit ;

(b) prorogue the House or Houses ;

(c) dissolve the Legislative Assembly.

*Art. 174 : Sessions, summoning, etc., of State Legislature.*—This Article exactly corresponds to Art. 85 [pp. ■ 91-5, *ante*].

' Session '—See p. 294, *ante*. Rule 1 of the West Bengal Legislative Assembly Procedure Rules defines it thus—

“ ‘ Session ’ means the whole period, from the time when the Assembly meets to the time when it is prorogued.”



*Summons for meeting.*—Rule 2 of the West Bengal Legislative Assembly Procedure Rules, 1950, says—

“Whenever it appears to the Governor that the Assembly should be summoned—

(a) he shall cause a notification to be published in the *Calcutta Gazette*, appointing the day, hour and place for a meeting of the Assembly; and,

(b) the Secretary shall send to each member a summons to attend the meeting.”

**175.** (1) The Governor may address the Legislative Assembly or, in the case of a State having a Legislative Council, either House of the Legislature of the State, or both Houses assembled together, and may for that purpose require the attendance of members.

Right of Governor to address and send messages to the House or Houses.

(2) The Governor may send messages to the House or Houses of the Legislature of the State, whether with respect to a Bill then pending in the Legislature or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

*Art. 175 : Governor's right to address and send messages.*—This article corresponds to Art. 86 [pp. 296-7, *ante*].

**176.** (1) At the commencement of every session, the Governor shall address the Legislative Assembly or, in the case of a State having a Legislative Council, both Houses assembled together and inform the Legislature of the causes of its summons.

Special address by the Governor at the commencement of every session.

(2) Provision shall be made by the rules regulating the procedure of the House or either House for the allotment of time for discussion of the matters referred to in such address and for the precedence of such discussion over other business of the House.

*Art. 176 : Opening Speech of Governor.*—Rule 3 of the West Bengal Legislative Assembly Procedure Rules, 1950, reproduced below, will illustrate the provisions of this Article—

“(1) On the day and the hour appointed for the commencement and holding of any session of the Assembly not being the first meeting after a dissolution and in the case of a session after a dissolution on the first sitting of the Assembly after the election of the Speaker, the Governor will address the Assembly as required by Art. 176 of the Constitution.

(2) After the delivery of the speech by the Governor, the Speaker shall report to the Assembly that the Governor had been pleased to make a speech and shall lay a copy of the speech on the table.

(3) On such report being made, notice may be given of a motion that a respectful Address be presented to His Excellency the Governor in reply to his speech expressing the thanks of the Assembly for the speech delivered by him.

(4) On such a motion being made, the Assembly shall adjourn to a future date for the discussion of the motion. The Speaker shall allot such time for the discussion of the motion as he may consider necessary.

(5) Amendments may be moved to such motion by way of adding additional words at the end of the Address but not otherwise on such notice being given as the Speaker may determine.

(6) The debate on the Address shall take precedence over all other business except formal business.

(7) The address having been adopted with or without amendment shall be presented to the Governor by the Speaker in such manner as the Governor may appoint.

(8) The Speaker shall report to the Assembly the Governor's reply to the Address.”

**177.** Every Minister and the Advocate-General for a State shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly of the State or, in the case of a State having a Legislative Council, both Houses, and to speak in, and otherwise to take part in the proceedings of, any committee of the Legislature of which he may be named member, but shall not, by virtue of this article, be entitled to vote.

*Art. 177 : Rights of Ministers as respects the Houses.*—This article exactly corresponds to Art. 88 [pp. 299-300, ante].

### *Officers of the State Legislature*

**178.** Every Legislative Assembly of a State shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be.

*Art. 178 : Speaker and Deputy Speaker.*—This article exactly corresponds to Art. 94 [p. 304, ante.]

*Election of Speaker.*—The West Bengal Assembly has made the following rules<sup>23</sup> relating to the election of Speaker and Deputy Speaker :

“5. (1) When, owing to a vacancy in the office of the Speaker, it is necessary to choose a member as Speaker, the Governor shall fix a date for the holding of the election, and the Secretary shall send to every member notice of the date so fixed.

(2) At any time before 1 p.m. on the day preceding the date so fixed, any member may nominate another member for election by delivering to the Secretary a nomination paper signed by himself as proposer and by a third member as seconder, and stating—

(a) the name of the member nominated, and

(b) that the proposer has ascertained that such member is willing to serve as Speaker, if elected.

(3) The person presiding shall read out to the Assembly the names of the members who have been duly nominated together with those of their proposers and seconds, and, if only one member has been so nominated, shall declare that member to be elected. If more than one member has been so nominated, the Assembly shall proceed to elect a Speaker by ballot.

(4) For the purposes of sub-rule 3, a member shall not be deemed to have been duly nominated or be entitled to vote if he and his proposer and seconder have not, before the reading out of the names by the person presiding, made the oath or affirmation as members of the Assembly.

(5) Where more than two candidates have been nominated and at the first ballot no candidate obtains more votes than the aggregate votes obtained by the other candidates, the candidate who has obtained the smallest number of votes shall be excluded from the election and balloting shall proceed, the candidate obtaining the smallest number of votes at each ballot being excluded from the election, until one candidate obtains more votes than the remaining candidate or than the aggregate votes of the remaining candidates, as the case may be.

(6) Where at any ballot any of two or more candidates obtain an equal number of votes and one of them has to be excluded from the election under sub-rule (5) the determination, as between the candidates whose votes are equal, of the candidate who is to be excluded shall be by drawing of lots in such manner as the person presiding may decide.

6. (1) As soon as may be after the election of the Speaker, the Assembly shall elect one of its members to be Deputy Speaker.

(2) At any time before 1 p.m. on the day preceding the date fixed by the Governor for the election of a Deputy Speaker any member may nominate another member for election by delivering

(23) Rules 5-6 of the West Bengal Assembly Procedure Rules, 1950 (Cal. Gaz. Extra-ordinary, dated 1-2-1950).

to the Secretary, a nomination paper signed by himself as proposer and by a third member as seconder, and stating—

- (a) the name of the member nominated, and
- (b) that the proposer has ascertained that such member is willing to serve as Deputy Speaker, if elected.

(3) The Speaker shall read out to the Assembly the names of the members who have been duly nominated together with those of their proposers and seconders, and if only one member has been so nominated, shall declare that member to be elected. If more than one member has been so nominated, the Assembly shall proceed to elect a Deputy Speaker by ballot.

(4) The provisions of sub-rules (4), (5) and (6) of rule 5 shall apply to such election.

(5) If a vacancy in the office of Deputy Speaker occurs during the life of an Assembly a fresh election shall be held in accordance with the procedure hereinbefore mentioned."

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

**179.** A member holding office as Speaker or Deputy Speaker of an Assembly—

(a) shall vacate his office if he ceases to be a member of the Assembly ;

(b) may at any time by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office ; and

(c) may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly :

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution :

Provided further that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

*Art. 179 : Vacation of Office of Speaker and Deputy Speaker.*—This Article corresponds to Art. 94 [p. 304 ante].

*Cl. (c) : Removal by resolution of Assembly.*—Rule 95 of the West Bengal Legislative Assembly Procedure Rules, 1950, provides—

" Any resolution to remove either the Speaker or the Deputy Speaker from office of which the required notice of fourteen days has been received, shall be read to the Assembly by the person presiding over the Assembly. <sup>24</sup> He shall then request those members who are in favour of leave being granted to move the resolution to rise in their places, and if not less than twenty-eight members rise accordingly, the person presiding over the Assembly shall intimate that leave is granted. If less than twenty-eight members rise, the person presiding over the Assembly shall inform the intending mover thereof that he has not the leave of the Assembly to move it."

**180.** (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the Assembly as the Governor may appoint for the purpose.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.

(2) During the absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person



as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker.

*Art. 180 : Performance of duties of Speaker during vacancy or absence.*—This article corresponds to Art. 95 [p. 304, *ante*].

*Cl. (2) : Temporary Chairman.*—This clause provides for the chairmanship of the Assembly during the *absence* of both the Speaker and the Deputy Speaker. Under the present clause, the West Bengal Legislative Assembly has made the following rule<sup>25</sup> :—

“At the commencement of every session the Speaker shall nominate from amongst the members of the Assembly a panel of not more than four chairmen any one of whom may preside over the Assembly in the absence of the Speaker and Deputy Speaker, when so requested by the Speaker, or in his absence, by the Deputy Speaker.”

All the powers belonging to the Speaker shall be exercisable by the person presiding under the above rule.<sup>1</sup>

**181.** (1) At any sitting of the Legislative Assembly, while any resolution for the removal of the Speaker

The Speaker and the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.

from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 180 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

*Art. 181 : Presiding over Assembly while resolution for removal of Speaker or Deputy Speaker is under consideration.*—This article corresponds to Art. 96 [p. 305, *ante*].

**182.** The Legislative Council of every State having such Council shall, as soon as may be, choose two

The Chairman and Deputy Chairman of the Legislative Council.

members of the Council to be respectively Chairman and Deputy Chairman thereof and, so often as the office of Chairman or Deputy Chairman becomes vacant, the Council shall choose another member to be Chairman or Deputy Chairman, as the case may be.

*Art. 182 : Chairman and Deputy Chairman of Legislative Council.*—This article is the same as Art. 178 [p. 457, *ante*].

*Gf. Art. 89 [p. 300, ante].*

(25) Rule 7 of the West Bengal Legislative Assembly Procedure Rules, 1950.

(1) Rule 18, *ibid.*

Vacation and resignation of, and removal from, the offices of Chairman and Deputy Chairman.

**183.** A member holding office as Chairman or Deputy Chairman of a Legislative Council—

(a) shall vacate his office if he ceases to be a member of the Council ;

(b) may at any time by writing under his hand addressed, if such member is the Chairman, to the Deputy Chairman, and if such member is the Deputy Chairman, to the Chairman, resign his office ; and

(c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council :

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

*Art. 183 : Vacation of office of Chairman and Deputy Chairman.*—This article is exactly similar to Art. 179 and also corresponds to Art. 90, *ante*.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as Chairman.

**184.** (1) While the office of Chairman is vacant, the duties of the office shall be performed by the Deputy Chairman or, if the office of Deputy Chairman is also vacant, by such member of the Council as the Governor may appoint for the purpose.

(2) During the absence of the Chairman from any sitting of the Council the Deputy Chairman or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

*Art. 184 : Presiding over Council when office of Chairman vacant.*—This article is similar to Art. 180, p. 458, *ante* ; also to Art. 95, p. 304, *ante*.

**185.** (1) At any sitting of the Legislative Council, while any resolution for the removal of the Chairman from his office is under consideration, the

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 184 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman or, as the case may be, the Deputy Chairman is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Council while any resolution for his removal from office is under consideration in the Council and shall, notwithstanding anything in article 189,

be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

*Art. 185 : Presiding over Council while resolution for removal of Chairman or Deputy Chairman is under consideration.*—This article is similar to Arts. 96 [p. 305] and 181 [p. 459], *ante*.

**186.** There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly, and to the Chairman and the Deputy Chairman of the Legislative Council, such salaries and allowances as may be respectively fixed by the Legislature of the State by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

*Art. 186 : Salaries of Speaker, Chairman, etc.*—This article is similar to Art. 97 [p. 305, *ante*].

**187.** (1) The House or each House of the Legislature of a State shall have a separate secretarial staff:

Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such Legislature.

(2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State.

(3) Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

*Art. 187 : Secretariat of State Legislature.*—This article corresponds to Art. 98 [p. 305, *ante*].

### *Conduct of Business*

**188.** Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Oath or affirmation by members.



**189.** (1) Save as otherwise provided in this Constitution, all questions at any sitting of a House of the Legislature of a State shall be determined by a majority of votes of the members present and voting, other than the Speaker or Chairman, or person acting as such.

Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

The Speaker or Chairman, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A House of the Legislature of a State shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature of a State shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) Until the Legislature of the State by law otherwise provides, the quorum to constitute a meeting of a House of the Legislature of a State shall be ten members or one-tenth of the total number of members of the House, whichever is greater.

(4) If at any time during a meeting of the Legislative Assembly or the Legislative Council of a State there is no quorum, it shall be the duty of the Speaker or Chairman, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

*Art. 189: Voting in Houses, etc.*—This article exactly corresponds to Art. 100 [p. 306, *ante*].

### *Disqualifications of Members*

**190.** (1) No person shall be a member of both Houses of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

Vacation of seats.

(2) No person shall be a member of the Legislatures of two or more States specified in the First Schedule and if a person is chosen a member of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States.

(3) If a member of a House of the Legislature of a State—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 191 ; or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be,

his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of a House of the Legislature of ■ State is without permission of the House absent from all meetings thereof, the House may declare his seat vacant :

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

*Art. 190 : Vacation of seats in State Legislature.*—This article corresponds to Art. 101 [p. 310, *ante*], excepting that Cl. (2) of the present article refers to membership of the Legislatures of two or more States.

*Cl. (4) : Rules made by West Bengal Assembly.*—The West Bengal Assembly has made the following rules under Art. 190 (4) of the Constitution—

“ 8. (1) If a member finds at any time that he is unable to attend meetings of the Assembly for ■ period of sixty days, computed in the manner provided in the proviso to sub-section (4) of Art. 190 of the Constitution, he shall apply for permission to be so absent.

(2) Such application shall, as soon as possible after receipt, be considered by the Assembly, ordinarily without discussion, in such manner as the Speaker may determine.

(3) The Secretary shall inform the member, as soon as possible, of the decision of the Assembly ■ his application.

(4) The Secretary shall keep a list showing the names of all members who are absent for sixty days or more, computed in the manner provided in the proviso to cl. (4) of Art. 190 of the Constitution, from all meetings of the Assembly, and such list shall be made available for inspection by members.

(5) If a member is absent without permission from all meetings of the Assembly for a period of sixty days or more, computed in the manner provided in the proviso to clause (4) of Art. 190 of the Constitution, any member may move that such member's seat be declared vacant.

(6) A member shall give ten days' notice of such ■ motion and shall, with his notice, forward a complete statement of the dates on which the member whose seat is to be declared vacant was absent.

(7) No such motion shall be admitted for discussion if the Speaker is satisfied that the statement is inaccurate.

(8) If such motion is carried, the Secretary shall intimate the fact to the Governor.”

## 191. (1) A person shall be disqualified

Disqualifications for membership.

for being chosen as, and for being, ■ member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State, specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder ;

(b) if he is of unsound mind ■ and stands so declared by ■ competent Court ;

(c) if he is an undischarged insolvent ;

(d) if he is not ■ citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to ■ foreign State ;

(e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

*Art. 191 : Disqualification for membership of State Legislature.*—This article corresponds to Art. 102 [pp. 312-4, *ante*].

**192.** (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

Decision on questions as to disqualifications of members.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

*Art. 192 : Decision as to disqualifications of members.*—This article corresponds to Art. 103 [p. 314, *ante*], substituting 'Governor' for 'President'.

**193.** If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

Penalty for sitting and voting before making oath or affirmation under article 188 or when not qualified or when disqualified.

*Art. 193 : Penalty for unauthorised sitting or voting.*—This article is similar to Art. 104 [p. 315, *ante*].

*Powers, Privileges and Immunities of State Legislatures and their Members.*

**194.** (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof.

(2) No member of the Legislature of a State shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.



(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

*Art. 194 : Privileges and immunities of State Legislature.*—This article is identical with Art. 105 [p. 316, ante].

*Rules and Standing Orders.*—The following rules of the West Bengal Legislative Assembly Procedure Rules, 1950, relate to privilege—

“13. (1) The matter of every speech must, in the opinion of the Speaker, be relevant to the matter before the Assembly.

(2) A member while speaking may not—

(i) reflect upon the conduct of—(a) the President, or (b) any Governor ;

(ii) use offensive expressions regarding the conduct or proceedings of the Union or any State legislature ;

(iii) reflect on any determination of the Assembly except on a motion for amending or rescinding it ;

(iv) except with the leave of the Speaker, discuss any ruling or direction or any order of the Speaker disallowing a question, resolution or motion ;

(v) use his right of speech for the purpose of wilfully obstructing the business of the Assembly ;

(vi) utter treasonable words ;

(vii) make a personal charge against any member ; or

(viii) refer to any matter of fact on which a judicial decision is pending.

14. (1) The Speaker shall decide all points of order which may arise, and his decision shall be final.

(2) Any member may at any time submit a point of order for the decision of the Speaker, but in doing so shall confine himself to stating the point.

15. Notwithstanding anything contained in these rules, a member may, with the permission of the Speaker, make a personal explanation at any time, but in doing so no debatable matter may be brought forward and no debate can arise.

16. The Speaker, after having called the attention of the Assembly to the conduct of a member who persists in irrelevance or in tedious repetition either of his own arguments or of the arguments used by other members in debate, may direct him to discontinue his speech.

17. (1) The Speaker shall preserve order and have all powers necessary for the purpose of enforcing his decisions on all points of order.

(2) He may direct any member whose conduct is in his opinion grossly disorderly to withdraw immediately from the Assembly, and any member so ordered to withdraw shall do so forthwith and shall absent himself during the remainder of the day's meeting. If any member is ordered to withdraw a second time in the same session, the Speaker may direct the member to absent himself from the meetings of the Assembly for any period longer than the remainder of the session, and the member so directed shall absent himself accordingly. The member so directed to be absent shall not be deemed to be absent for the purposes of clause (4) of Article 190 of the Constitution.

(3) The Speaker may in the case of grave disorder arising in the Assembly suspend any sitting for a time to be named by him.

\*        ■        ■        \*        \*        ■        \*

117. (1) The Secretary shall keep a journal, in which a short record of the proceedings of the Assembly for each day shall be fairly entered.

(2) The journal shall be submitted after each meeting to the Speaker for his confirmation and signature, and when so signed, shall be the record of the proceedings of the Assembly.

118. (1) The Secretary shall also cause to be prepared a full report of the proceedings of the Assembly at each of its meetings, and publish it as soon as practicable.

(2) He shall send a copy of such report to each member of the Assembly and to the Governor and the President.

119. All publications in connection with the work of the Assembly or any committee thereof and published by order of the Speaker shall be deemed to be publications by order of the Assembly.

122. The admission to the Assembly Chamber of—

- (1) visitors to the visitors gallery,
- (2) representatives of the Press to the Press gallery, and
- (3) officials,

during the sittings of the Assembly shall be regulated in accordance with orders made by the Speaker after consultation with the Governor.

123. The Speaker whenever he thinks fit, may order the galleries to be cleared.

124. (1) A committee of Privileges shall be constituted at the commencement of the first session in each financial year, and shall consist of the Deputy Speaker, who shall be Chairman, and eleven other members who shall be elected by the Assembly according to the principle of proportional representation by means of the single transferable vote.

(2) Members of the committee shall hold office until the committee is reconstituted in the following year in accordance with the provisions of sub-rule (1), and any member shall be eligible for re-election. Casual vacancies shall be filled as soon as possible after they occur by nomination by the Speaker from, whenever possible, the party to which the member in whose place the vacancy has occurred belonged, and any person nominated to fill such a vacancy shall hold office only until the committee is reconstituted but he shall be eligible for re-election."

**195.** Members of the Legislative Assembly and the Legislative Council of a State shall be entitled to receive such salaries and allowances as may from time to time be determined by the Legislature of the State by law and, until provision in that respect is so made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province.

*Art. 195 : Salaries of members of State Legislature<sup>2-3</sup>.—*This Article corresponds to Art. 106 [p. 326, ante].

### *Legislative Procedure*

**196.** (1) Subject to the provisions of articles 198 and 207 with respect to Money Bills and other financial Bills, a Bill may originate in either House of the Legislature of a State which has a Legislative Council.

Provisions as to introduction and passing of Bills.

(2) Subject to the provisions of articles 197 and 198, a Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in the Legislature of a State shall not lapse by reason of the prorogation of the House or Houses thereof.

(4) A Bill pending in the Legislative Council of a State which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Legislative Assembly of a State, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly.

*Art. 196 : Introduction and Passing of Bills other than Money Bills.*<sup>4</sup>—This article corresponds to Art. 107, pp. 326-9, *ante*.

*Stages in the passing of a Bill other than a Money Bill.*—The following rules of the West Bengal Legislative Assembly Procedure Rules, 1950, will illustrate the different stages in the passing of a Bill in the State Legislature, from the point of its introduction :

“(a) INTRODUCTION.

48. The Governor may order the publication of any Bill (together with the Statement of Objects and Reasons accompanying it) in the Gazette, although no motion has been made for leave to introduce the Bill. In that case it shall not be necessary to move for leave to introduce the Bill, and, if the Bill is afterwards introduced, it shall not be necessary to publish it again . . . . .

49. (1) Any member other than a Minister, desiring to move for leave to introduce a Bill, shall give notice of his intention, and shall, together with the notice, submit six copies of the Bill and of the Statement of Objects and Reasons.

(2) The period of notice of a motion for leave to introduce a Bill shall be fifteen days, unless the Speaker in exercise of his power to suspend this sub-rule allows the motion to be made at shorter notice.

50. (1) If notice is given of a motion to introduce a Bill or to move an amendment which, in the opinion of the Speaker, cannot be introduced or moved save with previous sanction, unless such previous sanction has been intimated to him, the Speaker shall, as soon as may be after the receipt of the notice, refer the Bill for the amendment to the Governor, and the motion shall not be placed in the list of business unless the Governor has indicated to the Speaker that the previous sanction required has been granted.

(2) If in the opinion of the Speaker any question arises whether a Bill or amendment thereto is or is not a Bill or amendment which cannot be introduced or moved save with previous sanction, he shall refer the question to the Governor, and the decision of the authority which would have the power to grant the previous sanction if it were necessary, shall be final.

(3) Notwithstanding the fact that the Speaker has made no reference under sub-rule (2) if, in the opinion of the Governor, any question arises whether a Bill or an amendment thereto is or is not a Bill or an amendment which cannot be introduced or moved save with previous sanction, he may intimate to the Speaker the fact that such a question has arisen and that the decision of the authority which would have the power to grant the previous sanction, if it were necessary, will be communicated to the Speaker.

(4) Until the decision referred to in sub-rules (2) and (3) has been communicated to the Speaker, and if the decision be that previous sanction is required, unless the Governor indicates to the Speaker that such sanction has been granted, the motion shall not be placed on the list of business, or if it has been so placed shall not be further proceeded with.

51. (1) If a motion for leave to introduce a Bill is opposed, the Speaker after permitting, if he thinks fit, a brief explanatory statement from the member who introduced it and from the member who opposes the motion may, without further debate, put the question thereon.

(2) If such motion be carried, the Secretary shall read the title of the Bill, and the Bill shall thereupon be deemed to be introduced in the Assembly.

52. As soon as may be after a Bill has been introduced, the Bill, unless it has already been published, shall be published in the Gazette.

(4) Cf. S. 73 of the Government of India Act 1935.



## (b) MOTIONS AFTER INTRODUCTION.

53. (1) When a Bill is introduced, or on some subsequent occasion, the member in charge of the Bill having given the notice prescribed in sub-rule (2), may make one of the following motions in regard to the Bill, namely :—

(a) that it be taken into consideration by the Assembly either at once or at some future day to be then mentioned or (b) that it be referred to a select committee, or (c) that it be circulated for the purpose of eliciting opinion thereon :

Provided that no such motion shall be made until after copies of the Bill have been made available for the use of members, and that any member may object to any such motion being made, unless copies of the Bill have been so available for fifteen days before a motion under clause (a) or for seven days before a motion under clause (b) or clause (c) is made, and such objection shall prevail, unless the Speaker in exercise of his power to suspend this sub-rule allows the motion to be made.

(2) Save as provided in rule 60, the period of notice of a motion to take a Bill into consideration shall be twenty-one days and of a motion that a Bill be referred to a select committee or circulated for the purpose of eliciting opinion thereon, fifteen days, unless the Speaker in exercise of his power to suspend this sub-rule allows the motion to be made at shorter notice.

(3) Where notice of any motion has been given under this rule before the 26th day of January, 1950, it shall not be necessary to give any fresh notice although such motion may be made in the Assembly after the aforesaid date.

54. (1) On the day on which any such motion is made, or on any subsequent day to which the discussion is postponed, the principles of the Bill and its general provisions may be discussed, but the details of the Bill must not be discussed further than is necessary to explain its principles.

(2) At this stage no amendments to the Bill may be moved but—

(a) if the member in charge of the Bill moves that the Bill be taken into consideration, any member may move as an amendment that the Bill be referred to a select committee or be circulated for the purpose of eliciting opinion thereon before a date to be mentioned in the motion, or

(b) if the member in charge of the Bill moves that the Bill be referred to a select committee, any member may move as an amendment that the Bill be circulated for the purpose of eliciting opinion.

(3) The period of notice of an amendment moved under sub-rule (2) shall be ten days, unless the Speaker in exercise of his power to suspend this sub-rule allows the amendment to be moved at shorter notice.

(4) Where a motion that the Bill be circulated for the purpose of eliciting opinion is carried in the Assembly and the Bill is circulated in accordance with that direction and opinions have been received thereon before the date mentioned in the motion, the member in charge of the Bill, if he wishes to proceed with the Bill thereafter, must move that the Bill be referred to a select committee, unless the Speaker in the exercise of his power to suspend this order allows a motion to be made that the Bill be taken into consideration.

55. No motion that a Bill be taken into consideration or be passed shall be made by any member other than the member in charge of the Bill and no motion that a Bill be referred to a select committee or be circulated or recirculated for the purpose of eliciting opinion thereon shall be made by any member other than the member in charge of the Bill, except by way of amendment to a motion made by the member in charge of the Bill.

## (c) SELECT COMMITTEES.

56. (1) A select committee shall consist of not more than seventeen members, unless, on a motion in that behalf carried by the Assembly, a Bill stands referred to a committee of the whole Assembly.

(2) Except in a motion that a Bill be referred to a committee of the whole Assembly, the Minister in charge of the department to which a Bill relates, the member who introduced the Bill and the other members of the select committee shall be named as members in the motion proposing the appointment of the committee.

(3) The Minister in charge of the department to which a Bill relates shall, if he is a member of the Assembly, ordinarily be Chairman of the committee, provided that in the case of a committee of the whole Assembly, the Chairman shall be the Speaker or a member appointed by him.

(4) If such Minister is not a member of the Assembly, the committee shall choose a member of the committee to be their Chairman.

(5) The Chairman shall not vote in the first instance, but in the case of an equality of votes, all have a casting vote.

(6) A Select committee may hear expert evidence and representatives of special interests affected by the measure before them.

57. All proceedings of a select committee shall be treated as confidential, and its recommendations shall not be disclosed until the report has been made available for the use of each member or has been published in the Gazette.

## (d) REPORTS BY SELECT COMMITTEES.

58. (1) When a Bill has been referred to a select committee the committee shall make a report thereon, provided that in the case of a committee of the whole Assembly, it shall not be necessary for a member, other than the Chairman, to sign the report.

(2) Reports may be either preliminary or final.

(3) The Select committee shall in their report, state whether or not, in their opinion, the Bill has been so made as to require re-publication, whether the publication directed by these rules has taken place and the date on which the publication has taken place or where publication in more than one language is ordered, the date on which the publication in each language took place.

(4) If any member of a select committee other than a committee of the whole Assembly, desires to record a minute of dissent on any point, he shall sign the minority report, stating that he does so subject to his dissent, and shall at the same time hand in his minute.

(5) Every such minute of dissent shall be confined to a discussion of the matter contained in the report and must refrain from personal remarks.

59. (1) The Secretary shall cause every report of a select committee to be printed, and a copy of the report shall be made available for the use of each member. The report, with the amended Bill, shall be published in the Gazette.

(2) If any member is unacquainted with the language of the report the Secretary shall also, if requested and if time permits, cause the report to be translated for his use into such vernacular language as the Speaker may direct.

60. (1) Every report by a select committee on a Bill, shall be presented to the Assembly by the Chairman of the committee.

(2) In presenting a report the Chairman shall, if he makes any remarks, confine himself to a brief statement of fact.

(3) After the presentation of the final report, the member in charge of the Bill may move—

(i) that the Bill as reported by the select committee be taken into consideration, but any member may object to its being so taken into consideration if a copy of the report has not been available for the use of members for seven days, and such objection shall prevail, unless the speaker in exercise of his power to suspend this rule allowed the report to be taken into consideration; or

(ii) that the Bill be re-committed either—(a) without limitation, or (b) with respect to particular clauses or amendments only, or (c) with instructions to the select committee to make a particular or additional provision in the Bill.

(4) If the member in charge of the Bill moves that the Bill be taken into consideration, any member may move an amendment that the Bill be re-committed.

(5) The period of notice of a motion to take a Bill into consideration under this rule shall be fifteen days, unless the Speaker, in exercise of his power to suspend the sub-rule allows the motion to be made at shorter notice.

(6) Copies of the report of a select committee may be made available to members and notice of a motion under sub-rule (3) given before the report is formally presented under sub-rule (1).

## (e) CONSIDERATION AND AMENDMENT OF BILLS.

61. When a motion has been agreed to by the Assembly that a Bill be taken into consideration, any member may propose an amendment to such Bill.

62. (1) Any member who wishes to move an amendment to any Bill under the consideration of the Assembly shall give notice thereof, at least ten days before the first day on which the Bill is to be taken into consideration by the Assembly and shall, together with the notice, send a copy of the amendment which he desires to move.

(2) The Secretary shall, if time permits, cause every notice of a proposed amendment to be printed and a copy shall be made available for the use of each member.

(3) If any member present is unacquainted with the language, the Secretary shall also, if requested, and if time permits, cause every such notice to be translated into such language as the Speaker may direct.

63. On an oral request made by a member at a meeting of the Assembly, the Speaker, in his discretion, may admit an amendment to a Bill under the consideration of the Assembly at shorter notice than that prescribed elsewhere in these rules, provided that the question to which such amendment relates shall not be taken into consideration on the day on which the amendment is admitted unless the Speaker directs otherwise.

64. Amendments shall ordinarily be considered in the order of the clauses of the Bill to which they respectively relate.

65. Notwithstanding anything in the foregoing rules, it shall be in the discretion of the Speaker, when a motion that a Bill be taken into consideration has been carried, to submit the Bill, or any part of the Bill, to the Assembly clause by clause. When this procedure is adopted, the Speaker shall call each clause separately, and, when the amendments relating to it have been dealt with, shall put the question "that this clause, or (as the case may be) this clause as amended, stand part of the Bill".

66. (1) If no amendment be made when a motion that a Bill be taken into consideration has been agreed to by the Assembly, the Bill may at once be passed.

(2) If any amendment be made, any member may object to the passing of the Bill at the same meeting; and such objection shall prevail, unless the Speaker in exercise of his powers to suspend this rule allows the motion that the Bill be passed to be made.

(3) Where the objection prevails, the Bill shall be brought forward again at a future meeting, and may then be passed with or without further amendment.

67. When a Bill is passed by the Assembly, the Secretary shall, if necessary, renumber the clauses, revise and complete the marginal notes thereof and make such purely formal consequential amendments therein as may be required and two copies of the Bill shall be submitted to the Speaker and shall be signed by him.

68. When a Bill has been passed by the Assembly it shall be signed by the Speaker and shall be submitted to the Governor for his assent and if assented to by him or the President it shall be published in the Gazette as an Act of the West Bengal Legislature assented to by the Governor or the President as the case may be.<sup>5</sup>

Restriction on powers of  
Legislative Council as to  
Bills other than Money  
Bills.

**197.** (1) If after a Bill has been passed by the Legislative Assembly of a State having a Legislative Council and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council; or

(b) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,

the Legislative Assembly may, subject to the rules regulating its procedure, pass the Bill again in the same or in any subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the Legislative Council and then transmit the Bill as so passed to the Legislative Council.

(2) If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council; or

(b) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is passed by the Council with amendments to which the legislative Assembly does not agree,

the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the

(5) At the commencement of the Constitution, the West Bengal Legislature is functioning with the lower House (Legislative Assembly) only. Hence, in the above rules, there is no reference to the Legislative Council. When the Legislative Council comes into being after the first election under the Constitution is held, the

above rules shall have to be modified; then, after passage of a Bill by the Assembly, a copy thereof, signed by the Speaker, shall be sent to the Legislative Council, for its concurrence (Art. 196 (2)). Similarly, a Bill originating in the Council and passed by it shall be sent to the Assembly for its concurrence.



Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly.

(3) Nothing in this article shall apply to a Money Bill.

*Art. 197 : Power of Legislative Council over Bills other than Money Bills.*<sup>6</sup>—This article differs from the provisions of Art. 108, *ante*, relating to the Union Parliament.

While a difference between the two Houses of the Union Parliament is to be resolved by a *joint sitting*, there is no such provision for solving differences between the Assembly and the Council of the State Legislature,—in this latter case, the will of the lower House *viz.* the Assembly shall ultimately prevail and the Council shall have no more power than to interpose some delay in the passage of the Bill to which it disagrees.

This difference of treatment in the two cases is due to the adoption of two different principles as regards the Union and the State Legislatures. (a) As to the Union Parliament,—it has been said that since the Upper House represents the federal character of the Constitution, it should have a status better than that of a mere dilatory body. Hence, the Constitution provides for a joint sitting of both Houses in case of disagreement between the House of the People and the Council of State, though, of course, the House will ultimately have an upper hand, owing to its numerical majority at the joint sitting. This provision for joint sitting is borrowed from the Government of India Act, 1935 and the Constitution of Australia (where joint sitting is the ultimate remedy). (b) As regards the two Houses of the State Legislature, however, the Constitution of India adopts the English system founded on the Parliament Act, 1911, *viz.* that the Upper House must eventually give way to the Lower House which represents the will of the people. Under this system, the Upper House has no power to obstruct the popular House other than to effect some delay. This democratic provision has been adopted in the case of the State Legislature in *our* Constitution in as much as in this case, no question of federal importance of the Upper House arises.

*Analysis of Art. 197.*—If a Bill (other than a Money Bill) is passed by the Legislative Assembly and the Council, (i) rejects the Bill, or (ii) passes it with such amendments as are not agreeable to the Assembly ; or (iii) does not pass the Bill within 3 months from the time when it is laid before the Council,—the Legislative Assembly may again pass the Bill with or without further amendments, and transmit the Bill to the Council again.

If, on this second occasion, the Council—(a) again rejects the Bill, or (b) proposes amendments, or (c) does not pass it within *one month* of the date on which it is laid before the Council, the Bill shall be deemed to have been passed by both Houses, and then presented to the Governor for his assent.

In short, in the State Legislature, a Bill, as regards which the Council does not agree with the Assembly, shall have two journeys from the Assembly to the Council. In the first journey, the Council shall not have the power to withhold the Bill for more than three months and in the second journey, not more than one month, and at the end of this period the Bill shall become law over the head of the Council, even though it remains altogether inert.

*‘ Having been passed by the Assembly .—*These words indicate that the provisions of this article apply only where a Bill originating in the Assembly is rejected by the Council. Where a Bill originating in the Council is rejected by the Assembly, there is an immediate end of the Bill.

(6) Contrast S. 74 (2) of the Government of India Act, 1935.

Special procedure in respect of Money Bills.

**198.** (1) A Money Bill shall not be introduced in a Legislative Council.

(2) After a Money Bill has been passed by the Legislative Assembly of a State having a Legislative Council, it shall be transmitted to the Legislative Council for its recommendations, and the Legislative Council shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the Legislative Assembly with its recommendations, and the Legislative Assembly may thereupon either accept or reject all or any of the recommendations of the Legislative Council.

(3) If the Legislative Assembly accepts any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Legislative Council and accepted by the Legislative Assembly.

(4) If the Legislative Assembly does not accept any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly without any of the amendments recommended by the Legislative Council.

(5) If a Money Bill passed by the Legislative Assembly and transmitted to the Legislative Council for its recommendations is not returned to the Legislative Assembly within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the Legislative Assembly.

*Art. 198 : Procedure in respect of money Bills?*—This article exactly corresponds to Art. 109, p. 333, *ante*.

**199.** (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely—

Definition of "Money Bills".

(a) the imposition, abolition, remission, alteration or regulation of any tax ;

(b) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State ;

(c) the custody of the Consolidated Fund or the Contingency Fund of the State, the payment of moneys into or the withdrawal of moneys from any such Fund ;

(d) the appropriation of moneys out of the Consolidated Fund of the State ;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure ;

(f) the receipt of money on account of the Consolidated Fund of the State or the public account of the State or the custody or issue of such money ; or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under article 198, and when it is presented to the Governor for assent under article 200, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.

*Art. 199 : Definition of Money Bills.*<sup>7-b</sup>—This article exactly corresponds to Art. 110, p. 335, *ante*.

*Cl. (a) : ' Imposition of a tax '.*—A law ' imposing ' a tax is one which in itself and by itself imposes a tax ; it does not necessarily comprehend every law which deals with taxation<sup>8</sup>. A statute which prescribes that there shall be a certain tax bearing the rates and conditions to be prescribed later, is a law imposing the tax<sup>9</sup> for, in order to be a taxing statute it need not be complete as to the rate, or subject-matter or person to be taxed. On the other hand, a statute by which the tax is thus subsequently assessed, or by which the imposing statute is interpreted, is not a statute ' imposing ' a tax<sup>10</sup>. Imposition of a tax and collection of a tax are not identical ; hence a statute containing procedural or punitive provisions framed to secure the collection of a tax imposed, is not a tax relating to imposition of a tax<sup>11</sup>.

But a statute which imposes a tax does not lose that character simply because it lays down certain conditions precedent to liability under the statute<sup>12</sup>. For, a tax may be imposed absolutely or conditionally.<sup>12</sup>

(7-b) Cf. S. 82, Government of India Act, 1935.

(8) *Crespin & Son v. Co-op. Farmers*, (1916) 21 C.L.R. 205.

(9) *Br. Imperial Co. v. Federal Commr.*, (1926) 38 C.L.R. 153.

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(10) *Br. Imperial Co. v. Federal Commr.*, (1926) 38 C.L.R. 153.

(11) *Wynes, Legislative and Executive Powers*, p. 167.

(12) *Nott Bros. Ltd. v. 98 (1925) 36 C.L.R. 20.*



Where the substantive object of a statute is not the raising of money, but the regulation of a certain line of conduct<sup>13</sup>, or the imposition of a penalty or exaction for departure from a specified course of conduct in business, it is not a statute imposing a tax.<sup>14</sup>

**200.** When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President :

Assent to Bills.

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom :

Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.

#### OTHER CONSTITUTIONS.

*Government of India Act, 1935.*—Art. 200 of the Constitution corresponds to Sec. 75 of the Government of India Act, 1935, with the following differences :

(a) The words ‘in his discretion’ have been omitted, with the result that the Governor must exercise his powers under this article according to the advice of his Ministers.

(b) At the end of the Proviso, the following words have been added :

“and if the Bill is passed again . . . . shall not withhold assent therefrom.”

As a result of this change, the Governor shall have no power to veto a reconsidered Bill, and must assent to a reconsidered Bill whether it is passed in the original form or with amendment.

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ART. 200 : GOVERNOR’S POWER OF VETO.—Cf. Art. 111, p. 337, *ante*.

When a bill is presented before the Governor after its passage by the Houses of the Legislature, it will be open to the Governor to take any of the following steps :

(a) He may declare his *assent* to the Bill, in which case, it would become law at once ; or,

(13) *R. v. Barger* (1908) 6 C.L.R. 41.

(14) *Bailey v. Drezel Furniture Co.*, (1984) 17

(b) He may declare that he withholds his assent to the Bill, in which case the Bill fails to become a law ; or,

(c) He may, in the case of a Bill other than a Money Bill, return the Bill or reconsideration to the Houses (or the House where the Legislature is unicameral), with a message, but if the Bill is again passed by the Legislature with or without amendment, it would be obligatory upon the Governor to give his assent to the Bill, which will thereupon become law ; or,

(d) The Governor may reserve a Bill for the consideration of the President. In one case reservation is compulsory<sup>14-a</sup>, viz. where the law in question would derogate from the powers of the High Court under the Constitution.

(e) In the case of a Money Bill, so reserved, the President may either declare his assent or withhold his assent. But in the case of a Bill, other than a Money Bill, the President may, instead of declaring his assent or refusing it, direct the Governor to return the Bill to the Legislature for reconsideration. In this latter case, the Legislature must reconsider the Bill within six months and if it is passed again, the Bill shall be presented to the President again. But it shall not be obligatory upon the President to give his assent in this case too (Art. 201).

*Proviso (1) : Procedure after return of Bill by the Governor.*—Rule 70 of the West Bengal Legislative Assembly Procedure Rules, 1950, lays down the procedure to be followed in the Assembly for reconsideration after a Bill is returned by the Governor under Art. 200 or 201 of the Constitution :

“ 70. (1) When a Bill is returned to the Assembly by the Governor with a message under Art. 200 or 201 of the Constitution, the Bill shall be reconsidered by the Assembly.

(2) (a) The Speaker shall, on a day fixed by the Governor, read the message to the Assembly. (b) On the day fixed by the Governor for reconsideration of the Bill by the Assembly and within such time as the Governor may allot for the purpose, the principles contained in the message shall be discussed, and on a motion (to which no amendment shall be admissible) moved and carried on that behalf, the recommendations of the Governor contained in his message shall, either, as the Governor may direct, at once or on such latter day as the Governor may fix, be considered in detail and voted upon. (c) The motion referred to in Cl. (b) and amendments to the Bill recommended by the Governor shall be moved by the member appointed by the Governor in his message to be the member in charge of the Bill for the purposes of this rule. (d) Subject to the provisions of this rule and unless the Governor in his message otherwise directs, amendments to any amendment recommended by the Governor may be moved and the period of notice of such amendments shall be such as the Governor may direct.

(3) (a) Amendments to the Bill shall be relevant to the recommendations of the Governor and shall propose only such provisions as lie between the provisions contained in the Bill first submitted for assent and the modifications thereof contained in the recommendations of the Governor. (b) Rule 40 of these rules shall not apply to proceedings under this rule.

(4) When a Bill has been reconsidered and passed by the Assembly, the provisions of rule 68 shall apply.”

*Proviso 2 : Reservation for consideration of President.*—This Proviso incorporates the provision contained in Cl. (b) of Para. XIII of the Instrument of Instructions issued to the Governor-General, and in a similar clause included in the Instrument of Instructions issued to each Provincial Governor, under the *Government of India Act, 1935*. Both the Governor and the Governor-General were required for the assent of the Crown, bills relating to certain matters, including :

“ (b) any Bill which in his opinion would, if it became law, so derogate from the powers of the High Court of any province as to endanger the position which that Court is by the Act designed to fulfil.”

The object of this Proviso is to secure that the Provincial Legislature shall not be able to diminish the authority of the High Court in any manner, without the President's assent. It is one of the means to secure the independence of the State Judiciary.

(14-a) Certain other provisions of the Constitution also require reservation by Governor and President on condition

of validity of State legislation—e.g., art. 31 (3) [p. 156, *ante*] ; arts. 286 (3), 288 (2), *post*.

Barring the cases specified in the Constitution, it would be within the Governor's consideration (subject to ministerial advice) whether he should reserve any particular Bill or not. Amongst other Bills which may be suggested as fit for reservation are—

Bills which in the opinion of the Governor, would be repugnant to any provision of the Constitution e.g., fundamental rights or any Act of Parliament ; or the constitutionality of which is doubtful ; or which would affect the powers of the Union ; or would be a mere colourable exercise of the powers of the State or would seriously conflict with Dominion policy or interests of the people<sup>1</sup> of India as a whole<sup>15,16</sup>. It may be expected that following modern Canadian practice<sup>17</sup>, the Governor or the President will not disallow legislation which is within the competence of the State Legislature but is supposed to be *harsh, unjust or injurious* to private rights. [See, further, under Art. 201].

'Any Bill.'—Proviso 2, thus, includes Money Bills as well, while Proviso 1 refers to Bills other than Money Bills.

*Effect of Proviso 2.*—While the prohibition referred to in this Proviso was contained in the Instruments of Instructions under the Government of India Act, 1935, in the present Constitution, it is embodied in the body of the Constitution itself, so as to give it a *legal* force. In the result, if a Governor overlooks the constitutional prohibition and assents to some Provincial legislation which is in any way derogatory to the position of the High Court, it will be open to challenge that legislation in the Courts as invalid.<sup>18</sup>

**201.** When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom :

Bills reserved for consideration.

Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 201 of the Constitution corresponds to Sec. 76 (1) of the Act of 1935, omitting the power to reserve for the signification of His Majesty's pleasure.

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*Art. 201 : President's veto over State legislation.*—In a strictly federal Constitution like that of the *United States*, the States are autonomous within their sphere and so there is no *scope* for the Federal Executive to veto measures passed by the State Legislatures. Thus, in the Constitution of *Australia*, too, there is no provision for reservation of a State Bill for the assent of the Governor-General<sup>19</sup>, and the latter has no power to disallow State legislation.

(15) Cf. Lefroy, *Canadian Constitutional Law* (1918), pp. 63—66.

(16) *In re Companies*, (1913) 48 S.C.R. 331.

(17) See Kennedy, *Essays in Canadian Constitutional Law*, pp. 44—57.

(18) There was no legal sanction to the

Instructions, under the Act of 1935 [*Jhalak v. Prov. of Bihar*, A.I.R. 1941 Pat. 306 (326) F.B.]

(19) In *Australia*, a State Governor has the power to reserve a Bill for the consideration of His Majesty but not of the Governor-General.



But in the *Canadian Constitution* (Sec. 90), (a) the Governor-General has the power of refusing his assent to a Provincial legislation, which has been reserved by the Governor for the signification of the Governor-General's assent. (b) The Governor-General also possesses the power of directly disallowing a Provincial Act, even where it has not been reserved by the Governor for his assent. These powers thus give the Canadian Governor-General a control over Provincial legislation, which is unknown in the United States or Australia. This power has been exercised by the Governor-General not only on the ground of encroachment upon Dominion powers, but also on grounds of policy, such as injustice, interference with the freedom of criticism and the like<sup>20</sup>. The Provincial Legislature is to this extent subordinate to the Dominion Executive.

As under the Government of India Act,<sup>21</sup> 1935, there is no provision in our Constitution, for a direct disallowance of State legislation by the Union President, but there is provision for disallowance of such bills as are reserved by the State Governor for assent of the President. The President may also direct the Governor to return the Bill to the State Legislature for re-consideration. If the Legislature again passes the Bill by an ordinary majority, the Bill shall be presented again to the President for his re-consideration. But if he refuses his assent again, the Bill fails. In short, there is no means of overriding the President's veto, in case of State legislation. So, the Union's control over State legislation shall be absolute, under the Indian Constitution, and no grounds are limited by the Constitution upon which the President shall be entitled to refuse his assent. As to reservation by the Governor, it is to be remembered that the Governor shall be a nominee of the President. So, the power of direct disallowance will be virtually available to the President through the Governor.

*Effects of reservation.*—It is clear that a Bill which is reserved for the consideration of the President shall have no legal effect until the President declares his assent to it. But no time limit is imposed by the Constitution upon the President either to declare his assent or that he withholds his assent. As a result, it would be open to the President to keep a Bill of the State Legislature pending at his hands for an indefinite period of time, without expressing his mind.

It may be noted that Secs. 57 and 90 of the *British North America Act* as well as Sec. 60 of the *Australian Constitution Act* fix a time limit within which only assent of the Crown to the reserved Bill may be signified, so that on the expiry of that period, there is an automatic end of the Bill, unless it has received the assent in the meantime. But the position will be different under the present Article of our Constitution. The Bill will not lapse by mere efflux of time. The President may express his assent on the expiry of any period of time.

*Proviso : Return by President.*—This Proviso should be compared with Proviso 1 to Art. 200. If a Bill returned by the President is again passed by the Assembly, the Governor is bound to give his assent. Similar is the position of the President as regards Union legislation [Proviso to Art. 111, p. 339, *ante*].

### *Procedure in Financial Matters*

**202.** (1). The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State ■ statement of the estimated receipts and expenditure of the State for that year, in this Part referred to as the “annual financial statement”.

(20) Cf. Reference re : Alberta Bills, (1938) S. C.R. 100 ; A. G. for Alberta v. A. G. for Canada,

(1939) A.C. 117.

(21) S. 75, Government of India Act, 1935.

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of the State ; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State ; and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State—

(a) the emoluments and allowances of the Governor and other expenditure relating to his office ;

(b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and, in the case of a State having a Legislative Council, also of the Chairman and the Deputy Chairman of the Legislative Council ;

(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt ;

(d) expenditure in respect of the salaries and allowances of Judges of any High Court ;

(e) any sums required to satisfy any judgment, decree or award of any Court or arbitral tribunal ;

(f) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged.

*Art. 202 : Annual Financial Statement*<sup>22</sup>.—This article corresponds to Art. 112, p. 343, *ante*.

**203.** (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of State shall not be submitted to the vote of the Legislative Assembly, but nothing in this clause shall be construed as preventing the discussion in the Legislature of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Governor.

(22) Cf. S. 78 of the Government of India Act, 1935.

*Art. 203 : Procedure in Legislature with respect to estimates.*<sup>23</sup>—This article exactly corresponds to Art. 113, p. 348, *ante*.

*Rules made by West Bengal Legislative Assembly.*—The following rules have been made by the West Bengal Legislative Assembly<sup>24</sup> as to the different stages since the presentation of the Annual Financial Statement or Budget :

“96. (1) The Annual Financial Statement for any financial year (herein referred to as the Budget) shall be presented to the Assembly on such date as the Governor may appoint.

(2) No discussion of the Budget shall take place on the day on which it is presented.

97. (1) A separate demand shall ordinarily be made in respect of the grant proposed for each department of the Government, provided that the Finance Minister may include in one demand grants proposed for two or more departments, or make ■ demand in respect of expenditure, such ■ Famine Relief and Interest, which cannot readily be classified under particular departments.

(2) Each demand shall contain, first a statement of the total grant proposed, and then ■ statement of the detailed estimates under each grant, divided into items.

(3) Subject to these rules, the Budget shall be presented in such a form as the Finance Minister may consider best fitted for its consideration by the Assembly.

98. The Budget shall be dealt with by the Assembly in two stages—(i) a general discussion ; and (ii) the voting of demand for grants.

99. (1) On ■ day or days not exceeding four, subsequent to the presentation of the Budget, ■ the Governor may appoint and for such time as he may allot for the purpose, the Assembly shall be at liberty to discuss the Budget as a whole or any question of principle involved therein, but at this stage no motion shall be moved nor shall the Budget be submitted to the vote of the Assembly.

(2) The Finance Minister shall have a general right of reply at the end of the discussion.

(3) The Speaker may, if he thinks fit, prescribe ■ time-limit for speeches.

100. (1) The voting of demands for grants for any financial year shall take place on such days not exceeding twenty but not later than the 30th day of June of that year as the Governor may appoint for the purpose ; the twenty days provided under this sub-rule shall include the days taken for ■ vote on account.

(2) Of the days ■ appointed not more than two days shall be allotted to the discussion on any one demand. As soon as the maximum limit of time for discussion is reached, the Speaker shall forthwith put every question necessary to dispose of the demand under discussion.

(3) On the last day of the days appointed under sub-rule (1) one hour before the time fixed for adjournment for the day, the Speaker shall forthwith put every question necessary to dispose of all the outstanding matters in connection with the demand for grants, and the consideration thereof shall not be anticipated by any motion for adjournment ■ interrupted in any manner whatsoever nor shall any dilatory motion be moved in regard thereto.

(4) On a day appointed under sub-rule (1) for the voting of grants, no other business shall, except with the consent of the Speaker, be taken up earlier than one hour before the time fixed for adjournment for the day ; but nothing herein shall prevent the asking and answering of questions during the time allowed for the purpose under these rules.

(5) No demand for grant shall be made except ■ the recommendation of the Governor.

(6) Motions may be made at this stage ■ reduce any grant but not to increase or alter the destination of ■ grant.”

**204.** (1) As soon as may be after the grants under article 203 have been made by the Assembly, there shall be introduced ■ Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet—

Appropriation Bills.

(a) the grants so made by the Assembly ; and

(b) the expenditure charged on the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the House or Houses.

(23) Cf. S. 79 of the Government of India Act, 1935.

(24) West Bengal Legislative Assembly Procedure Rules, 1950.



(2) No amendment shall be proposed to any such Bill in the House or either House of the Legislature of the State which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this article.

*Art. 204 : Appropriation Bills*<sup>25</sup>—This Article corresponds to Art. 114, 350, *ante*

Supplementary, additional  
or excess grants.

## 205. (1) The Governor shall—

(a) if the amount authorised by any law made in accordance with the provisions of article 204 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year, cause to be laid before the House or the Houses of the Legislature of the State another statement showing the estimated amount of that expenditure or cause to be presented to the Legislative Assembly of the State a demand for such excess, as the case may be.

(2) The provisions of articles 202, 203, and 204 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or grant.

*Art. 205 : Supplementary Grants*.<sup>1</sup>—This article corresponds to Art. 115, p. 356, *ante*.

Votes on account, votes of  
credit and exceptional  
grants.

## 206. (1) Notwithstanding anything in the foregoing provisions of this Chapter, the Legislative Assembly of a State shall have power—

(25) There was no such provision under the Government of India Act, 1935.

(1) Cf. Art. 81, Government of India Act, 1935.

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 203 for the voting of such grant and the passing of the law in accordance with the provisions of article 204 in relation to that expenditure ;

(b) to make a grant for meeting an unexpected demand upon the resources of the State when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement ;

(c) to make an exceptional grant which forms no part of the current service of any financial year ;

and the Legislature of the State shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which the said grants are made.

(2) The provisions of articles 203 and 294 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure.

*Art. 206 : Votes on account, votes of credit and exceptional grants.*—This article corresponds to Art. 116, p. 358, *ante*.

*Rules made by the West Bengal Legislative Assembly.*—The following rules made by the West Bengal Legislative Assembly, relating to vote on account, excess grant and vote of credit or exceptional grant may be noticed :—

“ 101. (1) Notwithstanding anything contained in the preceding rules, on any day or days subsequent to the presentation of the Budget, which may be appointed by the Governor for the purpose, motions may be made for grants in advance in respect of the estimated expenditure for a part of any financial year.

(2) Such demands shall be dealt with by the Assembly in the same way as if they were demands for grants and the provisions of rules 97 and 100 shall *mutatis mutandis* apply.

105. If any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year, a demand for the excess shall be presented to the Assembly and shall be dealt with in the same way as if it were a demand for grant.

106. At any time during the financial year a motion may be made for a vote of credit or exceptional grant as contemplated by Article 206, cl. (1) (b) and (c), of the Constitution.”

**207.** (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 199 shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council :

Special provisions as to financial Bills.

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of a State shall not be passed by a House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill.

*Art. 207 : Special provisions as to financial Bills.*<sup>2</sup>—This article exactly corresponds to Art. 117, pp. 361-4, *ante*.

### *Procedure Generally*

**208.** (1) A House of the Legislature of a State may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

Rules of procedure.

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the corresponding Province shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly, or the Chairman of the Legislative Council, as the case may be.

(3) In a State having a Legislative Council the Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, may make rules as to the procedure with respect to communications between the two Houses.

*Art. 208 : Rules of Procedure in State Legislature.*<sup>3</sup>—This article corresponds to Art. 118, p. 364, *ante*.<sup>4</sup>

**209.** The Legislature of a State may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, the House or Houses of the Legislature of the State in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of the State, and,

Regulation by law of procedure in the Legislature of the State in relation to financial business.

(2) Cf. Art. 82 of the Government of India Act, 1935.

(3) Cf. S. 84 of the Government of India Act, 1935.

(4) For rules framed by the West Bengal

Legislative Assembly under the above Article see the West Bengal Legislative Assembly Procedure Rules, 1950, — Calcutta Gazette, Extraordinary, dated 1-2-1950.



if and so far as any provision of any law so made is inconsistent with any rule made by the House or either House of the Legislature of the State under clause (1) of article 208 or with any rule or standing order having effect in relation to the Legislature of the State under clause (2) of that article, such provision shall prevail.

*Art. 209 : Regulation of financial procedure by legislation.*—This article corresponds to Art. 119, p. 366, *ante*.

**210.** (1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in the Legislature of a State shall be transacted in the official language or languages of the State or in Hindi or in English :

Language to be used in the Legislature.

Provided that the Speaker of the Legislative Assembly or Chairman of the Legislative Council, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in any of the languages aforesaid to address the House in his mother-tongue.

(2) Unless the Legislature of the State by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words " or in English " were omitted therefrom.

*Art. 210 : Language to be used in State Legislature.*<sup>5</sup>—This article corresponds to Art. 120, p. 367, *ante*, with this difference that besides to Hindi and English, the official language of the State [Art. 345] may be used in the State Legislature.

**211.** No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

Restriction on discussion in the Legislature.

*Art. 211 : Restriction on discussion in State Legislature.*<sup>6</sup>—This article corresponds to Art. 121, p. 367, *ante*, minus the exception contained therein.

**212.** (1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

Courts not to inquire into proceedings of the Legislature.

(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers.

(5) Cf. Art. 85 of the Government of India Act, 1935.

(6) Cf. S. 86 (1) of the Government of India Act, 1935.

*Art. 212 : Courts not to enquire into proceedings of the State Legislature?*—This is a reproduction of Art. 122, p. 367, *ante*.

#### CHAPTER IV.—LEGISLATIVE POWER OF THE GOVERNOR.

**213.** (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Power of Governor to promulgate Ordinances during recess of Legislature.

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature ; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President ; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council ; and

(b) may be withdrawn at any time by the Governor.

*Explanation.*—Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void :

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Cl. (1) of Art. 213 corresponds to sub-sec. (1) of Sec. 88 of the Government of India Act, 1935 ; the Proviso to Cl. (1) corresponds to Proviso (b) of Sec. 88 (1) ; Cl. (2) corresponds to sub-secs. (2) (a) and (2) (c) of Sec. 88 ; Cl. (3) and its Proviso correspond to Sec. 88 (3) and its Proviso which was added by the India (Provisional Constitution) Order, 1947.

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*Art. 213 : Governor's power to make Ordinances during recess of State Legislature.*—The provisions of this Article are a reproduction of Art. 123 [p. 370, *ante*], with certain changes. Hence, the Ordinance-making power of the Governor is similar to that of the President, on the following points :

(a) The Governor shall have this power only when the Legislature is not in session ;

(b) It is not a discretionary power, but must be exercised with the aid and advice of ministers ;

(c) The Ordinance must be laid before the State Legislature when it re-assembles, and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly, unless disapproved earlier by that Legislature.

On the other hand, the Ordinance-making of the Governor *differs* from that of the President, on the following points :

(a) The Governor cannot make Ordinances without 'instructions' from the President, if—

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature ;<sup>8</sup> or (b) the Governor would have deemed it necessary to reserve ■ Bill containing the same provisions for the consideration of the President<sup>9</sup> ; or (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President<sup>10</sup> or it had been introduced with the *previous sanction* of the President [Art. 213 (1), Proviso].

(b) The scope of the Ordinance-making power of the Governor is co-extensive with the legislative powers of the State Legislature, and he shall be confined to the subjects in Lists II and III of Schedule VII. But as regards repugnancy with ■ Union law relating to ■ *concurrent* subject, the Governor's Ordinance will prevail notwithstanding repugnancy, if the Ordinance had been made in pursuance of 'instructions' of the President. [Art. 213 (3), Proviso].

*Cl. (1) : 'Is satisfied'.*—As in the case of an Ordinance made by the President (see p. 371, *ante*), the Courts cannot question the validity of an Ordinance made by

(8) Cf. Arts. ■■ (2) ; 304, Proviso.

(9) Cf. Art. 200.

(10) Cf. Arts. 31 (3) ; 254 (2) ; 286 (3) ; 288 (2).



a Governor on the ground that there were no sufficient reasons for promulgating an Ordinance<sup>11</sup> or that it was made *mala fide*, to circumvent judicial decisions.<sup>11</sup> The only question with which the Courts are concerned is only one of legislative competence<sup>12</sup>.

*Proviso to Cl. (3).*—This Proviso gives validity to an Ordinance made by the Governor in respect to a matter in the Concurrent List, which is repugnant to a Union law, in the same manner as laid down in Art. 254 (2), as regards an Act of the State Legislature, of the same nature. But whereas under Art. 254 (2), assent of the President, after the Act is passed is required, the present Proviso validates the Ordinance if it has been made by the Governor in pursuance of 'instructions' received from the President. Thus, in the one case, the assent of the President is previous and in the other it is subsequent to the legislation.

A Governor's Ordinance, made without such previous instructions, is void<sup>13</sup>. This is clear from the Proviso to Cl. (1) of the present article which provides that the Governor *shall not* promulgate such an Ordinance without previous instructions of the President.

## CHAPTER V.—THE HIGH COURTS IN THE STATES.

**214.** (1) There shall be a High Court  
High Courts for States. for each State.

(2) For the purposes of this Constitution the High Court exercising jurisdiction in relation to any Province immediately before the commencement of this Constitution shall be deemed to be the High Court for the corresponding State.

(3) The provisions of this Chapter shall apply to every High Court referred to in this article.

### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—S. 219 of that Act, ■ amended by the India (Provisional Constitution) Order, 1947, was—

"(1) The following courts shall in relation to India be deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras, Bombay, Allahabad, Patna and Nagpur, the High Court of East Punjab, the Chief Court in Oudh, any other court in India constituted or reconstituted under this chapter as a High Court, and any other comparable court in India which ■ Act of the appropriate Legislature may declare to be ■ High Court for the purposes of this Act :

Provided that, if provision is made by His Majesty by Letters Patent for the establishment of a High Court to replace any court or courts mentioned in this sub-section, then, as from the establishment of the new court this section shall have effect as if the new court were mentioned therein in lieu of the court or courts so replaced.

(2) The provisions of this chapter shall apply to every High Court in India.

(3) In this Chapter "India" means the territories comprised in the Governors' Provinces and Chief Commissioners' Provinces, and does not include any Acceding State."

In exercise of the power conferred by Sec. 229 (1), of the Government of India Act, 1935, as adapted by the India Provisional Constitution (Amendment) Order, 1948, the following High Courts were constituted or reconstituted :

(i) A new High Court was created for Orissa, making a corresponding reduction in the jurisdiction of the Patna High Court, by the Orissa High Court Order, 1948.<sup>13</sup>

(11) *Jnan Prasanna v. Proc. West Bengal*, D.L.R. 201 (Pat.).  
A.I.R. 1949 Cal. 1 (F.B.).

(12) *Bhutnath v. Prov. of Bihar*, (1949) 4

(13) *Gazette of India, Extraordinary*, 30th April, 1948 : (1948) F.L.J. Supp. 14.

(ii) A new High Court was created, by making a corresponding reduction in the jurisdiction of the Calcutta High Court, by the Assam High Court Order, 1948.

(iii) The Chief Court in Oudh was amalgamated with the High Court in Allahabad, by the United Provinces High Court (Amalgamation) Order, 1948.<sup>14</sup>

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Cl. (1) : *A High Court for each State.*—This clause refers to the 9 States in Part A. Under Art. 238 (12), *post*, each of the 8 States in Part II shall also have a High Court. As regards States in Part C, *see* Art. 241, *post*.

Cl. (2) : ‘*Immediately before the commencement of this Constitution.*’—See sub-sec. (1) of Sec. 219 of the Government of India Act, 1935, quoted *above*.

Cl. (3) : *Applicability of Chap. V.*—Though this clause says that the provisions of Ch. V shall apply to States in Part A,—according to Art. 238, all the provisions of this Chapter will also apply to the High Courts in the States in Part B. These provisions will also apply to the High Courts in Part C [Art. 241 (2), *post*],—subject to modifications made by Parliament by law.

**215.** Every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself.

High Courts to be courts of record.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—S. 220 (1) of the Act was—

“Every High Court shall be a court of record. . . . .”

#### INDIA

Art. 215 : *High Court to be a Court of record.*—This article corresponds to Art. 129, p. 388, *ante*. As to ‘Contempt of Court,’ *see* p. 76, *et seq*.

**216.** Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint :

Constitution of High Courts.

Provided that the Judges so appointed shall at no time exceed in number such maximum number as the President may, from time to time, by order fix in relation to that Court.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 216 of the Constitution reproduces Sec. 220 (1) of the Act of 1935, substituting ‘President’ for ‘Governor-General.’

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Art. 216 : *Constitution of High Courts.*—The legislative power to constitute a High Court belongs to Parliament [Entry 78, List I, 7th Sch.]. The present article refers to the number of Judges constituting a High Court.

(14) *Gazette of India, Extraordinary*, 19th July 1948, p. 1051 : (1948) F.L.J. Supp. 12.

*When is a High Court constituted.*—The words “as the President may deem. . .” makes it clear that it is the appointment of the Chief Justice that constitutes a High Court. The President is not bound to appoint any other Judge or to fill up the vacancy in the office of any other Judge. The failure to fill up a vacancy would not affect the jurisdiction of the Court.<sup>15</sup> As to vacancy in the office of Chief Justice, see Art. 223, *post*.

**217.** (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office until he attains the age of sixty years :

Provided that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office ;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court ;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

(a) has for at least ten years held a judicial office in the territory of India ; or

(b) has for at least ten years been an advocate of a High Court in any State specified in the First Schedule or of two or more such Courts in succession:

*Explanation.*—For the purposes of this clause—

(a) in computing the period during which a person has been an advocate of a High Court there shall be included any period during which the person has held judicial office after he became an advocate ;

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

(15) Cf. *Lalsingh v. Ghansham*, (1887) 9 All. 322 ; *Sampatilal v. Baliprasad*, (1949) 54 C. W. N. 25 ; *Collector of Etah v. Golab*, (1936) All. 92.



## CL. (1) :

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sub-sec. (2) of S. 220 of that Act, as amended by the India (Provisional Constitution) Order, 1947, was—

“(2) Every Judge of a High Court shall be appointed by the Governor-General and shall hold office until he attains the age of sixty years :

Provided that—

(a) ■ Judge may by resignation under his hand addressed to the Governor resign his office ; (b) ■ Judge may be removed from his office by the Governor-General on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them, report that the Judge ought on any such ground to be removed ; (c) the office of a Judge shall be vacated by his being appointed to be ■ Judge of the Federal Court or of another High Court.”

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Cl. (1) : *Appointment of High Court Judges.*—This article corresponds to Art. 124 (2), p. 381, *ante*. The appointment will be made by the President. But he will consult the following persons in the matter—(1) Chief Justice of India ; (2) Governor of the State concerned ; (3) Chief Justice of that High Court. In the case of appointment of the Chief Justice himself, only (1) and (2) need be consulted.

The Proviso to Cl. (1) of Art. 217 corresponds to the second Proviso to Art. 124 (2), p. 381, *ante*, with the addition of Cl. (c), which is necessitated by the provision for transfer in Art. 222, *post*.

## CL. (2) :

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—See Sub-sec. (3) of S. 220 of that Act.

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Cl. (2) : *Qualifications for appointment as High Court.*—The points to be noted, with reference to the Government of India Act, 1935, are—(a) the exclusion of Barristers of the United Kingdom who are not advocates of a High Court of India, within the meaning of Sub-cl. (b) ; (b) the exclusion of members of the I.C.S., from post-Constitution appointments unless he satisfies Cl. (2) (a) ; (c) raising of period of service of a judicial officer from 5 to 10 years.

*Analogous Provision.*—See Art. 376 ■ to continuance in office of Judges sitting at the commencement of the Constitution.

**218.** The provisions of clauses (4) and (5) of Article 124 shall apply in relation to ■ High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

Application of certain provisions relating to Supreme Court to High Courts.

*Analogous Provisions.*—See Arts. 121, 211 [pp. 367, 482, *ante*] as to immunity of High Court Judges from criticism in Parliament or State Legislature ; Art. 202 (3) (d) which makes the salary and allowances of High Court Judges non-votable ; and Pro■ to Art. 221 (1), which safeguards the allowances, rights in respect of leave and pension against being affected after appointment.

**219.** Every person appointed to be a Judge of a High Court in a State shall, before he enters upon his office, Oath or affirmation by Judges of High Courts. make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

**220.** No person who has held office as a Judge of a High Court after the commencement of this Constitution shall plead or act in any Court or before any authority within the territory of India. Prohibition of practising in courts or before any authority by Judges.

*Art. 220 : Prohibition of practice by ex-Judge.*<sup>16</sup>—This prohibition also applies to Judges appointed before commencement of the Constitution but continuing in office thereafter.

**221.** (1) There shall be paid to the Judges of each High Court such salaries as are specified in the Salaries, etc., of Judges. Second Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule :

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

*Art. 221 : Salaries, etc., of High Court Judges.*—This article corresponds to Art. 125, p. 385, *ante*. [See Part D of the 2nd Sch., for the salaries.]

*Analogous Provisions.*—See Art. 238 (13), *post*, for salaries of Judges of High Courts in States in Part B. Salaries and allowances may both be reduced under a Proclamation of Financial Emergency [Art. 360 (4) (b), *post*.]

**222.** (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court within the territory of India. Transfer of a Judge from one High Court to another.

(2) When a Judge is so transferred, he shall, during the period he serves as a Judge of the other Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

*Art. 222 : Transfer of High Court Judges.*—There was no provision in the Act of 1935 for the transfer of a Judge from one High Court to another. The present

(16) There was no specific provision in the Government of India Act, 1935, to the above effect and this gave rise to the case of *Iqbal*

*Ahmad v. Allahabad Bench* (1950) S.C.J. 131 (F.C.).

article provides for such transfer, subject to compensatory allowance, as determined by the President.

**223.** When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

Appointment of acting Chief Justice.

*Art. 223 : Appointment of Acting Chief Justice.*<sup>17</sup>—This article is analogous to Art. 126, p. 387, *ante*.

*Delay in filling up of the vacancy would not affect jurisdiction of the High Court.*—So long as the vacancy is not filled up, there will be a temporary suspension of the duties to be discharged by the Chief Justice, but that the High Court itself will continue to have its jurisdiction or that the other Judges will continue to function.<sup>18</sup>

**224.** Notwithstanding any thing in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court :

Attendance of retired Judges at sittings of High Courts.

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.

*Art. 224 : Attendance of retired Judges.*—This article corresponds to Art. 128, p. 387, *ante*. There is no provision for the appointment of any temporary or Additional Judges for the High Court in the Constitution<sup>19</sup>, as existed in S. 222, Subsecs. (2)-(3), of the Government of India Act, 1935. Instead, there is this new provision in the Constitution for the employment of ex-Judges for particular periods.

**225.** Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution :

Jurisdiction of existing High Courts.

(17) Cf. S. 222 (1), Government of India Act, 1935.

(18) *Emperor v. Sohrai*, (1938) Pat. 550 ; *Collector of Etah v. Golab*, (1936) All. 322 ;

*Sampatilal v. Baliprasad*, (1949) 54 C.W.N. 92.

(19) There is no provision in Part VI, corresponding to Art. 127.



Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—S. 223 of that Act, as amended by the India (Provisional Constitution) Order, 1947, was—

“Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act, to the provisions of any order made under the Indian Independence Act, 1947, and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the establishment of the Dominion.”

Sec. 226 (1)<sup>20</sup> provided—

“(1) Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.”

Under the above provision, it was held that the High Court, in its original jurisdiction, could not do any of the following acts—

(a) to issue a mandamus upon a revenue authority to do his statutory duty in the matter of assessment of income-tax<sup>21</sup>; (b) to try a suit for wrongful distraint for realisation of quit rent due to Government;<sup>22</sup> (c) to entertain a suit as regards the validity of the orders of the Revenue authority with regard to payment of stamp duty under the Stamp Act<sup>23</sup>; (d) to entertain a suit to recover the penalty paid under S. 167 (17) of the Sea Customs Act (VIII) of 1878<sup>24</sup>; or relating to a confiscation order under S. 167 (36) of that Act;<sup>25</sup> (e) to interfere with the order of a village headman under S. 10 of Reg. 11 of 1816, either on appeal or revision;<sup>1</sup> (f) to entertain a suit relating to a dispute regarding demand or assessment of revenue,<sup>2</sup> e.g., determination of amount of income-tax<sup>3</sup>, (g) to entertain an application under S. 491, Cr.P.C., where a person had been detained under S. 46 (2) of the Income-tax Act.<sup>4</sup> The words ‘according to the usage and practice . . . . .’ were held to qualify the words ‘concerning an act ordered or done . . . . .’<sup>5</sup> But the section did not preclude the High Court, in a matter concerning any act ordered or done in the collection of revenue, as opposed to an act or order concerning the *revenue itself*, from enquiring whether that act has been ordered or done according to the law for the time being in force.<sup>5</sup>

(20) Reproducing S. 106 (2) of the Government of India Act, 1915.

(21) *Alcock, Ashdown & Co. v. Chief Revenue Authority*, A.I.R. 1923 P.C. 138; *Dinshaw v. Commissioner of Income-tax*, A.I.R. 1943 Bom. 77.

(22) *Spooner v. Juddow*, (1846) 4 M.I.A. 353.

(23) *Dewarkhand Cement Co. v. Secretary of State*, A.I.R. 1939 Bom. 215.

(24) *Aktieselskab v. Secretary of State*, A.I.R. 1940 Bom. 294 (303).

(25) *Thin Yen v. Secretary of State*, A.I.R. 1939 Cal. 763 (767); *Govindarajulu v. Secretary of State*, A.I.R. 1927 Mad. 689.

(1) *In re Perianna*, A.I.R. 1940 Mad. 183.

(2) *Governor-in-Council v. Raleigh Investment Co.*, A.I.R. 1946 F.C. 51 (54).

(3) *Janda Rubber Works v. Income-tax Officer*, A.I.R. 1950 E.P. 213.

(4) *Shaikh Ali v. Collector*, 51 Bom. L.R. 589.

(5) *Governor-General in Council v. Shiromani Mills, Ltd.*, A.I.R. 1946 F.C. 16 (23); *Shiromani Mills v. Governor-General in Council*, A.I.R. 1945 All. 354 (357); *In re United Province Electric Supply Co.*, 61 Cal. 556; *Indumati v. Court of Wards*, A.I.R. 1938 Cal. 385 (387).

## INDIA

*Object of Art. 225 : Jurisdiction of existing High Courts.*—The object of this article is to preserve all the powers possessed by the High Court at the date of commencement of the Constitution, until affected by any law passed by a competent Legislature (Entries 79, 95 of List I : 65 of List II and 46 of List III). At the same time, it does not confer on the High Courts any power or jurisdiction which they did not possess on that date.

*Analogous Provision.*—See Arts. 230-1 as to extension of or exclusion from jurisdiction of High Court in respect of any area outside the State where it has its principal seat.

*Proviso.*—The Proviso, removes the bar that existed under S. 226 (1) of the Act of 1935, to the original jurisdiction of the High Court in revenue matters [see *above*].

**226.** (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

CL. (1) : 'Including writs . . .'.—These words in Art. 32 (2), (p. 157, *ante*) and in Art. 226 (1), indicate that the powers of the Supreme Court or the High Court under these articles is not confined to issuing prerogative writs only.<sup>6</sup> Hence, though the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting prerogative writs (*see* p. 172, *ante*), our Supreme Court or High Courts would not be fettered by that consideration, in proper cases.<sup>6</sup> For the same reason, the Court may give a direction which does not exactly correspond to one of the specific writs mentioned in the above articles. Thus, the Court may give a direction to a State Government prohibiting it to enforce a restraint order against the petitioner.<sup>7</sup>

'For any other purpose'.—This means any purpose other than the enforcement of fundamental rights, *i.e.*, the enforcement of some other legal right or the performance of some legal duty.<sup>7-a</sup> It thus includes the other purposes for which such writs or orders were available before the commencement of this Constitution<sup>7-b</sup> (*see* p. 161, *et seq.*)

CL. (2) : The relief under Art. 32 can be sought from the Supreme Court at the first instance, without first resorting to the High Court under Art. 226. The reason is that the remedial right under Art. 32 is itself a fundamental right guaranteed by that articles—to which there is no similar provision in the Constitution of the United States.<sup>7-c</sup>

(6) *Rashid v. Municipal Board*, (1950) D.L.R. (S.C.) 53 (56).

(7) *Brajnandan v. State of Bihar*, (1950) D.L.R. (Pat.) 111 (170).

(7-a) *Bagram v. State of Bihar*, (1950) D.L.R.

(Pat.) 189 (F.B.).

(7-b) *Emp. v. Jaisinghai*, (1950) 52 Bom. L.R. 544 (F.B.).

(7-c) *Romesh Thappar v. State of Madras*, (1950) D.L.R. (S.C.) 42 (45).

Power of superintendence over all courts by the High Court.

**227.** (1) Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

- (a) call for returns from such Courts ;
- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts ; and
- (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein :

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 227 of the Constitution is a reproduction of S. 224 of the Government of India Act, 1935, with the following changes :

(a) The words ‘ and tribunals throughout the territories in relation to which it exercises jurisdiction ’ have been added in Cl. (1), after the word ‘ Courts.’

(b) Sub-sec. (2) of S. 224, which was as follows, has been omitted ;

“ Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.”

(c) Cl. (4) of the Article is new.

#### INDIA

##### WHETHER SUPERINTENDENCE WOULD INCLUDE POWER OF JUDICIAL REVISION.

(A) *Under the Act of 1915.*—Under the corresponding S. 107 of the Government of India Act, 1915, ‘ superintendence ’ was interpreted to include judicial as well as administrative superintendence, and the High Court intervened by revision in proper cases under S. 107 of the Government of India Act, 1919, in cases where S. 115 of the Civil Procedure Code<sup>8</sup> or S. 439 of the Criminal Procedure Code<sup>9</sup> did not apply.

(B) *Under the Act of 1935.*—But Sub-sec. (2) of S. 224 of the Act of 1935 expressly barred this power of judicial interference in exercise of the power of superintendence, and Beaumont, C.J., in *Balkrishna v. Emperor*<sup>9</sup> observed that this taking away of the power of extraordinary revision from the High Court was an ‘ unfortunate thing ’. By reason of sub-sec. (2), it was held under the Act of 1935 that S. 224 had no application to legal proceedings and did not confer any fresh

(8) *Sholapur Municipality v. Tuljiram*, A.I.R. 1931 Bom. 582 ; *Emperor v. Jannadas*, A.I.R. 1937 Bom. 153.

(9) *Balkrishna v. Emperor*, A.I.R. 1943 Bom. 1 ; *Manmatha v. Emperor*, (1932) 37 C.W.N. 201.



revisional jurisdiction. It only conferred powers of an *administrative* character<sup>10</sup>. 'Superintendence' in this section did not include a right of control over individuals or official bodies exercising judicial functions, such as the Board of Revenue, similar to that exercised in England by writ of *certiorari*<sup>10-a</sup>. Thus, under this section, the High Court could not interfere with—(i) a Deputy Collector's order under the Rent Act<sup>11</sup>; (ii) a decision of the District Judge, under S. 36 of the Legal Practitioner's Act<sup>12</sup>; or under the Bengal Municipal Act<sup>13</sup>.

(C) *Under the Constitution*.—The omission of any provision like that of sub-sec. (2) of S. 224 of the Government of India Act, and the omission of the words "and may do . . . . that is to say" from the end of sub-sec. (1) indicate that the High Court may, under its power of superintendence, exercise a power of revision in cases where no revision lies under S. 115 of the Civil Procedure Code<sup>14</sup>. The Constitution thus restores to the High Court the power it had under the Government of India Act, 1915.<sup>14-a</sup>

But the High Court's power of revision under the Constitution would be restricted to interference in cases of *grave dereliction of duty for which no other remedy* is available and which would have serious consequences if not remedied<sup>15</sup>.

'Superintendence' does not vest the High Court with any unlimited prerogative to correct all species of hardship<sup>16</sup>. The word has gathered a legal force and signification. It does not involve a responsibility of the superintending tribunal for the correctness of the decisions of the inferior Courts, either in fact or law. If the inferior Court, after hearing the parties, comes to an erroneous decision, on a matter within its jurisdiction, the Court having power of superintendence never interferes. The only mode of questioning the propriety of such a decision is by appeal.<sup>17</sup> Nor can this power be invoked to get round any express provision of the Code of Criminal Procedure<sup>18</sup>, or any other law.<sup>19</sup>

The general superintendence conferred by this constitutional provision over all jurisdictions subject to appeal, it is a duty 'to keep them within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner'<sup>16</sup>. Thus under the power of superintendence under the present article, the High Court would interfere with the decision of the inferior Court, Civil or Criminal, in the following cases—

(i) Non-exercise or illegal exercise of jurisdiction<sup>16</sup>.

(ii) Fraud on the part of the prosecutor and error on the face of the proceedings, e.g., where there is no evidence at all of the facts charged, or if on the Magistrate's own view of the facts proved, the offence was not in law committed.<sup>16</sup> If the case is otherwise ■ fit one for interference under its power of superintendence, according to the principles enumerated above, the High Court would interfere, even though the accused has allowed his appeal to be time-barred.<sup>16</sup>

(iii) A capricious interference with ■ Pleader Commissioner's Bill.<sup>20</sup>

(iv) An improper exercise of the power of granting or refusing an amendment of pleading.<sup>14-a</sup>

(10) *Sakal v. Iswar* (1941) 2 Cal. 366; *Jahnavi v. Basudeb* (1949) 54 C.W.N. 626.

(10-a) *Ryots of Garabandhu v. Parlakimedi* (1943) 70 I.A. 129.

(11) *Bhagaban v. Chandu* (1938) 1 Cal. 256.

(12) *Re Somana* (1938) Mad. 988.

(13) *Banbehari v. Makhan* (1938) 2 Cal. 69.

(14) Cf. *Sholapur Municipality v. Tulijaram* A.I.R. 1931 Bom. 582; *Lalla v. Balkrishna*, A.I.R. 1933 Lah. 327 (382); *Gokool v. Motilal*, A.I.R. 1931 Cal. 553; *Jawahir v. Fleming*, A.I.R. 1937 Lah. 28; *Indubala v. Lakshminarayan*, A.I.R. 1935 Cal. 102 (107); *Weli Ram v. Lal Shah*, A.I.R. 1935 Lah. 956; *Solomon v. Stark*, A.I.R. 1934 Cal. 758; *Lokenath v. Abani*, A.I.R. 1934 Cal. 102; *Behari v. Sardari*, A.I.R. 1933 Lah. 605; *Ganesh v. Asanand*, A.I.R. 1933 Lah. 259;

*Bhimnath v. Jagannath*, A.I.R. 1925 Pat. 674; In the matter of *Kadhari*, 42 All. 26.

(14-a) *Abdul Rahim v. Jabbar*, (1950) 54 C.W.N. 445.

(15) Cf. *Duraiswami v. Secretary of State*, A.I.R. 1939 Mad. 648 (650); *Mehrab v. Secretary of State*, A.I.R. 1933 Lah. 157.

(16) *Manmatha v. Emperor* (1932) 37 C.W.N. 201.

(17) *Gopal v. Court of Wards* (1867) 7 W.R. 430.

(18) *Emperor v. Jamnadas*, A.I.R. 1937 Bom. 153 (154).

(19) *Jhakri v. Ram*, A.I.R. 1935 All. 514; *Sapre v. Collector*, A.I.R. 1937 Nag. 12; *Masoom v. Ahmad*, A.I.R. 1933 All. 764.

(20) *Sitansujban v. Dilip* (1950) 54 C.W.N. 782.

'Superintendence' includes the power to guide, advise and encourage Judges of the subordinate courts<sup>21-22</sup> to direct subordinate courts and tribunals to carry out its orders<sup>23</sup>; to direct inquiry with a view to take disciplinary action for cases of flagrant maladministration of justice.<sup>24</sup>

'Tribunals'.—See p. 180, *et seq.*, *ante*. Even under the Government of India Acts, wherein the word 'tribunal' was absent,—the word 'Courts' was interpreted in the wide sense, under the Government of India Acts, to include any tribunal or authority, exercising *judicial* as distinguished from ministerial or administrative functions. Thus, it was held that under the above power of superintendence the High Court could revise the orders of—(a) the District Magistrate in deciding election disputes<sup>25</sup>; or (b) the Returning Officer as to the eligibility of a candidate<sup>1</sup>; (c) the Bar Association under the Legal Practitioners Act<sup>2</sup>; (d) a village headman under Reg. XI of 1916<sup>3</sup>; (e) the tribunal acting under section 32 of the Land Acquisition Act, 1894<sup>4</sup>; (f) District Judge acting under section 36 of the Bengal Municipal Act.<sup>5</sup>

The insertion of the word 'tribunals' in the *Constitution* makes it clear that all tribunals exercising quasi-judicial powers, *e.g.*, the labour tribunals<sup>5-a</sup> shall be under the supervisory control of the High Court, except military tribunals [Cl. (4)],—and whether such tribunals are under the appellate jurisdiction of the High Court or not,—but not so as to interfere upon the merits of an *intra vires* order.<sup>5-a</sup>

'Jurisdiction'.—The use of the unqualified word 'jurisdiction' includes all different jurisdictions of the High Court,—Civil,<sup>5-b</sup> Criminal, Admiralty, Testamentary, Matrimonial, etc.<sup>6</sup>

*Analogous Provision*.—The present power of superintendence and revision is in addition to the power of the Court to control inferior tribunals by the writs of *certiorari*, *mandamus* or *prohibition* [Art. 226 (1), p. 492, *ante*.]

**228.** If the High Court is satisfied that a case pending in a court subordinate to it involves a substan-

Transfer of certain cases to High Court.

tial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

(a) either dispose of the case itself, or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

#### OTHER CONSTITUTIONS

*U.S.A.*—It has been already pointed [p. 377, *ante*] out that the function of interpretation of the Constitution, as the interpretation of any other law, belongs to all Courts of the land,—not merely the Supreme Court or the Federal Courts.

(21-22) *Emperor v. Tarapore* A.I.R. 1940 Sind 239 (244).

(23) *Sant Lal v. Kedar*, A.I.R. 1935 All. 519.

(24) *Rajkumar v. Ramsundar*, A.I.R. 1932 P.C. 69.

(25) *Mahedar v. Kanti* (1934) 38 C.W.N. 838; *Chandrakishore v. Sachindra*, (1936) 65 C.L.J. 174.

(1) *Manindra Chandra v. Provas* (1923) 51 Cal. 58.

(2) *District Bar Association v. Bawa Ram*, A.I.R. 1936 Lah. 382.

(3) *In re Perrianna*, A.I.R. 1940 Mad. 183.

(4) *Adhar v. Radha Madan*, A.I.R. 1932 Cal.

660.

(5) *Narayan v. Aghore* (1935) 39 C.W.N. 971; also cf. *Sholapur Municipality v. Tuljiram*, A.I.R. 1931 Bom. 582.

(5-a) *Municipal Commrs. v. P. R. Mukerjee*, (1950) 54 C.W.N. 784 (792).

(5-b) Court-fee is payable under Sch. II, Art. 1 (d) (ii) of the Court-fees Act, or an application under Art. 227 of the Constitution *In re Bhagabati* (1950) 54 C.W.N. 795.

(6) Cf. *Malati v. Surendra*, A.I.R. 1942 Cal. 32 (34).

But though Courts of all grade shall have the jurisdiction to determine the validity of a statute, an inferior Court should proceed—

“with more than ordinary caution and hesitation, and to abstain altogether from declaring ■ statute invalid unless in the clearest cases, especially if, without serious detriment to justice, the decision can be delayed until the superior Court can have an opportunity to pass upon it”.<sup>7</sup>

*Australia.*—Under section 77 of the Australian Constitution Act, cases ‘arising under the Commonwealth Constitution or involving its interpretation’ can be determined by—(i) the High Court of Australia; (ii) other Federal Courts created by the Commonwealth Parliament; (iii) State Courts invested by the Commonwealth Parliament with ‘federal jurisdiction.’<sup>8</sup>

*Government of India Act, 1935.*—Section 225 of that Act, as amended in 1947, was as follows—

“(1) If on an application made in accordance with the provisions of this section ■ High Court is satisfied that a case pending in ■ inferior court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Dominion or Provincial Act, it shall exercise that power.

(2) An application for the purposes of this section shall not be made except, in relation to a Dominion Act, by the Advocate-General for the Dominion and, in relation to ■ Provincial Act, by the Advocate-General for the Dominion or the Advocate-General for the Province.”

#### INDIA

ART. 228 : *Withdrawal of cases relating to interpretation of Constitution.*—This article makes it obligatory for the High Court to withdraw from the subordinate Courts all cases which involve questions of law as to the interpretation of the Constitution. The article thus denies to the subordinate Courts ■ right to interpret the Constitution, for the sake of attaining some degree of uniformity as regards constitutional decisions. It would also be the duty of an inferior Court to refer ■ case to the High Court as soon as it comes to discover that it involves a question within the purview of the present Art.<sup>8-a</sup>

As regards *disposal* of such cases by the High Court, a distinction is made between (a) cases solely involving constitutional questions, and (b) those where constitutional questions were mixed with questions of ordinary law. In the former class of cases, the High Court would dispose of the entire suit or case, while in the latter class of cases, the High Court would only dispose of the constitutional issues and return the case to the lower Court to determine the other issues in the ordinary way. The High Court is given a discretion in the matter of disposal and in cases of small value or other proper cases, it may dispose of the entire case including ordinary questions.

The present Article improves upon the corresponding provision in section 225 of the Government of India Act, 1935, in the following respects—

(a) Under the Act of 1935, the High Court could exercise its power only on an application by the Advocate-General for the Dominion or for the Province. The Constitution does not specify how the High Court may be satisfied for the purpose of exercise of this power. Hence, the High Court may be satisfied not only upon the motion of the above Law-Officers but also of either party to the case or on a reference from the subordinate Court.

(b) On transfer,—instead of deciding the whole case, the High Court ■ free, under the Constitution, to determine the constitutional question only and then return the record to the subordinate Court.

‘Substantial question of law as to the interpretation of this Constitution.’—As to the meaning of this expression, see Art. 147, p. 429, ante.

**229.** (1) Appointments of officers and servants of ■ High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct :

Officers and servants and the expenses of High Courts.

(7) Cooley, Constitutional Law, p. 191.

(8) *Australian Apple Board v. Tonking* (1942) 66 C.L.R. 77 (104).

(8-a) See r. 14-A of the Calcutta High Court, Appellate side Rules.



Provided that the Governor of the State in which the High Court has its principal seat may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose :

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State in which the High Court has its principal seat.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

*Art. 229 : Officers and expenses of High Court.*—This article is analogous to art. 146, p. 429, *ante*.

Extension of or exclusion from the jurisdiction of High Courts.

## 230. Parliament may by law—

(a) extend the jurisdiction of a High Court to, or  
(b) exclude the jurisdiction of a High Court from,  
any State specified in the First Schedule other than, or any area not within, the State in which the High Court has its principal seat.

### OTHER CONSTITUTIONS\*

*Government of India Act, 1935.*—S. 230 (1) (2) of that Act, as amended by the India (Provisional Constitution) Order, 1947, was—

“(1) The Governor-General may, if satisfied that an agreement on that behalf has been made between the Governments concerned, by order extend the jurisdiction of a High Court in any Province to any area in India not forming part of that Province, and the High Court shall thereupon have the same jurisdiction in relation to that area as it has in relation to any other area in relation to which it exercises jurisdiction.

(2) Nothing in this section affects the provisions of any law or letters patent in force immediately before the establishment of the Dominion empowering any High Court to exercise jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of any Province.”

Under the above power, the following order was passed by the Governor-General—Madras High Court (Extension of Jurisdiction to Coorg) Order,<sup>9</sup> 1948,—extending the jurisdiction of the Madras High Court to the Chief Commissioner's Province of Coorg.

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*Art. 230 : Extra-State jurisdiction of High Courts.*—Instead of the Crown or the Governor-General as under the Government of India Act, 1935, it is Parliament which is vested with exclusive power to extend the jurisdiction of a High Court to any area outside the state where its principal seat is situate, or to

(9) *Gazette of India, Extraordinary*, 28th February, 1948 : (1948) F.L.J. Supp. 11.

exclude any such area from the existing jurisdiction of a High Court e.g., that of Madras High Court over Coorg.

*Legislative Power.*—See Entry 79 of List I, 7th Sch, *post*.

*Analogous Provision.*—Art. 230 is to be read along with Art. 231 which imposes limitations upon the State Legislatures in order to maintain the exclusive jurisdiction of Parliament conferred by the present Article.

Restrictions on the powers of the Legislatures of States to make laws with respect to jurisdiction of a High Court in State having jurisdiction outside that State.

**231.** Where a High Court exercises jurisdiction in relation to any area outside the State in which it has its principal seat, nothing in this Constitution shall be construed—

(a) as empowering the Legislature of the State in which the Court has its principal seat to increase, restrict or abolish that jurisdiction ;

(b) as empowering the Legislature of a State specified in Part A or Part B of the First Schedule in which any such area is situate, to abolish that jurisdiction ; or

(c) as preventing the Legislature having power to make laws in that behalf for any such area, from passing, subject to the provisions of clause (b), such laws with respect to the jurisdiction of the Court in relation to that area as it would be competent to pass if the principal seat of the Court were in that area.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 230 (3) of the Act was as follows—

“(3) Where a High Court exercises jurisdiction in relation to any area or areas outside the Province in which it has its principal seat, nothing in this Act shall be construed—

(a) as empowering the Legislature of the Province in which the Court has its principal seat to increase, restrict or abolish that jurisdiction ; or

(b) as preventing the Legislature having power to make laws in that behalf for any such area from passing such laws with respect to the jurisdiction of the court in relation to that area as it would be competent to pass if the principal seat of the court were in that area.”

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*Art. 231 : Restriction on power of State Legislature as regards extra-State jurisdiction of High Court.*—This article forms an exception to Entries 65 of List II and 46 of List III which confer power on the State Legislatures to legislate as regards jurisdiction of the High Courts, within their respective territories. This Article says that where a High Court exercises jurisdiction outside the State where it has its principal seat, that extra-State jurisdiction shall not be affected by a State Legislature. That power is given exclusively to Parliament, by Art. 230.

Cl. (a) imposes limitations upon the Legislature of the State in which the High Court in question has its principal seat.

Cl. (b) imposes limitation upon the Legislature of a State in Part A or B within which such area (in respect of which the High Court has its extra-State jurisdiction) is situate. This Legislature may increase or restrict the jurisdiction but cannot abolish it altogether. Subject to this limitation, such Legislature may make laws with respect to the jurisdiction of the High Court in relation to such area.

**232.** Where a High Court exercises jurisdiction in relation to more than one State specified in the First Schedule or in relation to a State and an

*Interpretation.*  
area not forming part of the State—

(a) references in this Chapter to the Governor in relation to the Judges of a High Court shall be construed as references to the Governor of the State in which the Court has its principal seat ;

(b) the reference to the approval by the Governor of rules, forms and tables for subordinate courts shall be construed as a reference to the approval thereof by the Governor or the Rajpramukh of the State in which the subordinate court is situate, or if it is situate in an area not forming part of any State specified in Part A or Part B of the First Schedule, by the President ; and

(c) references to the Consolidated Fund of the State shall be construed as references to the Consolidated Fund of the State in which the Court has its principal seat.

## CHAPTER VI.—SUBORDINATE COURTS.

OBJECT OF CH. VI.—The object of the provisions contained in this Chapter is to secure the independence of the subordinate Judiciary from the Executive, so that they may be free of any moral influence in the discharge of their judicial duties. As to the need for such independence we can do no better than to reproduce the observations of the Joint Parliamentary Committee<sup>10</sup> :

“ . . . . . We have been impressed by the mischiefs which have resulted elsewhere from a system under which *promotion* from grade to grade in a judicial hierarchy is in the hands of a Minister exposed to pressure from members of a popularly elected Legislature. Nothing is more likely to sap the independence of a magistrate than the knowledge that his career depends upon the favour of a Minister . . . . . It is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges . . . . . ”<sup>10</sup>

**233.** (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sub-secs. (1) and (2) of Sec. 254 of the Government of India Act, 1935, were—

“(1) Appointments of persons to be, and the posting and promotion of, district judges in any Province shall be made by the Governor of the Province<sup>11</sup> and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.

(2) A person not already in the service of His Majesty shall only be eligible to be appointed a district judge if he has been for not less than five years a barrister, a member of the Faculty of Advocates in Scotland, or a pleader and is recommended by the High Court for appointment.”

(10) J.P.C. Rep. (H.C. 1, Part I), paragraph 337, p. 200.  
 (11) The words ‘exercising his individual judgment’ after the word Province, were omitted by the India (Provisional Constitution) Order, 1947.



Sub-sec. (3) of the above section forms Cl. (a) of Art. 236 of the Constitution.

### INDIA

*Art. 233 : Appointment of District Judges.*—This Article maintains the position as under the Government of India Act, 1935, except that the Governor shall have to act on the advice of the Minister, in making the order of appointment, posting or promotion of a 'District Judge,' including all officers mentioned in Art. 236 (a) *post*. The order will be made 'in consultation with' the High Court, which means, that the Governor is not necessarily bound to accept the recommendation of the High Court.<sup>12</sup>

**234.** Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

Recruitment of persons other than district judges to the judicial service.

*Government of India Act, 1935.*—Sub-secs. (1)-(2) of Sec. 255 of that Act was—

"(1) The Governor of each Province shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the subordinate civil judicial service of a Province.

In this section, the expression "subordinate civil judicial service" means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of district Judge.

(2) The Provincial Public Service Commission for each Province, after holding such examinations, if any, as the Governor may think necessary, shall from time to time out of the candidates for appointment to the subordinate civil judicial service of the Province make a list or lists of the persons whom they consider fit for appointment to that service, and appointments to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province."

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*Art. 234: Appointment of persons other than District Judges.*—This Article corresponds to Sec. 255 (1) of the Act of 1935. While District Judges shall be appointed by the Governor in consultation with the High Court, other officers of the subordinate Judiciary shall be appointed by the Governor in accordance with rules framed by him in consultation with the High Court and the Public Service Commission.

**235.** The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Control over subordinate courts.

### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 235 of the Constitution is substantially the same ■ Sec. 255 (3) of the Act of 1935, with the addition of the words—

(12) Cf. J. P. C. Report, Vol. I, paragraph 340.

"The control of . . . . . including" at the beginning of the Article.

## INDIA

*Art. 235 : Control of Subordinate Judiciary.*—While the posting and promotion of District Judges shall be in the hands of the Governor acting in consultation with the High Court,—the posting and promotion, and granting of leave to officers of the State Judicial Service other than District Judges shall be exclusively in the hands of the High Court, subject, of course, to such appeal as are allowed by the law regulating conditions of the service.

Apart from the posting and promotion of the officers, the High Court shall have exclusive *control* not only over the subordinate Courts (*i.e.*, Courts subordinate to the District Courts) but also over the District Courts. See in this connection also the powers of *superintendence* conferred upon the High Court by Art. 227 (p. 494, *ante*).

Interpretation.

## 236. In this Chapter—

(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge ;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Cl. (a) of the present article is taken from Sec. 254 (3); and cl. (b) of the present article is taken from para. 2 of sec. 255 (1) of the Government of India Act, 1935.

## 237. The Governor may by public notification direct that the

Application of the provisions of this Chapter to certain class or classes of magistrates.

foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

*Art. 237 : Application of this Chapter to Magistrates.*—The provisions of this Chapter apply of their own force only to members of the subordinate *civil* judiciary and not to members of the Magistracy, save the Chief Presidency Magistrate and the Additional Chief Presidency Magistrate [Art. 236 (a)]. But separation of the judiciary from the executive is one of the objectives of the State under the Constitution [Art. 50, p. 201, *ante*]. In order to effect this by gradual steps, and to bring the 'trying Magistrates' *i.e.*, the Magistrates exercising (criminal) judicial powers further under the control of the High Court, the Governor is empowered by the present article to make the provisions (subject to modifications, if any) of the present Chapter, applicable to any class or classes of magistrates in the State

## PART VII

## THE STATES IN PART B OF THE FIRST SCHEDULE.

*General*GENESIS OF STATES IN PART B.<sup>13</sup>

At the time of the constitutional reforms leading to the Government of India Act, 1935, the geographical entity known as India was divided into two parts—British India and the Indian States. While British India comprised the 9 Governors' Provinces and some other areas administered by the Government of India itself, the Indian States comprised some 600<sup>14</sup> States which were mostly under the personal rule of Rulers or proprietors. All the 600 Indian States were not of the same order. Some of them were States under the rule of hereditary Chiefs, which had political status even from before the Mahomedan invasion; others (about 300 in number) were Estates or Jagirs granted by the Muslim rulers as rewards for services or otherwise, to particular individuals or families. But the common feature that distinguished these 600 States or thereabout from British India was that the Indian States had *not* been *annexed* by the British Crown. So, while British India was under the direct rule of the Crown through its representatives and according to the statutes of Parliament and enactments of the Indian Legislatures, the Indian States were allowed to remain under the personal rule of their Chiefs and Princes, under the 'suzerainty' of the Crown, which was assumed over the entire territory of India when the Crown took over authority from the East India Company in 1858. Lord Canning then made the pronouncement—

"The Crown in England stands forth the unquestioned ruler and paramount power in all India."

The relationship between the Crown and the Indian States since the assumption of suzerainty by the Crown came to be described by the term '*Paramountcy*.' The Crown was bound by engagements of a great variety with the Indian States.

A common feature of these engagements was that while the *States were responsible for their own internal administration, the Crown accepted responsibility for their external relations and defence*. The Indian States had no international life, and for *external* purposes, they were practically in the same position as British India.<sup>15</sup> As regards *internal* affairs, the policy of the British Crown was normally one of non-interference with the monarchical rule of the Rulers, but the Crown interfered in cases of misrule and maladministration, as well as for giving effect to its international commitments. So, even in the internal sphere, the Indian States had *no legal* right against non-interference, and so Lord Reading explained to the Nizam of Hyderabad.<sup>16</sup>

"The Sovereignty of the British Crown is supreme in India, and therefore ■ Ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing."

Nevertheless, the Rulers of the Indian States enjoyed certain personal rights and privileges, and normally carried on their personal administration, unaffected by all political and constitutional vicissitudes within the neighbouring territories of British India.

The Government of India Act, 1935, envisaged a federal structure for the whole of India, in which the Indian States could figure as Units, together with the Governors' Provinces. Nevertheless, the framers of that Act differentiated the Indian States from the Provinces ■ two material respects, and this differentiation ultimately proved fatal for the scheme itself. The two points of difference were—

(13) The best and most comprehensive reference on the subject is the White Paper ■ Indian States (M. S. 6) published by the Ministry of States, Government of India.

(14) 600 according to the J.P.C. Report (Vol. I, paragraph 3); 562 according to the

Butler Committee and the Simon Commission.

(15) White Paper on Indian States (M.S. 6) p. 22.

(16) Letter to Nizam of Hyderabad, reproduced in Appendix I, to the White Paper on Indian States (M.S. 6), pp. 149-151.



(a) While in the case of the Provinces, accession to the Federation was compulsory or automatic, in the case of an Indian State, it was *voluntary*, and depended upon the signing by the Ruler of an Instrument of Accession, and its acceptance by the Crown<sup>17</sup>. (b) While in the case of the Provinces, the authority of the Federation over the Provinces (executive as well as legislative) extended over the whole of the federal sphere chalked out by the Act,—in the case of the Indian States, the authority of the Federation could be limited by the Instrument of Accession and all residuary powers belonged to the State. It is needless to elaborate the details of the plan of 1935, for the accession of the Indian States to the proposed Federation never came, and this Part of that Act was finally abandoned in 1939<sup>18</sup>, when World War II broke out.

When Sir Stafford Cripps came to India with his plan (see p. 1, *ante*), it was definitely understood that the Plan proposed by him would be confined to settle the political destinies of British India, and that the Indian States would be left free to retain their separate status. This was later made clear by the Cabinet Mission<sup>19</sup>:

“When a new fully self-governing or independent Government or Governments come into being in British India, His Majesty’s Government’s influence with these Governments will not be such as to enable them to carry out the obligations of paramountcy. . . . Thus as a logical sequence and in view of the desires expressed to them on behalf of the Indian States, His Majesty’s Government will cease to exercise the powers of paramountcy. This means that the rights of the States which flow from their relationship to the Crown will no longer exist and that all the rights surrendered by the States to the paramount power will *return* to the States.”

But the Cabinet Mission supposed that the Indian States would be ready to co-operate with the new development of India. So, they recommended that there should be a Union of India, embracing both British India and the States, which would deal only with Foreign Affairs, Defence and Communications while the States would retain all powers other than these.

When the Indian Independence Act, 1947, was passed, it declared the lapse of suzerainty and paramountcy of the Crown, in s. 7 (1) (b) of the Act, which is worth reproduction:

7. “(1) As from the appointed day—

(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority, or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and

Provided that notwithstanding anything in paragraph (b) . . . of this sub-section, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the Ruler of the Indian State . . . on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.”

But though paramountcy lapsed and the Indian States regained their position which they had prior to the assumption of suzerainty by the Crown<sup>20</sup>, most of the States soon realised that it was no longer possible for them to maintain their existence independent of and separate from the rest of country, and that it was in their own interests necessary to accede to either of the two Dominions of India or Pakistan. So far as the States situated within the geographical boundaries of the Dominion of India, all of them (numbering 552) save Hydera-

(17) S. 6 of the Government of India Act, 1935.

(18) White Paper on Indian States (MS. 6), p. 26.

(19) Apps. II-III, *Ibid*, pp. 152-5.

(20) The Proviso to S. 7 (1) (b) of the Inde-

pendence Act, however, provided for the continuance, until denounced by either party, of agreements between the Indian States and the Central and Provincial Governments in regard to specified matters such as, Customs, Posts and Telegraphs.

bad, Kashmir and Junagadh, had acceded to the Dominion of India by the 15th August, 1947, *i.e.*, before the 'appointed day' itself. The problem of the Government of India as regards the States after the Accession was twofold :

(a) Shaping the Indian States into sizeable or viable administrative units<sup>21</sup> and (b) Fitting them into the constitutional structure of India.

(a) The first objective was sought to be achieved by a threefold process of integration—

(i) 216 States have been *merged* into the respective Provinces, geographically contiguous to them. These merged States have been included in the territories of the States in Part B in the First Schedule of the Constitution. The process of merger started with the merger of Orissa and Chattisgarh States with Orissa on January 1, 1948, and the last instance is the merger of Cooch-Bihar with West Bengal on January 1, 1950.

(ii) 61 States have been converted into centrally administered areas and included in Part C of the First Schedule. This form of integration has been resorted to in those cases in which for administrative, strategic or other special reasons, Central control has been considered necessary.

(iii) The third form of integration is the consolidation of groups of States into new viable units, known as Unions of States.<sup>22</sup> The first Union formed is the Saurashtra Union, consolidating the Kathiawar States and many other Estates (February 15, 1948), and the last one is the Union of Travancore-Cochin, formed on July 1, 1949. As many as 275 States have thus been integrated into 5 Unions—Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin. *These are included in the States in Part B of the First Schedule.* The other 3 States included in Part ■ are—Hyderabad, Jammu and Kashmir and Mysore. These are themselves viable units, and so no question of Union arose in these cases. The cases of Hyderabad and Jammu and Kashmir are peculiar. Jammu and Kashmir acceded to India on October 26, 1947, though the Government of India have agreed to take the accession subject to confirmation by ■ plebiscite. Hyderabad has not yet formally acceded to India, but the Nizam has issued ■ Proclamation<sup>23</sup> recognising the necessity of entering into ■ constitutional relationship with the Union of India and accepting the Constitution of India, subject to ratification by the Constituent Assembly of that State.

(b) We have so far seen how the States in Part ■ has been formed as viable units of administration,—being the residue of the bigger Indian States, left after the smaller States had been merged in the Provinces or converted into Centrally Administered Areas. So far as the latter two groups are concerned, there was no problem in fitting them into the body of the Constitution framed for the rest of India. There was an agreement between the Government of India and the Ruler of each of the States so merged, by which the Rulers have voluntarily agreed to the merger and ceded all powers for the governance of the States to the Dominion Government,<sup>24</sup> reserving certain personal rights and privileges for the Rulers.

But the story relating to the States in Part ■ is not so short. At the time of their accession to the Dominion of India in 1947, the States had acceded only on three subjects, *viz.*, Defence, Foreign Affairs and Communications.<sup>25</sup> With the

(21) For, many of these 552 States contained an ■ of only ■ few miles or acres and could hardly be expected to carry on the administration envisaged by the framers of the Constitution.

(22) As to the territories included in these Unions of States, ■ Apps. XXXV to XLIII of the White Paper ■ Indian States.

(23) App. LIV, White Paper on Indian States

(MS. 6), p. 369.

(24) See the Agreements in Apps. XI to XXXIII of the White Paper on Indian States (MS. 6).

(25) In conformity with the Cabinet Mission's recommendations, p. 503, *ante*. See Form of Instrument of Accession in App. VII in White Paper on Indian States (MS. 6), pp. 164-8.

formation of the Unions and under the influence of political events, the Rulers found it beneficial to have a closer connection with the Union of India and all the Rajpramukhs of the Unions, as well as the Maharaja of Mysore, signed revised Instruments of Accession,<sup>1</sup> by which all these States acceded to the Dominion of India in respect of all matters included in the Union and Concurrent Legislative Lists, except only those relating to taxation.<sup>2</sup> Thus, *the States in Part B have been brought at par with the States in Part A*, subject only to the difference embodied in Art. 238, and the supervisory powers of the Centre for the transitional period of 10 years (Art. 371). Special provisions have been made only for Kashmir (Art. 370) in view of its special position and problems. That Article makes special provisions for the partial application of the Constitution with the concurrence of the Government until the Constituent Assembly of the State decides that the limitations should be removed. [See, further, under Art. 370, *post.*]

It is to be noted that the Rajpramukhs of the 5 Unions as well as the Rulers of Hyderabad, Mysore, Jammu and Kashmir have all adopted the Constitution of India as the Constitution of the Union or State as far as applicable, by Proclamations.<sup>3</sup> One of the terms of these Proclamations is—

“The provisions of the said Constitution (of India) shall, as from the date of its commencement supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State.”

**238.** The provisions of Part VI shall apply in relation to the States specified in Part B of the First Schedule as they apply in relation to the States specified in Part A of that Schedule subject to the following modifications and omissions, namely :—

Application of provisions of Part VI to States in Part B of the First Schedule.

(1) For the word “Governor” wherever it occurs in the said Part VI, except where it occurs for the second time in clause (b) of article 232, the word “Rajpramukh” shall be substituted.

(2) In article 152, for the word and letter “Part A” the word and letter “Part B” shall be substituted.

(3) Articles 155, 156 and 157 shall be omitted.

(4) In article 158,—

(i) in clause (1), for the words “be appointed” the word “becomes” shall be substituted ;

(ii) for clause (3), the following clause shall be substituted, namely :—

“(3) The Rajpramukh shall, unless he has his own residence in the principal seat of Government of the State, be entitled without payment of rent to the use of an official residence and shall be also entitled to such allowances and privileges as the President may, by general or special order, determine.”;

(iii) in clause (4), the words “emoluments and” shall be omitted.

(1) Apps. XLIX-L, White Paper on Indian States (MS. 6), pp. 317-340. (The process took the period September, 1948 to June, 1949.)

(2) This limitation has also been modified

by subsequent agreement [*cf.* Art. 278, *post.*].

(3) App. LIV, White Paper on Indian States (MS. 6), pp. 365-372.



(5) In article 159, after the words "seniormost Judge of that Court available" the words "or in such other manner as may be prescribed in that behalf by the President" shall be inserted.

(6) In article 164, for the proviso to clause (1) the following proviso shall be substituted, namely :—

"Provided that in the State of Madhya Bharat there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work."

(7) In article 168, for clause (1) the following clause shall be substituted, namely :—

"(1) For every State there shall be ■ Legislature which shall consist of Rajpramukh and—

(a) in the State of Mysore, two Houses ;

(b) in other States, one House."

(8) In article 186, for the words "as are specified in the Second Schedule" the words "as the Rajpramukh may determine" shall be substituted.

(9) In article 195, for the words "as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province" the words "as the Rajpramukh may determine" shall be substituted.

(10) In clause (3) of article 202—

(i) for sub-clause (a), the following sub-clause shall be substituted, namely :—

"(a) the allowances of the Rajpramukh and other expenditure relating to his office as determined by the President by general or special order ;"

(ii) for sub-clause (f) the following sub-clauses shall be substituted, namely :—

"(f) in the case of the State of Travancore-Cochin, a sum of fifty-one lakhs of rupees required to be paid annually to the Devaswom fund under the covenant entered into before the commencement of this Constitution by the Rulers of the Indian States of Travancore and Cochin for the formation of the United State of Travancore and Cochin ;

(g) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged."

(11) In article 208, for clause (2) the following clause shall be substituted, namely :—

"(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the

State or, where no House of the Legislature for the State existed, the rules of procedure, and standing orders in force immediately before such commencement with respect to the Legislative Assembly of such Province, as may be specified in that behalf by the Rajpramukh of the State, shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be. ”

(12) In clause (2) of article 214, for the word “ Province ” the words “ Indian State ” shall be substituted.

(13) For article 221, the following article shall be substituted, namely :—

“ 221. (1) There shall be paid to the  
Salary, etc., of Judges.
Judges of each High Court such salaries as may be determined by the President after consultation with the Rajpramukh.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as may be determined by the President after consultation with the Rajpramukh :

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.”

*Art. 238 : Applicability of Part VI to States in Part B.*—Generally speaking, the States in Part B of the First Schedule [excepting Jammu and Kashmir, as to which see Art. 370, *post* ]—shall be governed by the provisions of Part VI which govern States in Part A, with the following principal differences :

(a) The Executive head of a State in Part B will be called ‘ Rajpramukh ’ (instead of Governor) and shall be allowed such allowances as the President may by his order determine [Art. 238, Cls. (1) and (4)].

(b) While a Governor is a person *appointed* by the President [Art. 155], the Rajpramukh is a person *recognised* as such by the President [Art. 366 (21)].

*Other Special Provisions relating to States in Part B.*—The Constitution makes the following other special provisions relating to States in Part B :

(a) The States in Part B shall be allowed to maintain their armies as part of the Union Forces, until Parliament directs otherwise [Art. 259].

(b) For ■ period of 10 years, the Government of the States in Part ■ shall be under the general control of the President and shall be liable to carry out his particular directions [Art. 371].

(c) Disputes arising out of any treaty, covenant, agreement, *sanad* or other similar instrument entered into prior to the Constitution, to which a State in Part B

was a party, is excluded from the original jurisdiction of the Supreme Court [Proviso (i) to Art. 131, p. 389, *ante*]. But such disputes may be referred to the Supreme Court for its *advisory* opinion, by the President [Art. 143].

(d) For a period of 10 years from the commencement of the Constitution, the Government of India may make special financial arrangements with a State in Part B, otherwise than as provided in Part XII, by agreement [Art. 278, *post*].

Cl. (1) : *The Head of the Executive*.—The effect of this clause is only to change the name of the Governor of ■ State in Part B to 'Rajpramukh', which term is defined in Art. 366 (21), *post*.

Cl. (2) :—This clause is needed to make all the provisions of Part VI applicable to States in Part B unless otherwise provided by the Constitution.

Cl. (3) : *Term of office of Rajpramukh*.—The effect of this clause is that the provisions of Part VI relating to the appointment and term of office of a Governor are inapplicable to a Rajpramukh. There is no provision in the Constitution relating to these matters as regards a Rajpramukh, except cl. (21) of Art. 366, which simply says that the Rajpramukh shall be a person *recognised* by the President. [See further under Art. 366 (21), *post*.]

Cl. (4) : *Conditions of Rajpramukh's Office*.—The provisions of Cls. (1), (2) and (4) of Art. 158 will also be applicable to Rajpramukhs. But as regards allowances, etc., the word 'emolument' is not properly applicable to ■ Rajpramukh who is not 'appointed' by the President. As to allowances and privileges, while in the case of a Governor they are to be determined by Parliament by law, and until so determined, they shall be as laid down in the Second Schedule of the Constitution,—in the case of a Rajpramukh, it is the President who shall determine them. The allowances of the Rajpramukhs of the Unions of States (Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin) are prescribed in the Covenants<sup>4</sup> for the formation of these Unions, and the Government of India have guaranteed the provisions of these Covenants<sup>5</sup>. So, in the case of these Rajpramukhs, the President will determine the allowances and privileges according to the terms of these covenants. As regards Hyderabad and Mysore, see Apps. LVII-LVIII of the White Paper on Indian States.

Cl. (6) : *Council of Ministers*.—The Rajpramukh shall act with the advice of a Council of Ministers<sup>6</sup> and Arts. 163-4 (pp. 443-5, *ante*) shall be applicable to the same extent to States in Part B as to States in Part A.

The present clause substitutes the Proviso to Art. 164 (1) and says that in the State of Madhya Bharat there shall be a Minister in charge of tribal welfare and the welfare of the Scheduled Castes and backward classes.

Cl. (7) : *Legislature*<sup>7</sup>.—Except the State of Mysore, all other States in Part B shall have ■ unicameral Legislature, that is to say, a Legislature consisting of the Rajpramukh and ■ Legislative Assembly.

Cl. (8) : *Salaries and Allowances of Speaker, Deputy Speaker, Chairman, Deputy Chairman of Legislature*.—In States in Part B, the salaries and allowances of these functionaries shall be ■ determined by the Rajpramukh, instead of those specified in the Second Schedule.

Cl. (9) : *Salaries and Allowances of Members of Legislature*.—Until the State Legislature determines these by law, the salaries and allowances of the members of Legislature of ■ State in Part ■ shall be ■ the Rajpramukh may determine.

(4) See Apps. XXXIV, XXXVII, XXXIX, XL, XLII, White Paper ■ Indian States (MS. 6).

(5) See, for example, Art. IV (a) of the Covenant for the formation of Madhya Bharat.

(6) See Art. 386 ■ to the Council of Ministers for States in Part B, during the transitional period.

(7) See Art. 385, *post*, ■ to the Provisional Legislatures in States in Part B.



*Cl. (10) : Expenditure Charged on the Consolidated Fund of a State in Part B.*—All the items specified in Cls. (b)-(f) of Art. 202 (3), *ante*, will be charged in such States as well.

As regards Cl. (a), such allowances and expenditure of the Rajpramukh shall be charged as the President may by general or special order determine.

In the case of Travancore-Cochin, there will be an *additional* item charged on the Consolidated Fund, namely, the sum of Rs. 51,00,000, payable annually to the Devaswom Fund, under Art. VIII (a) of the Covenant<sup>8</sup> entered into by the Rulers of Travancore and Cochin for the formation of the United State of Travancore and Cochin.

*Cl. (11) : Rules of Procedure in Legislature.*—The departure made by this clause, from the provisions in Art. 208 (2), p. 408, *ante*, is that in the case of a State in Part B which had no Legislature existing at the commencement of the Constitution, the Rajpramukh will specify a Province, and the rules of procedure of the Legislative Assembly of that Province will then be adapted by the Speaker as the provisional rules of procedure for such State in Part B.

*Cl. (12) :—*This is merely verbal.

*Cl. (13) : Salaries of Judges of High Courts.*—Instead of the salaries specified in the Second Schedule, Judges of the High Courts in States B shall receive such salaries as may be determined by the President in consultation with the Rajpramukh. The allowances, pension, etc., shall also be similarly determined until Parliament determines them by law.

## PART VIII

### THE STATES IN PART C OF THE FIRST SCHEDULE.

**GENESIS OF STATES IN PART C.**—We have already seen (p. 504, *ante*), that some of the old Indian States have been converted into Centrally administered areas. These are Himachal Pradesh, Bhopal, Bilaspur, Kutch, Tripur, Manipur and Vindhya Pradesh.<sup>9</sup> The remaining States of this Part are Ajmer, Coorg and Delhi.<sup>9</sup> These were Chief Commissioner's Provinces under Sec. 58 of the Government of India Act, 1919 and Sec. 94 of the Act of 1935. Previous to the Act of 1919, Coorg and Ajmer-Merwara were Scheduled Districts<sup>10</sup> under the Scheduled Districts Act, 1874.

Under the Act of 1935, the Chief Commissioner's Provinces were units of the Federation [Sec. 311 (2)], but these areas were under the direct administration of the Federal Government [Sec. 94 (3)], governed by the Governor-General acting, in his discretion through a Chief Commissioner appointed by him in his discretion.

The States in Part C of the First Schedule of the Constitution thus comprise some of the Chief Commissioner's Provinces and some Indian States.

(8) App. XLII of the White Paper on Indian States (MS. 6), at p. 287.

(9) As to the territory of these States, see under Part C, First Sch., *post*; see also White Paper on Indian States (MS. 6), pp. 46-9.

(10) Even after Constitution of these territories as Chief Commissioner's Provinces by the Government of India Act, 1919, the Scheduled Districts Act, 1874, continued to apply to the Chief Commissioner's Provinces. That Act provided that no general laws would apply to these territories except so far as they were declared applicable by notifications of the Local

Government. This Act was repealed by the Adaptation of Indian Laws Order, 1937, without prejudice to the existing notifications, regulations etc., made under the Act. Under the Government of India Act, 1935, the Federal Legislature was empowered to legislate in relation to the Chief Commissioner's Provinces and without any limitation as to subjects [Sec. 100 (4)]. This is also the position under the Constitution as regards the States in Part C. [As regards Andaman and Nicobar Islands, however, see Art. 243 (2), *post*].

**239.** (1) Subject to the other provisions of this Part, a State specified in Part C of the First Schedule shall be administered by the President acting, to such extent as he thinks fit, through ■ Chief Commissioner or a Lieutenant-Governor to be appointed by him or through the Government of a neighbourign State :

Administration of States in Part C of the First Schedule.

Provided that the President shall not act through the Government of ■ neighbouring State save after—

- (a) consulting the Government concerned ; and
  - (b) ascertaining in such manner as the President considers most appropriate the views of the people of the State to be so administered.
- (2) In this article, references to a State shall include references to a part of a State.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 94 (3) of that Act was—

“ A Chief Commissioner’s Province shall be administered by the Governor-General acting, to such extent ■ he thinks fit, through ■ Chief Commissioner to be appointed by him in his discretion.”

#### INDIA

*Art. 239 : Administration of States in Part C.*—The provisions of this Part differ from those in Sec. 94 (3) of the Government of India Act, 1935, inasmuch as the functions exercised by the President shall not be in his discretion, but on Ministerial advice. Again, power is given to Parliament to create ■ Legislature, Council of Ministers and High Court for such a State (Arts. 240-1).

The administration will be carried on by the President, but he will carry it through—(1) either a Chief Commissioner ; or (2) a Lieutenant-Governor ; or (3) through the Government of ■ neighbouring State. The agency of these authorities will be limited to such extent as the President may direct. But the third alternative, namely, administration through ■ neighbouring Government shall not be adopted without consulting the Government concerned ■ well ■ the views of the people of the State in Part C concerned.

**240.** (1) Parliament may by law create or continue for any State specified in Part C of the First Schedule and administered through ■ Chief Commissioner or Lieutenant-Governor—

- (a) a body, whether nominated, elected or partly nominated and partly elected, to function ■ a Legislature for the State ; or
  - (b) ■ Council of Advisers or Ministers,
- both with such constitution, powers and functions, in each case, ■ may be specified in the law.

(2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends ■ has the effect of amending the Constitution.

Creation or continuance of local Legislatures or Council of Advisers or Ministers.

ART. 240 : POWER OF PARLIAMENT TO CREATE LEGISLATURE OR COUNCIL OF ADVISERS OR MINISTERS OR BOTH.—When a State in Part C is administered through a Chief Commissioner or Lieutenant-Governor, Parliament may by law create a Legislature for the State or a Council of Advisers or Ministers or both. The constitution, powers and functions of these bodies, and their relation to the Chief Commissioner, etc., will all be regulated by law made by Parliament. Cl. (2) says that any such law will not be deemed to be an amendment of the Constitution for the purposes of Art. 368. The object of this article seems to be the gradual upliftment of the States in Part C to the level of the States in Part A, by gradual legislative process, having regard to their individual conditions.

*Sub-cl. (a) : Legislative Power of Parliament over a State in Part C, before and after creation of a Legislature.*—When a Legislature is created by Parliament for a State in Part C, it will provide in that law, what powers are to be exercised by that Legislature. So, the Legislature in Part C shall not *ipso facto* be entitled to exercise the legislative powers included in List II or III [Cf. Art. 246 (2)-(3)]. Again, even after a legislature is created for a State in Part C, Parliament shall possess paramount power to legislate with respect to any matter included in List II, in relation to that State [Art. 246 (4), *post*]. In other words, the Legislature of a State in Part C shall have no exclusive power with respect to List II as the Legislatures of States in Parts A and B possess [Cf. Art. 246 (3), *post*].

It is obvious that *before* creation of ■ Legislature for a State in Part C, the legislative power as regards that State will *solely* belong to Parliament, excepting Coorg which has already a Legislative Council [Art. 242] and which shall have legislative powers subject to Art. 246 (4). See in this connection, the Part C States (Laws) Act (XXX of 1950),<sup>10-a</sup> by which Parliament has extended certain Central Acts and Ordinances to the States in Part C.

**241.** (1) Parliament may by law constitute a High Court for a State specified in Part C of the First Schedule or declare any Court in any such State to be a High Court for all or any of the purposes of this Constitution.

(2) The provisions of Chapter V of Part VI shall apply in relation to every High Court referred to in clause (1) as they apply in relation to a High Court referred in article 214 subject to such modifications or exceptions as Parliament may by law provide.

(3) Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by or under this Constitution, every High Court exercising jurisdiction immediately before the commencement of this Constitution in relation to any State specified in Part C of the First Schedule or any area included therein shall continue to exercise such jurisdiction in relation to that State or area after such commencement.

(4) Nothing in this article derogates from the power of Parliament to extend or exclude the jurisdiction of a High Court in any State specified in Part A or Part B of the First Schedule to, or from, any

(10-a) Read with the Merged State (Laws) Act (LIX of 1949).



State specified in Part C of that Schedule or any area included within that State.

*Art. 241 : High Courts for States in Part C.*—This Article gives power to Parliament to raise the Judiciary of a State in Part C to the same level as that of the States in Part A. It may either create a High Court for such a State, or declare that the Judicial Commissioner's Courts already existing for some of the States or any other Courts shall be deemed to be a 'High Court' for all or some purposes of the Constitution. Cl. (3) maintains the existing jurisdiction of the Madras High Court over Coorg, under the Madras High Court (Extension of Jurisdiction to Coorg) Order, 1948 [see p. 497, ante]. Cl. (4) saves the power conferred on Parliament by Art. 230, p. 497, ante.

*Cl. (1) : Declaration of existing Courts as High Courts for the purposes of Arts. 132-4.*—Secs. 3-5 of the Judicial Commissioner's Courts (Declaration as High Courts) Act (XV) 1950, provide—

"3. *Declaration of certain courts as High Courts for certain purposes.*—Every court in a Part C State known, at the commencement of this Act <sup>10-b</sup>, as the Court of the Judicial Commissioner for that State (hereinafter referred to as a Judicial Commissioner's Court), is hereby declared to be a High Court for the purposes of Articles 132, 133 and 134.

4. *Appeals to the Supreme Court not to be barred on ground of judgment, etc., being of a single Judge.*—An appeal shall lie to the Supreme Court under the provisions of Article 133 from any judgment, decree or final order of a Judicial Commissioner's Court notwithstanding that such judgment, decree or final order is that of a single Judge.

5. *Appeals to lie to the Supreme Court from judgment, decree, etc., whether passed or made before or after the commencement of the Act.*—Subject to any rules made under Article 145 or any other law as to the time within which appeals to the Supreme Court are to be entered, an appeal shall lie to that Court from a judgment, decree or final order of Judicial Commissioner's Court under the provisions of Article 132 or Article 133 or from a judgment, final order or sentence of such court under the provisions of Article 134 whether such judgment, decree, final order or sentence, as the case may be, was passed or made before or after the commencement of this Act."

*Cl. (2) : Applicability of Ch. V of Part VI, subject to exception and modifications.*—Sec. 6 of the above Act (XV of 1950) provides—

"The provisions of Chapter V of Part VI of the Constitution shall in their application to a Judicial Commissioner's Court have effect subject to the following exceptions and modifications, namely :—

(a) the provisions of articles 216<sup>11</sup>, 217<sup>12</sup>, 218<sup>13</sup>, 220<sup>14</sup>, 221<sup>15</sup>, 222<sup>16</sup>, 223<sup>17</sup>, 224<sup>18</sup>, 230<sup>19</sup>, 231<sup>20</sup> and 232<sup>21</sup> shall not apply ;

(b) references in Article 219, in the proviso to clause (3) of Article 227 and in Article 229 to the Governor shall be construed as references to the Chief Commissioner of the State in relation to which that Court exercises jurisdiction."

**242.** (1) Until Parliament by law otherwise provides, the constitution, powers and functions of the Coorg Legislative Council shall be the same as they were immediately before the commencement of this Constitution.

(10-b) Judicial Commissioners' Courts were also established in Bhopal and Vindhya Pradesh, by ordinances issued on 25-1-50, which have been later replaced by the Bhopal and Vindhya Pradesh (Courts) Act (XLI of 1950).

(11) Constitution of High Courts.

(12) Appointment and conditions of office of a Judge of a High Court.

(13) Removal of High Court Judge.

C-6,

(14) Prohibition of practice.

(15) Salaries, etc., of Judges.

(16) Transfer of Judges.

(17) Appointment of Acting Chief Justice.

(18) Attendance of retired Judges.

(19) Extension for exclusion from extra-State jurisdiction.

(20) Restrictions on powers of Legislature.

(21) Interpretation.

(2) The arrangements with respect to revenues collected in Coorg and expenses in respect of Coorg shall, until other provision is made in that behalf by the President by order, continue unchanged.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 97 of the Act of 1935 was—

“ Until other provision is made by His Majesty in Council<sup>22</sup>, the Constitution, powers and functions of the Coorg Legislative Council, and the arrangements with respect to revenues collected in Coorg and expenses in respect of Coorg, shall continue unchanged.”

#### INDIA

*Art. 242 : Coorg.*—Coorg was administered under the Scheduled Districts Act, 1874. Under the Government of India Act, 1919, it became a Chief Commissioner's Province. In 1923, a Legislative Council was created for Coorg, composed of 20 members,—15 of whom are elected and 5 nominated. The Council has legislative, deliberative and interrogatory powers. But its resolutions on the Budget are merely *recommendatory* and its Bills required the previous sanction as well as subsequent assent of the Governor-General.<sup>23</sup> The Government of India Act, 1935, maintained the above position, and no modification was made under Sec. 97 of that Act.

The present Article of the *Constitution* also maintains the above position and powers of the Legislative Council, subject to legislation by Parliament.

### PART IX

#### THE TERRITORIES IN PART D OF THE FIRST SCHEDULE AND OTHER TERRITORIES NOT SPECIFIED IN THAT SCHEDULE

Administration of territories specified in Part D of the First Schedule and other territories not specified in that Schedule.

**243.** (1) Any territory specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule shall be administered by the President acting, to such extent as he thinks fit, through a Chief Commissioner or other authority to be appointed by him.

(2) The President may make regulations for the peace and good government of any such territory and any regulation so made may repeal or amend any law made by Parliament or any existing law which is for the time being applicable to such territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to such territory.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 96 of the Act was—

“ The provisions of sub-section (3) of the last preceding section shall apply in relation to the Andaman and Nicobar Islands as they apply in relation to British Baluchistan.”

After amendment by the India (Provisional Constitution) Order, 1947, the section (96) stood thus—

(22) The words ‘His Majesty in Council’ were substituted by the words ‘the Constituent Assembly. . . .’ by the India (Provisional

Constitution) Order in Council, 1947.

(23) Simon Report, Vol. I, para. 369, pp. 329-330.

"The Governor-General may make regulations for the peace and good government of the Andaman and Nicobar Islands, and any regulations so made may repeal or amend any Act of the Dominion Legislature or any existing law which is for the time being applicable to the Province, and, when promulgated by the Governor-General, shall have the same force and effect as an Act of the Dominion Legislature which applies to the Province."

## INDIA

*Art. 243 : Territories in Part D.*—At the commencement of the Constitution, the only territory included in Part D of the First Schedule is the Andaman and Nicobar Islands. But any other territory, subsequently acquired, may be included in this Part [see p. 35, ante] and the provisions of this Article shall apply to all territories for the time being included in Part D.

These territories would also be administered, like States in Part C, by the President acting through a Chief Commissioner (or other authority appointed by the President). But there is no provision in Part IX corresponding to Articles 240-1. Instead of Parliament, it is the President who has the power to make any regulations<sup>24</sup> 'for the peace and good government' of the territories in Part D, and these regulations shall have the force and effect of an Act of Parliament and the President shall be competent, by his regulations, to repeal or amend any law made by Parliament,—under its general powers under Art. 245 (1),—which extend to the whole of the territory of India. In other words, as regards territories in Part D, the general legislative powers of Parliament shall be subject to modifications made by the President's regulations.

*A history of the Andaman and Nicobar Islands.*—This group of Islands was the penal settlement of India. It was governed under the Scheduled Districts Act, 1874. In 1921, the penal settlement was abolished and it was decided to develop it into a free colony. It was a Chief Commissioner's Province under the Government of India Acts, 1919 and 1935.

Art. 243 of the Constitution maintains the provisions of section 96 of the Act of 1935, as amended in 1947. They will be directly administered by regulations made by the President and through a Chief Commissioner or other authority appointed by the President.

## PART X

### THE SCHEDULED AND TRIBAL AREAS

**244.** (1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State specified in Part A or Part II of the First Schedule other than the State of Assam.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam.

*Art. 244 : Scheduled Areas and Scheduled Tribes.*—Cl. (1) of this article simply provides that the administration of the Scheduled Areas and Scheduled Tribes shall be according to the provisions of the Fifth Schedule ; and Cl. (2), similarly applies the Sixth Schedule to the Tribal Areas in Assam.

So, it would be better to deal with these subjects under the Fifth and Sixth Schedules, *post*.

(24) See, for example, Regs. I and II of 1950.



## PART XI

## RELATIONS BETWEEN THE UNION AND THE STATES

## CHAPTER I.—LEGISLATIVE RELATIONS

*Distribution of Legislative Powers**General—SCHEME OF DISTRIBUTION.*

## OTHER CONSTITUTIONS

*U. S. A.*—The Constitution of the U. S. A. makes the division of powers between the Federation and the States by provisions of four classes—

- (i) Provisions enumerating the powers of the Union [Art. I, Sec. 8].
- (ii) Provisions prohibiting the Union from doing certain things [Art. I, Sec. 9].
- (iii) Provisions prohibiting the States from doing certain things [Art. I, Sec. 10].
- (iv) Leaving the residue, *i.e.*, powers not delegated to the Union or prohibited to the States,—to the States or to the people [10th Amendment].

I. The Federal Congress has no general power to make laws for the people ; it has got only *enumerated* powers.

“The State Governments are the ordinary governments of the country ; the federal government is its instrument only for particular purposes”.<sup>25</sup>

The Tenth Amendment makes this clear—

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved* to the States respectively, or the people.”

As to the powers of the national government, Marshall, C.J., said<sup>1</sup>—

“The genius and character of the whole government seem to be, that its action is to be applied to all the *external* concerns of the nation, and to those internal concerns which affect the States *generally*, but not to those which are *completely* within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the (national) Government”<sup>1</sup>.

By reason of this broad division of powers, the system of ‘double government’ has not resulted in much conflict between the two—

“The people of the United States resident within any State are subject to two governments, one State and the other National ; but there need be no conflict between the two . The powers which one possesses, the other does not. They are established for *different* purposes and separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete Government, ample for the protection of all rights at home and abroad”<sup>2</sup>.

II. Though all powers not expressly given to the Union were reserved to the States, the Constitution at the same time imposed certain limitations upon the exercise of those reserved powers so that their exercise might not interfere with the exercise of the powers conferred upon the National Government.

These limitations are, *e.g.*,—

(a) *Taxation*.—No State may, without the consent of Congress, lay any tax (1) on tonnage [Art. I, Sec. 10 (3)] ; or (2) on imports and exports beyond what may be necessary for enforcing its inspection laws [Art. I, Sec. 10 (2)] ; and the net produce of all imposts on imports and exports shall be for the use of the treasury of the United States and all such State laws shall be subject to the revision and control of Congress (*ibid.*).

(b) *Monetary system*.—“No State shall coin money ; emit bills of credit ; make anything but gold and silver coin a tender in payment of debts” [Art. I, Sec.

(25) Woodrow Wilson, *Constitutional Government*, quoted in *New York v. United States*, (1946) 326 U.S. 572 (592).

(1) *Gibbons v. Ogden*, (1824) 9 Wh. 195.  
(2) *U. S. v. Cruikshank*, (1876) 92 U.S. 542.

10 (1)]. This prohibition makes it clear that the power over "currency and coinage" given to the National Government is exclusive. It is essential in the commercial and economic interests of the Union to have a uniform monetary system.

(c) *Foreign and inter-State agreements*.—Art. I, Sec. 10 says—

"No State shall enter into any treaty, alliance or confederation . . . . No State shall, without the consent of Congress, enter into any agreement or compact with another State or with a foreign power."

The prohibition against foreign agreement complements the provisions regarding treaties [Art. II, Sec. 2 (2)] in favour of the National Government. The power is made exclusive by prohibiting the States to enter into that field.

The prohibition against inter-State compacts without the consent of Congress, is, obviously, meant to prevent the growth of political combinations which may encroach upon the supremacy of the United States<sup>3</sup>. In practice, the clause has made possible inter-State co-operation on common problems with the approval of the National Government.

III. On the other hand, Congress is prohibited from interfering with inter-State Commerce or giving preference to particular States, by Cls. (5) and (6) of Art. I, Sec. 9 which are—

"5. No Tax or Duty shall be laid on Articles exported from any State.

6. No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to or from, one state, be obliged to enter, clear or pay Duties in another."

There is no concurrent legislative list in the American Constitution.<sup>3-a</sup>

IV. Amongst the reserved rights of the State may be mentioned—

"the right to pass laws, to give effect to laws through executive action, to administer justice through the Courts, and to employ all necessary agencies for legitimate purposes of State Government . . . ."<sup>4</sup>

*Australia*.—As in the United States, the Commonwealth Parliament (of Australia) has only 'enumerated or selected legislative powers'<sup>5</sup> and no general power to make laws for the 'peace, order and good government of the people' as the Canadian Parliament has. The enumeration is not double; only the powers of the Commonwealth Parliament are enumerated.

The Parliament of the Commonwealth has both exclusive and concurrent powers, though there is no separate List enumerating the concurrent powers. It is by construction that some of the powers of the Commonwealth have become concurrent. The *exclusive* powers are enumerated in Secs. 52, 90, 111, 114, and 115. These are—(i) the seat of Government of the Commonwealth; (ii) places acquired for public purposes; (iii) Federal Public service; (iv) Customs, Excise, Bounties; (v) Surrendered territory; (vi) Naval and Military Defence and Forces; (vii) Coinage.

The legislative powers of the States are residual. The State Parliaments may legislate on any subject not exclusively assigned to the Commonwealth Parliament, but in case of inconsistency the law of the Commonwealth is to prevail. Sec. 51 enumerates 39 heads of power over which the Commonwealth Parliament may legislate. Some of these are by implication exclusive powers of the Commonwealth Parliament, but others are concurrent, by reason of the operation of Secs. 107 and 109 of the Australia Constitution Act.

Sec. 107 says—

"Every powers of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or at the admission or establishment of the State, as the case may be."

(3) *Virginia v. Tennessee*, (1893) 148 U.S. 503.  
(3-a) On this point, see Black, Constitutional Law, pp. 204-5.

(4) *Veazie Bank v. Fenno*, (1870) 8 Wall. 533.  
(5) *Melbourne Corporation v. Commonwealth*, (1947) 74 C.L.R. 31 (47).

The jurisdiction of the State legislation over the entire concurrent sphere is maintained by the theory of 'unoccupied field'. If the Commonwealth Parliament has actually entered the field and enacted legislation on any of the concurrent subjects, that law shall prevail and the State Legislature will lose its jurisdiction, but the State Legislation will be good law on any subject and to the extent that the Commonwealth Parliament has not actually legislated, or to the extent that the State law is not repugnant to the Commonwealth.<sup>6</sup> If the Commonwealth law were repealed, the State law would again become operative.<sup>7</sup>

Sec. 109 thus says—

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The result is that the powers enumerated in Sec. 51 are concurrent, subject to the prevalence of Dominion legislation in case of inconsistency.<sup>8</sup> The concurrent sphere is thus very large in Australia.

*Canada.*—The Constitution Act of Canada divides the field of legislation between the Dominion Parliament and the Legislatures of the Provinces by Secs. 91 and 92. (Br. N. America Act, 1867). There is no concurrent sphere in the Canadian Constitution except in respect of agriculture and immigration, and in case of repugnancy, Dominion legislation prevails [Sec. 95]. The Provincial Legislatures have exclusive jurisdiction to legislate on the 16 subjects enumerated in Sec. 92 while the Dominion Parliament has exclusive jurisdiction to legislate on the 29 subjects enumerated in Sec. 91.

The general principle underlying the distribution is that matters of common Canadian concern are assigned to the Dominion Parliament while matters of local concern are assigned to the Provincial Legislatures.<sup>9</sup> Sec. 91 further provides that in case of any overlapping between the subjects enumerated in Sec. 91 and Sec. 92, the matter should be deemed to be outside the class of subjects enumerated in Sec. 92, or in other words, the interpretation will be in favour of the Dominion Parliament. The two sections must be read together.<sup>10</sup>

"The general power conferred on the Dominion by Sec. 91 . . . . . extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the Provinces. But if the subject-matter falls within any of the heads of Sec. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of Sec. 91, for if so, by the concluding words of that section it is excluded from the powers conferred by Sec. 92".<sup>11</sup>

The latter part of Sec. 91 declares that any matter coming within any of the classes enumerated in Sec. 91—

"shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Provinces".

Besides, the *residuary power* is vested in the Dominion Parliament, by providing in Sec. 91, that the Dominion Parliament can legislate, for the peace, order and good government of Canada, in relation to all matters not coming within the subjects enumerated in Sec. 92. From the above constitutional provisions, the following propositions have been deduced by the Courts relating to the distribution of legislative powers in Canada :

I. When any legislation comes in pith and substance within one of the classes specially enumerated in Sec. 91, as the exclusive subjects for the Dominion Parliament, it is beyond the legislative competence of the Provincial Legislatures, and in a conflict between the enumerated heads of Sec. 91 and the heads of Sec. 92, the former **must** prevail. In such a case, *viz.*, where the matter falls 'in pith and substance' within one of the enumerated heads of Sec. 91, it is immaterial whether the Dominion

(6) *Parrie v. McFarlane*, (1925) 36 C.L.R. 176.

(7) *Carter v. Egg Marketing Board*, (1942) 66 C.L.R. 557.

(8) *Amalgamated Society of Engineers v. Adelaide Steamship Co.*, (1920) 28 C.L.R. 129.

(9) *A.-G. for Ontario v. A.-G. for Canada*, (1896)

A.C. 348.

(10) *Citizen's Insurance Co. v. Parsons*, 7 App. Cas. 96.

(11) *Deere Plow Co. v. Wharton* A.I.R. 1914 P.C. 174.



has or has not dealt with the subject by legislation, that is to say, whether or not that legislative field has been 'occupied' by legislation of the Dominion Parliament<sup>12</sup>. The Dominion has been given exclusive legislative authority as to "all matters coming within the classes of subjects" enumerated under 29 heads, and the contention that unless and until the Dominion Parliament legislates on any such matter the Provinces are competent to legislate, is therefore unsound<sup>13</sup>.

In short, the legislation of the Parliament of the Dominion, so long as it *strictly* relates to subjects of legislation expressly enumerated in Sec. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislature by Sec. 92.<sup>14</sup>

II. If, on the other hand, in its pith and substance, the legislation relates to a Provincial subject enumerated in Sec. 92, the Dominion Parliament has no power to enact such legislation unless it comes within the residuary part of Sec. 91 by reason of some 'national importance ; or special emergency'.<sup>15</sup>

"Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province ; or encroach upon the classes of subjects which are reserved to provincial competence. It is *not necessary that it should be a colourable device, or a pretence*. If, on the true view of the legislation, it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the Provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain".<sup>16</sup>

III. But where a matter which is only *incidental or ancillary* to the main subject which was within the exclusive powers of the Dominion Parliament, has been dealt with by the Provincial Legislature, then, if the matter is properly within one of the subjects enumerated in Sec. 92, the legislation of the Province is competent unless and until the Dominion Parliament chooses to *occupy* that field by legislation<sup>17</sup>. But once the Dominion Parliament chooses to legislate on such ancillary matter, the Provincial Legislatures are precluded from entering into that 'occupied field'<sup>17, 18</sup> and any existing Provincial legislation is superseded by the Dominion legislation which occupies the field.

IV. In case there is any overlapping of subjects as between the matters enumerated in Sec. 91 and Sec. 92, "the general language in the heads of Sec. 92 yields to the particular expressions in Sec. 91, where the latter are unambiguous".<sup>19</sup> But the object of the Court should be to arrive at a reasonable and practical construction so as to reconcile the respective powers and give effect to all of them.<sup>20</sup>

V. Where the subject-matter of a legislation is not within any of the enumerated heads of either Sec. 91 or Sec. 92, the sole power rests with the Dominion Parliament, under the preliminary words of Sec. 91, relative to "laws for the peace, order and good Government of Canada".<sup>13</sup>

*Burma.*—There is no Concurrent Legislative List in the Constitution of Burma. There are only two Lists, and in case of overlapping, the Union List prevails. Sec. 92 of the Constitution says—

"(1) The Parliament shall have power to make laws of the whole or any part of the Union except in so far as such power is assigned by the next succeeding sub-section exclusively to the State Councils.

For greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, notwithstanding anything in the next succeeding sub-section, the exclusive legislative authority of the Parliament shall extend to all matters enumerated in List I of the Third Schedule to this Constitution (hereinafter called 'the Union Legislative List').

(12) *A.-G. for Canada v. A.-G. for Ontario*, (1898) A.C. 700.

(13) *A.-G. for Alberta v. A.-G. for Canada*, A.I.R. 1943 P.C. 76 (80).

(14) *A.-G. of Canada v. A.-G. of British Columbia*, (1930) A.C. 111.

(15) *A.-G. of Canada v. A.-G. of Ontario*, A.I.R. 1937 P.C. 89.

(16) *A.-G. for Ontario v. A.-G. for Canada* (1894) A.C. 189.

(17-18) *Royal Bank of Canada v. Larue*, (1928) A.C. 187.

(19) *G. W. Saddlery Co. v. The King*, (1921) A.C. 91 (116).

(20) *John Deere Plow Co. v. Wharton*, (1915) A.C. 330.

Any matter coming within any of the classes of subjects enumerated in the said List, shall not be deemed to come within the class of matters of a local or private nature comprised in the list of subjects assigned by the next succeeding sub-section exclusively to the State Councils.

(2) Each State Council shall have power exclusively to make laws for the State or any part thereof with respect to any of the matters enumerated in List II of the said Schedule (hereinafter called "the State Legislative List").

(3) Any State Council may by resolution surrender any of its territories or any of its powers and rights to the Union."

*Government of India Act, 1935.*—The method of distribution of powers adopted in this Act was neither the Canadian nor the Australian but is a mixture of the two.

"It follows the Canadian example in that powers of both the centre as well as the units of the Federation are enumerated, but it differs from it in failing to vest the residue in the Dominion and in having a long concurrent list. It follows the Australian in enumerating the concurrent powers and generally in providing for the method of resolving repugnancy in the concurrent field: but it differs from it again in not leaving the unenumerated powers to the States. It differs from both however in that it exhaustively enumerates all the subjects of legislation and leaves practically no residue."

The Act made a threefold distribution of legislative powers,—Federal, Provincial and Concurrent.

List I enumerated a number of matters in respect of which the Central Legislature had an *exclusive* right of legislation. List II enumerated a number of matters in respect of which the Provincial Legislatures had an *exclusive* right. List III specified matters in respect of which the Central and Provincial Legislatures had concurrent powers of legislation.

In case of overlapping as between the Lists, predominance was given to the Federal rather than to the Provincial Legislature. Thus the power of the Provincial Legislature to legislate with respect to matters in the Provincial List was made subject to the power of the Federal Legislature to legislate over matters enumerated in the Federal and Concurrent Legislative Lists.<sup>21</sup> Again, the power of the Federal Legislature to legislate over the Concurrent List was given 'notwithstanding the powers of the Provincial Legislature with respect to the Provincial List' (Sec. 100), subject, of course, to the doctrine of 'pith and substance'<sup>21-a</sup>.

As regards the *concurrent* powers,—Sub-sec. (1) of S. 107 provided that if any provision of a Provincial Law was repugnant to any provision of a Federal law or of an existing law with respect to any matter of List III, the Federal law was to prevail. But Sub-sec. (2) of Sec. 107 provided that if, in the foregoing case, the Provincial legislation was reserved for the consideration of the Governor-General and received his assent, the Provincial law, though repugnant to the Federal or existing law, would prevail. In other words, sub-sec. (2) cured the repugnancy. [This was an innovation upon the Australian and Canadian Constitutions].

The allocation of the *residual* power in the Act of 1935 was unique. This did not belong to either of the Legislatures but to the Governor-General, who (Sec. 104) had the power to authorise either the Federal or a Provincial Legislature to enact a law with respect to any matter which is not enumerated in any of the Lists. This power, the Governor-General was to exercise 'in his discretion'.

#### INDIA

As under the Government of India Act, 1935, there is a *threefold* distribution of legislative powers between the Union and the States, under the Constitution of India (Art. 246). Thus, there are three Legislative Lists in the 7th Schedule of the Constitution.

List I or the *Union* List includes subjects over which the Union shall have exclusive powers of legislation, including 97 items or subjects. These include defence, foreign affairs, banking, currency and coinage, Union duties and taxes and the like.

(21) *Prafulla v. Bank of Commerce*. (1947) 51 C.W.N. 599 (610) (P.C.).

(21-a) *A.-G. for Alberta v. A.-G. for Canada* A.I.R. 1943 P.C. 76 (80).

List II or the State List comprises 66 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local Government, public health and sanitation, agriculture, forests and fisheries, education, State taxes and duties, and the like.

List III gives concurrent powers to the Union and the State Legislatures over 47 items, such as Criminal law and procedure, Civil procedure, marriage, contracts, torts, trusts, welfare of labour, social insurance, economic and social planning.

In case of *overlapping* of a matter as between the three Lists, predominance has been given to the Union Legislature, as under the Government of India Act, 1935. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been made subject to the power of Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists [Art. 246 (3)]. For the same reason, even when a State Legislature legislates with respect to a matter included in the exclusive State List, the law will be void to the extent of its repugnancy with a Union law which Parliament is competent to make under the Constitution [Art. 254 (1)].

In case of repugnancy between a law of a State and a law of the Union in the *concurrent* sphere, the latter will prevail. The State legislation may, however, prevail notwithstanding such repugnancy, if the State law was reserved for the President and has received his assent [Art. 254 (2)].

In one important respect, the scheme of distribution *differs* from that under the Act of 1935, *viz.*, as to *residual* powers. While under the Act of 1935, the residual powers were vested neither in the Federation nor in the States but were placed at the hands of the Governor-General, the Constitution vests the residuary power, *i.e.*, the power to legislate in respect of any matter not enumerated in any one of the three Lists,—in the *Union* [Art. 248; Entry 97, List I], as in Canada [see p. 517, *ante*].

Another innovation is the provision in Art. 249. Under this Article the Union Parliament is empowered to make temporary laws overriding the normally exclusive powers of the State Legislature,—relating to matters enumerated in the State List, if by a special majority the Council of State declares that this is expedient in the national interest.<sup>22</sup>

### THE PROBLEM OF INTERPRETATION

Having passed through a survey of the general scheme of distribution of legislative powers under the Constitution of India with reference to analogous federal Constitutions, let us now attend to the problem of interpretation of the distribution made by *our* Constitution with reference to the rules formulated by Courts in India and in other countries relating to the subject. Earlier in this book (p. 22, *ante*), we promised to make a separate treatment of the rules of interpretation relating to the distribution of legislative powers.

**APPLICABILITY OF DECISIONS UNDER OTHER CONSTITUTIONS.**—The first thing to start with is a general idea as to how far decisions under other Constitutions may be useful in interpreting *our* Constitution.

In a case<sup>22-a</sup> under the Government of India Act, 1935, the Federal Court observed—

“The decisions of the Canadian and Australian Courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgment of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed.

But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is expounding; and since no two constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the

(22) ‘Emergency’ provisions are not dealt with in this broad survey. See under Part XVIII, *post*.

(22-a) *Re C. P. Motor Spirit Taxation*, A. I. R. 1939 F. C. I. (5)



same in both cases ; for a word or a phrase may take a colour from its context and bear different senses accordingly".<sup>23</sup>

Since *our* Constitution is an instrument made up of materials collected from different sources (see p. 4, *ante*), there is no doubt that the judicial interpretation put upon the borrowed provisions (see p. 15) would be material in interpreting the identical or analogous provisions of *our* Constitution. As Sir B. N. Rau said—

"There is another advantage in borrowing not only the substance but even the *language* of established Constitutions ; for we obtain in this way the benefit of the *interpretation* put upon the borrowed provisions by the Courts of other countries of their origin and we thus avoid ambiguity or doubt."<sup>24</sup>

At the same time we must take care not to make an indiscriminate use of foreign decisions. They will be applicable in interpreting *our* Constitution only in so far as the provisions under interpretation are in *pari materia* with the provisions of the foreign Constitutions concerned, and in so far as the apparently similar provisions are not controlled or modified by some other provisions which are peculiarly *our* own.

Thus, coming to the matter of distribution of legislative powers, we have seen how the scheme underlying *our* Constitution differs fundamentally from some of the principles underlying other Constitutions, and we cannot apply foreign doctrines overlooking these fundamental differences.<sup>25</sup> Thus, before applying the doctrine of 'Implied Powers', we should remember that the division of powers in *our* Constitution differs radically from the American inasmuch as we have enumerated powers not only for the Union Legislature but also for the State Legislatures, and there is a Concurrent List, not insignificant in dimension, and that within the ambit of its exclusive powers (List II) the State Legislature need not give way to the exigencies of national unity and strength in the American sense, except so far as the Constitution itself provides<sup>1</sup>, for example, in Art. 249, *post*.

With these general observations, we may now take up the rules relating to the interpretation of legislative powers as formulated by the Courts under different Constitutions and consider their applicability under *our* Constitution :

### I. The doctrine of 'Implied Powers'.

(a) The doctrine of Implied Powers had its origin under the Constitution of the *United States*, which conferred enumerated powers to the Federal Congress, within a brief span of 17 entries, but by the 18th clause [Art. I, S. 8 (18)] empowered Congress—

"to make laws which shall be necessary and proper for carrying into execution the foregoing powers . . . . ."

Not long after the inauguration of the Constitution, it was found that the exigencies of national development and safety demanded that the Federal Legislature should have dynamic powers to keep pace with social and economic changes. Hence, in order to enlarge the enumerated powers of Congress, the Supreme Court formulated the doctrine of 'Implied Powers' as follows<sup>2</sup> :

" . . . . . The sound construction of the Constitution must allow to the national Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people . . . . ."

In its actual working, the American federal system is not, in 1949, what it was in 1789. While the original plan of the Constitution was to give limited and defined powers to the national Government, the pressure of economic forces and the development of industry and commerce have tended towards greater

(23) *Re C. P. Motor Spirit Taxation*, A.I.R. 1939 F.C. 1 (5).

(24) Article on "The Indian Constitution" by Sir B. N. Rau, in the *Amrita Bazar Patrika*, Calcutta, Sunday, 15-8-48 (Independence Day Number, p. 4).

(25) *Governor-General v. Province of Madras*,

A.I.R. 1945 P.C. 98.

(1) Cf. *Megh Raj v. Alla Rakhia*, (1942) 46 C.W.N. (F.R.) 61 ; *Ramkrishna v. Municipal Committee*, (1950) 5 D.L.R. 1 (S.C.).

(2) *McCulloch v. Maryland*, (1819) 4 Wheaton 316.

unification and the Courts have given effect to this inevitable tendency towards centralisation, by *expanding* the meaning of the enumerated federal powers<sup>3</sup>.

Thus, the Judiciary has allowed the Union—

(a) to assume control over *banking* under the constitutional power over 'coinage'<sup>4</sup>;

(b) to regulate communication of ideas by telegraph, telephone or wireless<sup>5</sup>, under the authority to regulate 'commerce';

(c) to enact social security measures such as unemployment and old age pension, under the power to tax and to provide for 'the general welfare.'<sup>6</sup>

The Constitution granted the Federal Government only 17 items of *enumerated* powers while the residue was left to the States in such a manner as led Tocqueville to observe (in 1835) that in the United States, "Government by the Centre was the *exception*, while Government by the States was the rule". But by a judicial expansion of federal powers, the position has just come to be the reverse.

As an American writer<sup>7</sup> shows :

"During the past 10 years (1936-46), the United States Supreme Court has *removed substantially all restrictions (upon national power)* that previously existed, so that the scope of national authority has become a *question of governmental policy*, and has substantially ceased to be one of constitutional law."

A most crucial example of the attitude of the Supreme Court towards expansion of federal power is illustrated by the observations in the recent Insurance Case, of 1944,<sup>8</sup> in which the Court has revised its 75-year-old policy of excluding insurance from federal control :

"The purpose (of the commerce power) is not confined to empowering Congress with the *negative* authority to legislate against State regulations of commerce deemed inimical to the national interest. The power granted Congress a *positive* power. It is the power to legislate concerning transactions which, reaching across State boundaries, affect the people of more States than one ; to govern affairs which the individual States, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across State lines was essential to weld a loose Confederacy into a single, indivisible Nation ; its continued existence is equally essential to the *welfare of the Nation*."

Whatever may have been the reasoning by which one particular Bench of Judges nullified the decision of successive Benches for three-quarters of a century, the irresistible logic behind the present decision,<sup>9</sup> is that the nation must have the control of any activity which has assumed national importance or whose incidents have become national :

"The modern insurance business holds a commanding position in the trade and commerce of our nation . . . . Perhaps no commercial enterprise directly affects so many persons in all walks of life as does this insurance business. Insurance touches the home, family and the occupation or the business of almost every person in the U.S.A."<sup>10</sup>

(b) But the scope for application of the doctrine is narrowed down where there is a *double enumeration* of powers, as in *Canada*. Thus, in *Canada*, it has been held that both the Dominion and Provincial Legislatures have plenary powers of legislation. So, the two sections 91 and 92 must be read together<sup>11-a</sup> and each must be given, where necessary, a modifying effect upon the other, thus limiting in each the wide scope which upon the bare words the individual class enumerations would have.<sup>12</sup>

(c) Similarly, under the *Government of India Act*, 1935, the Supreme Court of India has refused to apply the doctrine of 'Implied powers' to give ■ broad

(3) On the subject, generally, see my Article on 'The Indian Constitution through American Eyes' in (1949) F.L.J. 147 (152-160), Journal.

(4) *McCulloch v. Maryland*, (1819) 4 Wh. 316.

(5) *Pensacola Tel. Co. v. W. U. Tel. Co.*, (1877) 96 U.S. 1.

(6) *Steward Machine Co. v. Davis*, (1936) 301 U.S. 548 ; *Helvering v. Davis*, (1936) 301 U.S. 619.

(7) Dodd, Article on United States Supreme Court, quoted in *Godshall*, Government in the

United States, 1948, p. 688.

(8) *United States v. S. E. Underwriters' Association*, (1944) 322 U.S. 533, reversing *Paul v. Virginia*, (1869) 8 Wall. 168 ; *McCulloch v. Maryland*, (1819) 4 Wh. 316 ; *N. Y. Life Insurance Co. v. Deer Lodge County*, (1913) 231 U.S. 495.

(8-a) *A.-G. for Ontario v. A.-G. for Canada*, (1896) A.C. 348.

(9) Clement, *Canadian Constitution*, pp. 401, 497.

interpretation to the federal power at the expense of provincial power.<sup>10</sup> Their Lordships observed—

"It is natural enough, when considering the ambit of an express power in relation to an unspecified residuary power<sup>11</sup>, to give a broad interpretation to the former at the expense of the latter. The case however is different where as in the Constitution Act there are two complementary powers, each expressed in precise and definite terms. There can be no reason in such a case for giving a broader interpretation to one power rather than to the other."<sup>12</sup>

#### Illustrations.

1. Entry 45 in List I of Sch. VII of the Government of India Act, 1935, was—"Duties of excise on tobacco or other goods manufactured or produced in India except . . . . ."<sup>12</sup>. Entry 49 of List II, on the other hand, was—"Cesses on the entry of goods into a local area for consumption, use or sale therein."<sup>13</sup>. The C. P. Municipalities Act levied an *octroi* duty. The duty was levied on tobacco brought into the Province for the purpose of making *bidis*. It was contended that any impost on the tobacco from the time it came into existence till it was converted into *bidis* was an "excise duty" under Entry 45 of List I and so the imposition of an *octroi* duty before that stage was *ultra vires* of the Provincial Legislature. *Held*, that the above argument could be upheld only if one read the words 'except for manufacture of exciseable articles' after Entry 49 of List II. But there is no reason for thus extending the meaning of the expression 'duties of excise' at the expense of the Provincial power to levy *octroi* duty. "Excise duty is a tax on manufactured goods. *Octroi* duty is a tax levied on the entry of goods within a particular area . . . . . Entry 45 of List I is limited to excise duty and is not wide enough to cover tobacco or other goods generally for all purposes of legislation . . . . . It is wrong to think that two independent imposts arising from two different sets of circumstances were not permitted by law".<sup>14</sup>

2. Item 48 of the Provincial List of the Government of India Act was—

"Taxes on the sale of goods . . . . ."<sup>15</sup>

In the case of *Governor-General in Council v. Province of Madras*<sup>16,17</sup>, there was an alleged conflict of this item with item No. 45 of the Federal List (*see* the foregoing case) relating to duties of 'Excise'. It was contended that the Madras Sales Tax Act, 1939, was *ultra vires* in so far as it sought to impose a tax on *first* sales. Negating the contention, their Lordships held that a duty of 'excise' is primarily a duty levied upon a *manufacturer* or producer in respect of the commodity manufactured or produced. It is a tax upon the *goods*, not upon *sales* or the proceeds of the sale of goods, which is the province of a sales tax. Hence, the taxing authority, imposing a duty of excise may impose the duty when the *exciseable* article leaves the factory or the workshop for the first time upon the *occasion* of the sale; similarly, the Provincial Legislature may impose a tax upon the *sale* of exciseable goods, when manufactured.

II. *The doctrine of 'Incidental and ancillary powers'.*—But though the doctrine of 'Implied powers' in the strict American sense may not be applicable under the Constitution of India, it should not be supposed that the Courts have no business in interpreting the legislative powers and that the Entries in the Legislative Lists are to be interpreted in their narrow, literal and grammatical sense. We have seen at the outset (pp.16-17), that constitutional provisions are entitled to a liberal or generous interpretation and not to a 'strict' construction as may be applicable to statutes with particular objects. So viewed, every Legislature,—not the federal

(10) *Ramkrishna v. Municipal Committee*, A.I.R. 1950 S.C. 11. [See also *Kishori v. The King*, A.I.R. 1950 F.C. 69; *Governor-General in Council v. Province of Madras*, (1945) C.W.N. 381 (384) (P.C.)].

(11) As in the U.S.A. [see p. 521 *ante*].

(12) Entry 84 of List I of the Constitution is identical.

(13) Entry 52 of List II of the Constitution is the same, excepting the use of 'taxes' instead of cesses.

(14) *Ramkrishna v. Municipal Committee*, A.I.R. 1950 S.C. 11.

(15) Entry 54 of List II of the Constitution corresponds to the above item.

(16-17) (1945) 49 C.W.N. 381 (P.C.).



Legislature alone,—must have certain incidental and ancillary powers to make sure that legislation with respect to its enumerated powers may be *effective*.<sup>18</sup>

The *Australian Constitution* is an instance where the Constitution itself gives the Commonwealth Parliament the power of incidental legislation. S. 51 (xxxix) of the *Australian Constitution Act* gives the Commonwealth Parliament to legislate with respect to—

“Matters incidental to the execution of any power vested by this Constitution in the Parliament, . . . . in the Government of the Commonwealth, or in any Department . . . . of the Commonwealth.”

In applying this provision, the Australian High Court has observed—

“ . . . . The Constitution marks the outlines of the powers granted to the national legislature, but does not undertake, as a code of laws would, to enumerate the sub-divisions of those powers or to specify all the means of executing them. Laws which, in the language of the American Constitution, are ‘necessary and proper’, or, in the language of the Australian Constitution, ‘incidental to the execution of the power’, are alike constitutional.”<sup>19</sup>

But in the exercise of the incidental powers, the Legislature “may complement, but cannot *supplement* ■ grant of power”<sup>20</sup>. There must be such a *necessary connection* between the express power and the power claimed that the latter may be *properly* said to be ‘incidental to the execution’ of the express power :

“It is the natural relation between the power and the thing done that determined whether the doing of the thing is ■ proper incident of the power, and the existence of such a relation or connection depends on the limits and the purpose of the power ■ the one side and, on the other side, on the nature of what it is sought to do.”<sup>21</sup>

It is to be noted that the Australian Constitution, like the American, enumerates only the powers of the Commonwealth Parliament (*see* p. 516, *ante*), and leaves the residue to the States<sup>22</sup>. Hence, under the Australian Constitution, the scope for the application of the incidental powers (in view of the provision in S. 51 (xxxix) also), arises only in connection with the interpretation of the Commonwealth powers.

But, ■ I have already said, the principle of incidental powers is not confined to any particular Legislature. The English Courts have applied it even in the matter of execution of statutory powers :

“When you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, *prima facie*, to follow from the authority for effectuating the main purpose by proper and general means.”<sup>23</sup>

Hence, under ■ Constitution of double enumeration of powers, as in *Canada*, the principle is applicable in the case of both the Dominion and Provincial Legislatures. Thus, it has been held<sup>24</sup> that it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislature, are necessarily incidental to the *effective* legislation by the Parliament of the Dominion upon a subject of legislation enumerated in S. 91.<sup>25</sup> In *Cushing v. Dupuy*<sup>1</sup>, the Privy Council observed—

“It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates [S. 91 (21)], without interfering with and modifying some of the ordinary rights of property and other civil rights [S. 91 (13)], nor without providing some special mode of procedure [S. 92 (14)], for the vesting, realization and distribution of the estate . . . . Procedure ■■■■ necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency

(18) Cf. *Hepburn v. Griswold*, (1869) 8 Wall. 603 (613).

(19) *Stemp v. Australian Glass Manufacturers*, (1917) 23 C.L.R. 226 (233).

(20) *Ex parte Walsh*, 37 C.L.R. 36 (121); *Australian Employees' Federation v. Whybrow Co.*, (1910) 11 C.L.R. 311 (338).

(21) *Farley's case*, (1940) 63 C.L.R. 278 (315).

(22) *Baxter v. Commissioner of Taxation*, (1907) 4 C.L.R. 1087.

(23) *Small v. Smith*, (1884) 10 App. Cas. 119 (129).

(24) *A.-G. of Canada v. A.-G. of Br. Columbia* (1930) A.C. 111.

(25) *A.-G. for Ontario v. A.-G. for Canada*, (1896) A.C. 348.

(1) *Cushing v. Dupuy*, (1880) 5 App. Cas. 409.

[S. 91 (21)], intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a *general* law relating to those subjects might affect them."

Similarly, the Provincial Legislatures in the exercise of their powers under S. 92 are entitled to exercise ■ power which is 'reasonably and practically necessary for the efficient exercise of such enumerated powers'—subject to the provisions of S. 91.<sup>2</sup>

Under the *Government of India Act*, 1935, the above doctrine was applied by the Federal Court in *United Provinces v. Aliqa Begum*<sup>3</sup>, to hold that—

(i) The *validation of doubtful executive orders* is a power subsidiary or ancillary to the power of legislating on a particular subject in respect of which the executive orders may have been issued.

(ii) The power *to impose penalties* for disobedience to the laws made by a Legislature, to declare offences for violation of the laws, and to direct the destination of the fines imposed, are essential to the effectiveness of the power to legislate on any subject. (So far as this latter power is concerned, *the Constitution* has expressly provided this power to each Legislature, by inserting an entry, relating to 'offences against laws') in List I [Entry 93] as well as List II [Entry 64].

In the above case<sup>3</sup>, the Federal Court observed—

"None of the items in the *Lists* is to be read in a narrow or pedantic sense, and each general word should be held to extend to all *ancillary* and *subsidiary* matters which can fairly and reasonably be comprehended in it."

So, in India, the application of the doctrine is not confined to the Union Legislature; it is also applicable to the powers of the State Legislature.

III. *The doctrine of Immunity of Instrumentalities*.—The doctrine of Immunity of Instrumentalities was propounded by the Supreme Court of the *United States* in the case of *McCulloch v. Maryland*<sup>4-5</sup> to mean that when two separate Governments are established as in a Federal Constitution, each with a limited jurisdiction, the power of each Government shall be construed as being under an *implied* limitation that it shall be so exercised as not to impair the functions allotted to the other Government. Hence, any incidental or indirect interference with the functions of the Federal Government would make a State legislation bad, even though the legislation may relate to a subject allotted to the State Legislature, and conversely. So, in this case<sup>4-5</sup> it was held that a State cannot tax the '*agencies or instrumentalities*<sup>6-7</sup> of the Federal Government (such as the operations of a Bank chartered by Congress), so as to cripple the functions of the Federal Government. A similar limitation would apply as regards the Federal Legislature. For,

"The power to tax involves the power to destroy"<sup>4-5</sup>.

But the Constitution assumed the perpetuity of both the National and State Governments. If the two Governments are to maintain themselves side by side without either becoming subordinated to the other, neither must be permitted to hamper the functions of the other.

This doctrine, thus, may be said to be the converse of the doctrine of 'implied powers' and may be termed the doctrine of 'implied *prohibitions*.'

In recent years, however, the Supreme Court—

"has curtailed sharply the doctrine of implied delegated immunity."<sup>8</sup>

While the principle that "possessions, institutions, and activities of the Federal Government *itself*, in the absence of congressional consent are not subject to any form of State taxation remains unshaken,"<sup>8</sup> the doctrine has in recent years

(2) Clement, *Canadian Constitution*, pp. 506-7.

(3) *United Provinces v. Aliqa Begum*, A.I.R. 1941 F.C. 16 (26).

(4-5) *McCulloch v. Maryland*, (1819) 4 Wh. 316.

(6-7) Cf. Under Art. 264 (1) of the Indian

Constitution it is the "property" of the Union that is exempt from State taxation, and not the 'agencies or instrumentalities'.

(8) *United States v. Allegheny County*, (1944) 322 U.S. 174 (177).

been refused in favour of *individuals*, where the Federation or the State is only *indirectly* concerned.

Thus, the protection from a State tax has been denied to—

(i) a contractor with the Federal Government (in respect of ■ State occupation tax) ;<sup>9</sup> (ii) an employee of ■ Federal instrumentality (from State income-tax)<sup>10</sup> ; (iii) a contractor, from a State sales tax upon his purchases of building materials, though they were to be incorporated into a Government project<sup>11</sup> ; (iv) a purchaser in possession under an uncompleted contract from the United States (in respect of a State tax upon his interest in the land)<sup>12</sup>.

Similarly, protection from Federal tax has been denied to—

(a) the lessee of an oil lease granted by a State subject to a royalty, in respect of his income from the same<sup>13</sup> ; (b) officers of ■ State authority from federal taxation of their salaries<sup>14</sup> ; (c) a corporation created by ■ State to manage athletic exhibition<sup>15</sup> ; (d) a *business* of a private nature, conducted by a State, e.g., the sale of liquor from a national excise tax<sup>16</sup>. The Supreme Court observed<sup>16</sup>—

“While the national Government may do nothing by taxation in any form to prevent the full discharge by the State of its *Governmental functions*, yet, whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the Nation.”<sup>16</sup>

But this distinction between governmental and non-governmental functions has not been observed in the case of the national government.<sup>17</sup>

Again, a function which was non-governmental at one time, may be treated as governmental owing to change of circumstances or of ideas. Thus, the service of supplying water has come to be regarded as a governmental function<sup>18</sup>.

The following have been enumerated as instances of governmental functions of the States which are exempt from federal taxation—

“The right to pass laws, to give effect to laws through executive action, to administer justice through the Courts, and to employ all necessary agencies for legitimate purposes of State Governments . . . .”<sup>19</sup>

In some earlier cases<sup>20</sup>, the High Court of *Australia* followed the American doctrine of Immunity of Instrumentalities. But the Privy Council in *Webb v. Outrim*<sup>21</sup>, refused to follow that doctrine and held that officers of the Commonwealth Government were liable to pay State income-tax on their salaries. Since, 1920, the Privy Council decision has come to be followed in *Australia*<sup>22</sup>. In this last-mentioned case<sup>22</sup>, it was held that employees of a State Government were within the jurisdiction of the Commonwealth Arbitration Court.

On the one hand, once it is found that the Commonwealth has a legislative power under S. 51 or 52, it is immaterial that by such legislation the legislative

(9) *James v. Dravo Contracting Co.*, (1937) 283 U.S. 570.

(10) In *Graves v. New York*, [(1939) 306 U.S. 466], the Supreme Court observed—“So much of the burden of a non-discriminatory general tax upon the incomes of employees of ■ Government, state or national, ■ may be passed on economically to that Government, through the effect of the tax on the price level of labour ■ materials, is but the normal incident of the organisation within the same territory of two Governments, each possessing the taxing power. . . . It is not a tax on the property or income of . . . the Government . . . It is measured by income which becomes the property of the tax-payer when received as a compensation for his services ; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the Government, either directly or indirectly.

(11) *Alabama v. King and Boozer*, 314 U.S. 1.

(12) *S.R.A. v. Minnesota*, (1946) 327 U.S. 558.

(13) *Helvering v. Mountain Producers*, (1938) 303 U.S. 376.

(14) *Helvering v. Gerhardt*, (1938) 304 U.S. 405.

(15) *Allen v. Regents*, (1938) 304 U.S. 439.

(16) *South Carolina v. U.S.*, (1905) 199 U.S. 437.

(17) *McCulloch v. Maryland*, (1819) 4 Wh. 316.

(18) *Brush v. Commissioner of Internal Revenue*, (1937) 300 U.S. 352.

(19) *Veazie Bank v. Fenno*, (1870) 8 Wall. 533.

(20) *D'Emden v. Pedder*, (1904) 1 C.L.R. 91 ;

*Deakin v. Webb*, (1904) 1 C.L.R. 585 ; *Amalgamated Ry. Association v. Traffic Employees' Association*, (1906) 4 C.L.R. 448.

(21) *Webb v. Outrim*, (1907) A.C. 81.

(22) *Amalgamated Society of Engineers v. Steamship Co.*, (1920) 28 C.L.R. 129 ; *Davoren v. Commonwealth Commissioners*, (1923) 29 A.L.R. 129.



or executive power of a State may be *affected*<sup>23</sup>. On the other hand, federal military officers are subject to State legislation relating to motor-cars, in the absence of inconsistent Commonwealth legislation<sup>24</sup>.

But even in Australia it has been held<sup>25</sup> that neither the Commonwealth Parliament nor a State Parliament has the power to make laws which are *directed against* and impair the exercise of 'an essential governmental function' of the other. The imposition and collection of taxation falls within this principle.

In this connection, a distinction has been made between 'general legislation' and 'legislation limited to a particular case.'<sup>1</sup> While provisions of a State Legislature 'which apply generally to the whole community without discrimination' are valid, 'an act of the State Legislature discriminating against Commonwealth officers' is invalid<sup>2</sup>.

"The Government is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other."<sup>3</sup>

In *Canada*, the application of the above doctrine has been definitely rejected by the Privy Council as being foreign to the English rules of interpretation. The question whether a legislation is valid or not has to be decided in each case solely with reference to the question whether it relates to a subject within the legislative competence of the Legislature which enacted that law, and not with reference to the consideration whether it would hamper the powers or functions of another Government. Thus, if it is found that the Act relates to a legislative power included in S. 92 of the British North America Act (power conferred on the Provincial Legislature),—

"It would be quite wrong to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament"<sup>4</sup>;

or may possibly bring the Provincial Legislature into conflict with the Dominion Legislature<sup>5</sup>.

Similarly, when a legislative power is given to the Province, it is no bar to the validity of a Provincial enactment relating to that power, that it came into conflict with Dominion powers or trenched upon Dominion revenue or the like<sup>6</sup>. Thus, within its taxing powers, a Provincial Legislature may tax Dominion officers<sup>7</sup>.

#### Illustrations.

1. The Bank of Toronto, which had been formed by an Act of the Dominion Parliament, had an agency within the Province of Quebec, which passed a law imposing a tax on every bank carrying on business within that Province. The Bank of Toronto resisted the payment of this tax on the ground that such a tax might be so heavy as to defeat the power of the Dominion to incorporate banks and to deal with banking, under Sec. 91 (15). The Privy Council rejected this contention and held that the Provincial Legislature had the power to impose a tax on the commercial corporations carrying on business within the Province (under its power of direct taxation under Sec. 92 (2)), notwithstanding the fact that the incorporation had taken place under the Dominion powers.<sup>4</sup>

2. The Liquor Act of Manitoba, 1900, was impugned on the ground that it came in conflict with the Dominion power of regulation of trade and commerce and the raising of money by indirect taxation. The Privy Council rejected this plea on the ground that legislation dealing of 'matters of merely local or private nature',—

"however carefully it may be framed, may or must have an effect outside the limits of the Province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades"<sup>6</sup>.

There was an apparent application of the doctrine in the Privy Council case of *John Deere Plow Co. v. Wharton*<sup>8-10</sup>. In this case, it was held that the Dominion

(23) *Parker v. Commonwealth*, (1931) 44 C.L.R. 492.

(24) *Pirrie v. McFarlane*, (1925) 36 C.L.R. 170.

(25) *Melbourne Corporation v. Commonwealth*, (1947) 74 C.L.R. 31.

(1) *Uniform Taxation case*, (1942) 65 C.L.R. 373 (431).

(2) *Engineers' case*, (1920) 28 C.L.R. 129.

(3) *S. Australia v. Commonwealth*, (1942) 65 C.L.R. 373 (442).

(4) *Bank of Toronto v. Lambe*, (1887) 12 A.C. 575 (587).

(5) *A.-G. of Alberta v. A.-G. of Canada*, A.I.R. 1939 P.C. 53 (59).

(6) *A.-G. of Manitoba v. Manitoba Licence Holders*, (1902) A.C. 73 (76).

(7) *Forbes v. A.-G. of Manitoba*, (1937) A.C. 260.

(8-10) *John Deere Plow Co. v. Wharton*, (1915) A.C. 330.

Parliament is competent, under its 'trade and commerce' power [(S. 91 (2))], to incorporate companies and confer status and powers upon such companies and that—

"The Province cannot legislate [under Sec. 92 (13)] so as to deprive a Dominion company of its status and powers . . . . . The status and powers of a Dominion company as such cannot be destroyed by provincial legislation . . . . . A Province cannot interfere with the status and capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the Parliament of Canada to carry on business on every part of the Dominion"<sup>10</sup>.

Thus, a Province cannot require a Dominion company to obtain a Provincial licence or to be registered in the Province as a condition of exercising its powers and of suing in the Courts<sup>10</sup>. The above decision may, however, be supported on other grounds, *viz.*, that such regulation by the Province would be an *excess* or a colourable exercise of its legitimate power to legislate in relation to 'civil rights and property' within the Province. Thus, in the guise of enacting a law of taxation to raise revenue for provincial purposes, a Province cannot prevent the operation within the Province of those banking institutions which have been called into existence by the Dominion Parliament<sup>11</sup>.

In *India*, the doctrine of Immunity of Instrumentalities does not appear to have been adopted in the *Constitution*, apart from the limited application as regards exemption from mutual taxation, in Arts. 285 and 289 (corresponding to Ss. 154-5 of the Act of 1935). In the words of the Judicial Committee in *Webb v. Outtrim*<sup>12</sup>, it may be said that the very inclusion in the *Constitution* of Arts. 285 and 289 shows that the question of interference on the part of the Federal and State powers as against each other was not left to an 'implied prohibition', and that outside these two provisions, the State and Union Legislatures have the full power to legislate on the matters included within their respective Lists, subject to the other provisions of the *Constitution*.

Thus, a State Legislature cannot be denied its power to control possession, transport, etc., of foreign liquor, under Entry 8 of List II of the 7th Schedule of the *Constitution*, on the ground that it would defeat the power of Parliament to regulate the import of foreign liquors across the customs frontiers, under Entry 41 of List I<sup>13</sup>. In this case<sup>13</sup>, the Federal Court observed—

"It may be that a general adoption of the policy of prohibition by the Provinces will lead to a fall in the import of foreign liquors and to a consequential diminution of the central customs revenue, but where the *Constitution Act* has given to the Provinces legislative power with respect to a certain matter in clear and unambiguous terms, the Court should not deny it to them or impose limitations on its exercise, on such extraneous considerations."

On the subject of encroachment by one Legislature upon the powers of another Legislature, the sole test in *India* is that of legislative competence as determined with reference to the doctrine of 'pith and substance' (as to which see *post*.) As the Privy Council observed<sup>14</sup>, the extent of encroachment is important in determining what is the pith and substance of the impugned Act, but its *validity* cannot be determined "by discriminating between *degrees* of invasion."

IV. *The doctrine of Colourable Legislation*.—But though the doctrine of Immunity of Instrumentalities has been rejected in *India*, the doctrine of colourable legislation has been applied<sup>15</sup> under the Government of India Act, 1935, and it is clear that it shall be applied under the *Constitution* since it is a principle of general application where there is a division of legislative powers.

This doctrine means that though a Legislature is not fettered, in the exercise of its exclusive powers, by any consideration of the possible effects of the exercise of such powers upon the powers allotted to some other Legislature, it cannot,—

(10) *John Deere Plow Co. v. Wharton*, (1915) A.C. 330.

(11) *A.-G. of Alberta v. A.-G. of Canada*, A.I.R. 1939 P.C. 53 (58).

(12) *Webb v. Outtrim*, (1907) A.C. 81.

(13) *Kishori v. The King*, A.I.R. 1950 F.C. 69.

(14) *Prafulla v. Bank of Commerce*, 1947 F.C.R. 28.

(15) *Megh Raj v. Alla Rakhia*, (1942) 46 C.W. N. (F.R.) 61 (65).

"under the *guise*, or the *pretence*, or in the *form* of an exercise of its own powers, carry on an object which is beyond its powers and a trespass on the *exclusive* powers of the other."<sup>16</sup>

In other words, neither the Federal nor the State Legislature has the power, under the colourable exercise of its own powers, to nullify by implication or expressly, statutes which it could not enact<sup>17</sup>. What cannot be done directly, cannot be done indirectly<sup>18,19</sup>.

Thus, the *Canadian* Parliament cannot, in the guise of enacting criminal legislation [S. 91 (27)] in truth and in substance encroach on any of the classes enumerated in S. 92.

"It is no objection that it does in fact *affect* them. In a *genuine* attempt to amend the criminal law, it may obviously affect previously existing civil rights. But it cannot use the criminal law as a *pretext* for interfering with 'civil rights in the Provinces' [section 92 (13)]."<sup>20</sup>

On the other hand, a Provincial Legislature cannot effect indirect taxation [Sec. 91 (3) ; 92 (2)], by enacting a pretended License Act which is in substance a Stamp Act<sup>21</sup>. Similarly, the exclusive power of the Dominion Parliament to regulate 'trade and commerce' [S. 91 (2)] cannot be nullified by a Provincial Act requiring licence for companies incorporated under Dominion legislation<sup>22</sup>.

In order to determine the true nature of a legislation impeached as colourable,

(i) The Court must look to the *substance* and not merely the form of the Act, and in this connection, consider two things—(a) effect of the legislation and (b) object or purposes of the Act<sup>23,25</sup>.

"The next step in case of difficulty will be to consider the effect of the legislation. For that purpose, the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be . . . . It is often impossible to determine the effect of the Act under examination without taking into account any other Act operating, or intended to operate, or recently operating in the Province."<sup>23</sup>

As regards the objects of a legislation, the statement of the Legislature itself is not conclusive.<sup>1</sup>

"Where a Parliament has only limited powers, the declaration of Parliament that a law is enacted for the purpose of securing the stated objects cannot bring an enactment within power if its operative provisions have no *real* connection with a subject with respect to which Parliament has power to make laws. Such a declaration is entitled to respectful consideration, but it cannot be decisive upon a question of validity. Each provision must be considered in the context of the Act, independently of any such statement of objects though such a statement may *suggest* a connection between the legislation and a relevant subject-matter . . . . It is the duty of the Court to determine what is the actual operation of the law in creating, changing, regulating or abolishing rights, duties, powers or privileges and then to consider whether that which the enactment does fall in substance within the relevant authorised subject-matter . . . . or whether it is really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power."<sup>1</sup>

(ii) Again, the mere object of the Legislature is not conclusive as to the validity of the legislation. An Act may have a perfectly lawful object, but it may seek to achieve that object by *invalid methods*. What is to be determined is whether the Act is passed in respect of a forbidden subject<sup>2</sup>.

(iii) When an enactment is void or inoperative, any attempt to exclude attack on it by barring the jurisdiction of the Courts will be deemed to be an attempt to do by indirect means what the Legislature was not entitled to do<sup>3</sup>.

(16) *A. G. for Alberta v. A.-G. for Canada*, A.I.R. 1939 P.C. 53.

(17) *G. W. Saddlery v. The King*, (1921) A.C. 91.

(18) *Board of Trustees v. Investment Orders*, (1940) A.C. 513.

(19) *Guy v. Baltimore*, (1879) 100 U.S. 434 (442).

(20) *A. G. of British Columbia v. A.-G. of Canada*, A.I.R. 1937 P.C. 91.

(21) *A.-G. for Quebec v. Queen Ins. Co.*, (1878) 3 App. Cas. 1090.

(22) *Deere Plow Co. v. Wharton*, (1915) A.C. 330. (The facts in *G. W. Saddlery Co. v. The King*, (1921) A.C. 330, were similar.)

(23) *A.-G. for Alberta v. A.-G. for Canada*, A.I.R. 1939 P.C. 53.

(24-25) *Union Colliery v. Brydon*, (1899) A.C. 580.

(1) *Bank of N. S. W. v. Commonwealth*, (1948) 76 C.L.R. 1.

(2) *Gallagher v. Lynn*, (1937) A.C. 863 (869).

(3) *Megh Raj v. Alla Rakhia*, (1942) 46 C.W.N. (F.R.) 61 (65).



(iv) Time will not validate an Act which when challenged is found to be *ultra vires* : nor will a history of a gradual series of advances till this boundry is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is whether *in substance* the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value<sup>4</sup>. A Legislature is not competent to legislate by a series of Acts upon matters which it could not regulate together<sup>5</sup>.

V. *The rule of Avoidance of Conflict*.—It has already been pointed out [p. 522, *ante*] that where there is an exhaustive enumeration of legislative powers between the Federal and Provincial Legislatures (as under the Constitution), the language of one list may be *coloured or qualified by that of the other*<sup>6</sup>, and, accordingly, they must be read together<sup>7</sup>.

In case of apparent conflict between entries in the Exclusive Lists (I and II) it should be borne in mind that it could not have been the intention of the makers of the Constitution that conflict should exist. In order to prevent such result, therefore, the two entries must be *read together*, and the language of the one interpreted, and where necessary modified, by that of the other. In that way, in most cases, it may be found possible to arrive at a reasonable and practical construction and to reconcile the respective powers the provisions contain and give effect to all of them<sup>8</sup>. When the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the *context and scheme* of the Act<sup>9</sup>.

VI. *The doctrine of 'Pith and substance'* : But inspite of all caution, some conflict and overlapping must arise in certain cases, owing to the nature of things. For,

"It is not possible to make so clean a cut between the powers of the various legislatures ; they are bound to overlap from time to time."<sup>10</sup>

In such cases, the Court is to apply the golden rule of 'pith and substance'.

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also ■ ■ subject in another list and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly *verbal* interpretation would result in ■ large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in ■ forbidden sphere. Hence, the rule has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this List or that."<sup>11</sup>

The doctrine of 'pith of substance' is one of *general* application whenever ■ legislation by ■ body with *limited* (federal or otherwise) authority is impugned as *ultra vires*. The question in each case is whether the power has been substantially transgressed or not. Thus, in an *Irish* case<sup>11</sup>, the Privy Council observed—

"It is well established that you are to look at the 'true nature and character of the legislation' . . . 'the pith and substance of the legislation'. If, on the view of the statute ■ a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field."<sup>11</sup>

(4) *Proprietary Articles Trade Association v. A.-G. for Canada* A.I.R. 1931 P.C. 94 (96).

(5) *Wynes, Legislative and Executive Powers*, p. 43.

(6) *Governor-General v. Province of Madras*, (1945) 49 C.W.N. 381 (384) P.C., affirming *Bodu Paidanna v. Province of Madras*, (1942) 46 C.W.N. (F.R.) 38.

(7) So stated this rule is virtually ■ application of the general principle [p. 9, *ante*], that the Constitution must be read as ■ whole.

(8) *Re C. P. Motor Spirit Act*, A.I.R. 1939 F.C. 1 (31).

(9) *Prasulla v. Bank of Commerce*, (1947) 1 D.L.R. P.C. 425.

(10) *Subrahmanian v. Muttuswami*, (1940) F.C.R.

188 (201) quoted in *Prasulla v. Bank of Commerce*, (1947) 1 D.L.R. (P.C.) 275.

(11) *Gallagher v. Lynn* (1937) A.C. 863 (870). In this case, the facts were as follows—

The Government of Ireland Act, 1920 conferred upon the Parliament of Northern Ireland the power to make laws for the peace, order and good government of Northern Ireland, but *not*—

"in respect of trade with any place out of that part of Ireland within their jurisdiction, except ■ far as trade may be affected by the exercise of the powers of taxation given to the said Parliaments, or by regulation made for the sole purpose of *preventing contagious diseases* . . . ."

So, in the federal sphere, the principle may have to be applied, even where there is a single enumeration of powers. Thus, in *Australia*, it has been held that in determining whether a Commonwealth legislation has exceeded the enumerated power, the Court has to look into the substance and not the label of the statute<sup>12</sup>.

"What the statute may in any case be called is of little moment, the label may not correctly describe the goods."<sup>13</sup>

The doctrine has equally been applied in the case of State legislation to determine whether it has encroached upon the Commonwealth powers :

"A law may produce an effect in relation to a subject-matter without being a law *with respect to* that subject matter . . . . . A prohibition of imports or a very high duty in a customs tariff may bring about the closing of business enterprises in a State. But the tariff is not a law with respect to such enterprise. Similarly, a State law may prohibit the carrying on of occupation with the result that they are necessarily abandoned, with perhaps great consequential loss to Commonwealth in customs duties or income-tax receipts. But the State law does not for this reason become a law with respect to customs duties or income-tax."<sup>14</sup>

In *Canada*, the doctrine was asserted in the case of *Russel v. The Queen*<sup>15</sup> that whenever a complaint of encroachment by one Legislature upon that of another was made—

"The true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subject to which to which it really belongs."

In another case, the Judicial Committee observed—

"One has to ascertain the true nature and character of the enactment, its pith and substance ; it is the result of this investigation, and not the form alone which the statute may have assumed under the hand of the draftsman, that will determine within which of the 'legislative lists' the legislation falls, and for this purpose, the legislation must be scrutinised in its entirety"

#### Illustrations.

1. The Canadian Employment and Social Insurance Act, 1935, provided a system of unemployment insurance under which persons engaged in employment were to be insured against unemployment and the funds were to be raised partly by money provided by Parliament and partly by contributions by the employers and the employees paid by revenue stamps. *Held*, in its pith and substance, the Act affected the contract of employment and came within the 'property and civil rights within the Province' reserved to the Provinces by section 92 (13) of the B. N. Act and did not relate to 'the public debt and property' or 'the raising of money by any system of taxation', in section 91 (1) or (3).<sup>16</sup>

2. A Mortgagee brought an action for sale of the assets of a mortgagor Paper Co., The action related to 'property and civil rights' in the Province and was within the exclusive authority of the Ontario Legislature as the action affected property in that Province. During the pendency of the action, an unsecured creditor applied for proceeding against the Co. under Bankruptcy (Dominion) Laws. Thereafter a Royal Commission was appointed for solving the financial difficulties of the Co. and the Commission recommended a plan to serve the interests of all the parties concerned. Thereafter, the Ontario Legislature passed the Abitibi Paper Co. Ltd. Moratorium Act, 1941, directing a stay of the action against the Co. so that an opportunity might be given to all the parties concerned to consider the plan submitted by the Royal Commission. *Held*, the legislation did not, in its pith and substance, relate to Bankruptcy and Insolvency which is a Dominion subject. The Legislation sought to regulate an action relating to the assets of a mortgagor within the Province, which is a Provincial subject ['property and civil rights' in the Province] and it was competent to the Provincial Legislature to pass a Moratorium Act relating thereto.<sup>17</sup>

3. Similarly a Provincial Act which appeared to deal with the Dominion subject of bankruptcy and insolvency [section 91 (21)] was held valid as in pith and substance it related to municipal institutions in the Province.<sup>18</sup>

In 1934, the Parliament of Northern Ireland passed the Milk and Milk Products Act, providing certain precautions to protect the health of the inhabitants of Northern Ireland from the dangers of an unregulated supply of milk. But the effect of the Act was practically to put an end to the milk trade between certain farmers in Irish Free State and customers in Northern Ireland. The House of Lords upheld the Act as valid on the ground that its pith and substance was to protect the health of the inhabitants of Northern Ireland ; though it might incidentally affect trade outside Northern Ireland, "it is not

passed in respect of trade".

(12) *Huddart Parker v. The Commonwealth*, (1931) 44 C.L.R. 492 ; *South Australia v. Commonwealth*, (1942) 65 C.L.R. 375 (432).

(13) *Bank of N. S. W. v. Commonwealth*, (1948) 76 C.L.R. 1.

(14) (1882) 7 A.C. 829 (839).

(15) *A.-G. of Canada v. A.-G. of Ontario*, A.I.R. 1937 P.C. 89.

(16) *Abitibi Paper Co. v. Montreal Trust Co.*, A.I.R. 1944 P.C. 7.

(17) *Ladore v. Bennett*, (1939) A.C. 468.

In *India*, it has already been pointed out (p. 531, *ante*) that notwithstanding the adoption of a threefold division of powers, it was held that some overlapping between the entries in the several lists was inevitable and that in cases of alleged encroachment, the doctrine of 'pith and substance' of the legislation in question was to be determined.

"In ■ Federal Constitution, in which there is a division of legislative powers between Central and Provincial legislatures, it appears to be inevitable that controversy should arise whether one or other Legislature is not exceeding its own, and in such a controversy, it is not the name of the tax but its *real nature* its 'pith and substance,' which must determine into what category it falls."<sup>18</sup>

The question of invasion into the territory of another Legislature is to be determined not by degree but by substance<sup>19-20</sup>.

Nevertheless the *extent* of invasion is not altogether irrelevant for the determination of the question. Though the validity of an Act is not to be determined by discriminating between degrees of invasion, the extent of invasion into another sphere may itself determine what is the 'pith and substance' of the impugned Act. Thus—

"Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters."<sup>20</sup>

#### Illustration.

The Bengal Money Lenders Act, 1940, limits the amount recoverable by ■ money-lender on his loans for principal and interest and prohibits the payment of sums larger than those permitted by the Act. It was contended that the Act was *ultra vires* in so far as promissory notes were concerned, since 'promissory notes,'<sup>21</sup> were included in item 28 of the Federal List (List I). The Judicial Committee rejected this contention by holding that the power to make laws in respect to money-lending necessarily includes the power to affect the money-lender's rights in respect to promissory notes given as security in money-lending transactions, and since the pith and substance of the Provincial Act was 'money-lending,'<sup>22</sup> [item 27 of List II] it was not void for encroaching upon the Federal List."<sup>23</sup>

The principles above discussed are equally applicable in the case of taxation ■ in the case of general legislation. In order to determine whether a tax imposed by ■ Legislature, Federal or Provincial, is *ultra vires* of the powers of that Legislature our examination must be directed to ascertain the *real nature*<sup>24</sup> and *incidence* of these taxes in fact and for this purpose no great help can be obtained from the use of the *names* employed or *definitions* applied by the Legislature to that tax<sup>25</sup>. Nor is the *mode of assessment* any criterion for determining the same<sup>1</sup>. The nature of the *machinery* by which the tax is to be assessed is not of assistance, except in so far as it may throw light on the general character of the tax<sup>1</sup>. In determining the nature of the tax, consideration may be given to the *standard* on which the tax is levied, but that is not the determining factor<sup>2-4</sup>. Thus, ■ duty of excise and sales tax are distinct imposts, one being imposed upon a manufacturer in respect of his *goods*, the other upon a vendor in respect of his *sales*.

"If in fact they overlap, that may be because the taxing authority, imposing ■ duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or the workshop for the first time *upon the occasion of sale*. But the method of collecting the tax is an accident of administration, it is not of the essence of the duty of excise which is attracted by the manufacturer itself."<sup>5</sup>

(18) *Governor-General v. Province of Madras*, (1945) 49 C.W.N. 381 (P.C.)

(19-20) *Prafulla v. Bank of Commerce*, (1947) 51 C.W.N. 599 (610) P.C.

(21) Included in Entry 46 of List I of the Constitution.

(22) Included in Entry 30 of List II of the Constitution.

(23) *Prafulla v. Bank of Commerce*, (1947) 51 C.W.N. 599 (608) P.C.

(24) *R. v. Caledonian Collieries*, (1928) A.C. 358 (362).

(25) *Punjab Flour Mills v. Province of Punjab*, (1947) 81 C.L.J. 417 (422) F.C.

(1) *Byramjee v. Province of Bombay*, A.I.R. 1940 Bom. 65 (70.)

(2-4) *Reference under the Govt. of Ireland Act*, (1936) A.C. 352.

(5) *Governor-General in Council v. Province of Madras*, (1945) 49 C.W.N. 381 (P.C.)



*Illustration.*

Under sec. 92 (ii) of the British North America Act, 1867, a Provincial Legislature has the power to impose 'direct taxation within the Province in order to the raising of a revenue for provincial purposes,' while the imposition of customs duties is within the exclusive competence of the Dominion Legislature.

The Legislature of the Province of Columbia imposed a tax on all timber cut within the Province, but by the schedules, the Act, by rebate, sought to reduce to an illusory amount the tax payable on timber used in the Province, leaving it to operate to its full effect only on timber exported. The minute rebated tax on timber used in the province was never collected and the tax came to be known as 'the timber tax on export.' The economic effect and, presumably, the object of the tax was to encourage the utilisation within the Province of home-grown timber and to discourage its exportation. The success of the tax would thus be measured inversely by the revenue which it yielded. *Held*, that the 'real nature' of the tax was not a tax imposed for the raising of a revenue for the Province but an export duty. Hence, the Provincial Act was *ultra vires*. Further it was not a direct but an indirect tax.<sup>6</sup>

VI. *The doctrine of 'Aspect' of legislation.*—Akin to the doctrine of 'pith and substance' is the doctrine of 'aspect of legislation', referred to in *Lefroy's Treatise on Canadian Constitutional Law*. Substantially they mean the same thing. According to this doctrine, the mere fact that a Provincial enactment may contain certain provisions bearing upon a subject exclusively reserved to the Dominion Legislature will not suffice to invalidate the Provincial enactment.

"It seems quite possible that a particular Act, regarded from one aspect, might be *intra vires* of a Provincial Legislature and yet regarded from another aspect might also be *intra vires* of the Dominion Parliament. In other words, what is properly called the subject-matter of an Act may depend upon what is the true aspect of the Act."<sup>7</sup>

"By aspect here must be understood the aspect or point of view of the legislator in legislating, the *object, purpose and scope* of the legislation. The word is used subjectively of the legislator rather than objectively of the matter legislated upon."<sup>8</sup>

As the Judicial Committee observed, in an appeal from Canada—

"It must be borne in mind in construing those two sections (91 and 92) that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within another. In such cases, the *nature and scope* of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in *substance and reality*."<sup>9</sup>

**GENERAL PRINCIPLES FOR INTERPRETATION OF THE THREE LISTS IN THE SEVENTH SCHEDULE.**—From the above general discussion, we may now summarise the principles that should be followed by our Courts in interpreting the entries in the three Lists of the 7th Sch. of the Constitution, which are, on broad lines very similar to those of the Government of India Act, 1935, excepting that the Concurrent List (List III) is larger under the Constitution and contains several items which were previously included in List II.

(1) The Entries in the Lists should be given a large and liberal interpretation, the reason being that the allocation of the subjects in the Lists is *not* by way of scientific definition but by way of a mere *simplex enumeratio* of broad categories<sup>10</sup>. [See pp. 17-18, 524, *ante*].

As the Privy Council has observed, while interpreting the Canadian Constitution :—

"The language of sections 91-92 of the Act conferring legislative powers upon the Dominion Parliament and Provincial legislatures respectively, and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfectly logical scheme. . . . If there is at points obscurity in language, this may be taken to be due, not to the uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. For these reasons it is imprac-

(6) *Att. Gen v. Murphy Lumber Co.*, A.I.R. 1930 P.C. 173.

(7) *Lefroy's Treatise on Canadian Constitutional Law*, p. 80.

(8) *Lefroy's Treatise on Canadian Consti-*

*tutional Law*, p. 98.

(9) *Deere Plow Co. v. Wharton*, A.I.R. 1914 P.C. 174.

(10) *Re C. P. & Berar Sales Taxation Act etc.* A.I.R. 1939 F.C. 1.

licable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by the sections and between their various sub-heads *inter se*. Lines of demarcation have to be drawn in construing the sections in their application to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them"<sup>12</sup>

So, none of the items in the lists is to be read in a *narrow or restricted* sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it<sup>13</sup>.

(2) Just as the framers of the Constitution have avoided a scientific or logical definition of the expressions used in the Legislative Entries, so the Courts also should try to interpret their ambit with reference to the facts of each case before them, instead of attempting an abstract definition, circumscribing their scope, once for all.

So, *Lefroy*, utters this word of caution to the Courts, with reference to the Canadian Constitution :

" . . . . It becomes unwise for the Courts to attempt exhaustive definitions of the meaning and scope of the expressions used. Such definitions must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided "<sup>14</sup>

(3) In case of apparent conflict between Entries in the Exclusive Lists (I and II), it should be borne in mind that it could not have been the intention of the makers of the Constitution that conflict should exist. In order to prevent such result, therefore, the two entries must be *read together*, and the language of the one interpreted, and where necessary modified by that of the other<sup>15</sup>. In that way, in most cases, it may be found possible to arrive at a reasonable and practical construction and to reconcile the respective powers the provisions contain and give effect to all of them<sup>16</sup>. When the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the *context* and the *scheme* of the Act [See p. 9, *ante*].

Before an Act is declared to be *ultra vires* on the ground that it invades another exclusive sphere, there should be an attempt to reconcile the two conflicting jurisdictions, and, *only if such ■ reconciliation shall prove impossible*, the impugned Act shall be declared invalid<sup>17</sup>.

" A general power ought not to be ■ construed as make ■ particular power conferred by the same Act and operating in the same field, a nullity, when by reading the former in ■ more restricted sense effect can be given to the latter in its ordinary and natural meaning and thus the overlapping between them can be avoided "<sup>18</sup>

(4) To determine whether an enactment is *ultra vires* or not, the primary test is that of 'pith and substance' [see p. 530, *ante*]. See, further, under Art. 246, *below*].

(5) If a particular legislative power is found to properly come within the State List, the Court cannot refuse to hold it to be *intra vires* on the ground that the power may possibly be abused by the State or bring it into conflict with the Union Legislature<sup>19</sup> [See p. 528, *ante*].

" The question whether ■ Ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or of policy. It depends simply ■ examining the language of the Government of India Act. . . . In construing enacted words we are not concerned with the policy involved or with the results, however injurious or otherwise, which may follow from giving effect ■ the language used."<sup>20</sup>

(12) *John Deere Plow v. Wharton*, 1915 A.C. 330 (338).

(13) *United Provinces v. Atiqua*, A.I.R. 1941 F.C. 16 (25).

(14) *Lefroy*, Canadian Constitutional Law, p. 72.

(15) *Governor-General v. Province of Madras*, (1945) ■ C.W.N. 381 (384) P.C.

(16) *Re. C. P. Motor Spirit Act*, A.I.R. 1939

F.C. 1 (31).

(17) *Rulla Ram v. Province of East Punjab*, (1949) 4 D.L.R. (F.C.) 8 (15).

(18) *In re C. P. and Berar Motor Spirit Taxation Act*, A.I.R. 1939 F.C. 1.

(19) *Att. General of Alberta, v. Att. Gen. of Canada*, A.I.R. 1939 P.C. 53 (59).

(20) *King Emp. v. Benoari Lal*, (1944) 49 C.W.N. 178 P.C.

Extent of laws made by Parliament and by the Legislatures of States.

**245.** (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

#### OTHER CONSTITUTIONS

*Australia*—S. 51 of the Australian Constitution Act says.—

The Parliament shall, subject to this constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to. . . . ”

*Government of India Act*—Sec. 99 (1) says as follows :—

“(1) Subject to the provisions of this Act, the Federal Legislature may make laws<sup>21</sup> for the whole or any part of British India and a Provincial Legislature may make laws for the Province or for any part thereof.”

#### INDIA

##### CL. (1) :

**EXTENT OF UNION LEGISLATION.**—The Union Parliament, according to the present cl., has the power to legislate for the whole or any part of the ‘territory of India’, as defined in Art. 1 (3), p. 32, *ante*. But this territorial jurisdiction of Parliament is, ‘subject to the provisions of this Constitution’. In other words, the provisions of the present cl. (1) are to be read subject to any other provision of the constitution which may modify the above jurisdiction of Parliament. For example, Art. 243 (2) p. 513, *ante*, says that as regards the territories included in Part D of the First Sch., Regulations made by the President may repeal or amend a law made by Parliament in relation to such territory and that such Regulations shall have the same force as Acts of Parliament. Similarly, para. 5 of the Fifth Sch. says that the application of Acts of Parliament to any Scheduled area may be barred or modified by notifications made by the Governor or Rajpramukh. See also Para. 12 of the Sixth Sch., *post*.

Other provisions which curtail the powers of Parliament and the State Legislatures as conferred by Arts. 245-6 are the Fundamental Rights contained in Part III. Whether any law has transgressed any of these limitations is to be ascertained by the Court and if it is found so to transgress, the Court will declare the law to be void.<sup>21-a</sup> Again, though there is no specific guarantee of the High Court’s power to issue the judicial writs under Art. 226, as in Art. 32 (1), the very inclusion in the Constitution of the specific provision of Art. 226, together with the words ‘subject to the provisions of this Constitution’ in Art. 245 (1), indicate that the power of the High Courts under Art. 226 cannot be affected by Parliament or the State Legislature.<sup>21-b</sup>

**EXTENT OF STATE LEGISLATION.**—While the Union Parliament has power to make laws for the whole or any part of the territory of India, the Legislature of a State can make laws only for the State or any part thereof. The legislative power of the State Legislature is thus confined to the territory of the State. The subjects included in the State List or in the Concurrent List (in relation to the State) must therefore be read as referring to objects situate within the territory of the State concerned.<sup>22</sup>

While Sovereign Legislatures have extra-territorial powers, at least so far as recognition by their own Courts are concerned, non-sovereign Legislatures do not possess any extra-territorial jurisdiction unless it is conferred on them expressly or by necessary implication.<sup>23</sup>

(21) By the (Provincial Constitution) Order, 1947, the words “including laws having extra-territorial operation” were inserted after the word ‘laws’, and sub-section (2) of the section was omitted.

(21-a) *Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27 (109).

(21-b) *Harendra v. State of Madhya Bharat*,

A.I.R., 1950 M.B. 46 (50).

(22) Hence, a State Legislature cannot affect rights which have accrued outside the State and are not sought to be enforced in any manner within that State [Cf. *Madangopal v. Lachmidas*, (1947) 82 C.L.J. 347 (352)].

(23) *British Coal Corporation v. King*, (1935) A. C. 500.



The Colonial Legislatures of the British Empire, being non-sovereign, were subject to this limitation.<sup>23-a</sup> Section 3 of the Statute of Westminster removed this defect so far as the Parliaments of the Dominions were concerned.<sup>24</sup> But the Legislatures of the Provinces or States of those Dominions and of other Colonies to which that statute does not apply, still suffer from this limitation.

Though it may be debatable whether the State Legislatures under the Constitution of India are sovereign or non-sovereign, a reading of cls. (1) & (2) of Art. 245 makes it clear that it is not intended by the Constitution that the State Legislatures should have extra-territorial powers. The position of the State Legislatures is thus similar to those of the Provincial Legislatures of Canada and Australia, and of the State Legislatures in the U. S. A.<sup>25</sup> and their legislation should be similarly interpreted.

STATE LEGISLATION TO BE PRESUMED TO BE TERRITORIAL AND INTRA VIRES.—There is a general presumption that a Legislature knows its jurisdiction and does not intend to exceed it.<sup>1</sup> Hence, as regards a Legislature, having a limited jurisdiction, the Court will not presume an enactment to have intended an extra-territorial operation and to be *ultra vires* on that account, unless the invalidity is clear beyond doubt.<sup>2</sup> The general rule of construction of an enactment of a Legislature with limited powers is that it was only legislating for those who were actually within its jurisdiction.<sup>3</sup>

But though a subordinate Legislature is not competent to legislate as to matters outside its territory, it does not follow that a legislation which is *in substance* in respect of matters within the competence of that subordinate Legislature would be *ultra vires* simply because it may have *possible* effects outside that territory. Hence, when a statute is impugned as having an extra-territorial operation, the validity of that legislation “depends on the *sufficiency* of the purpose for which is used of the territorial connection.”<sup>4</sup>

“There is no rule of law that the territorial limits of a subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depends upon the proper construction of the *statute conferring those powers*. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the legislature. Concern by a subordinate legislature with affairs or persons outside its own territory may therefore suggest a query whether the legislature is *in truth* minding its own business. It does not compel the conclusion that it is not. The enabling statute has to be *fairly construed*.”<sup>5</sup>

Thus, when a provincial legislation has reference to the maintenance of public order within that Province, the enactment does not become *ultra vires* simply because it may have repurcussions or consequences outside the Province.<sup>6</sup>

If the extra-territorial provisions are severable, invalidity of the statute will attach only to those provisions.<sup>3</sup>

EFFECTS OF THE TERRITORIAL LIMITATION.—As a result of the territorial limitation, the State Legislature shall not be competent to make laws on the following matters :

(i) Laws imposing a penalty or creating a civil liability in respect of an act committed outside its territorial limits.<sup>3</sup>

#### Illustration.

A New South Wales statute enacted for the punishment of bigamy was held not to relate to a second marriage committed outside the territory of that State.<sup>3</sup>

(23-a) *British Coal Corporation v. King*, (1935) A. C. 500.

(24) *Croft v. Dumphy*, (1933) A.C. 156.

(25) *United States v. Bennett*, 232 U.S. 299.

(1) Maxwell, 9th Ed., 148.

(ii) *Valin v. Langlois*, (1880) 1 A.C. 115; *Att.-Gen. for Ontario v. Att.-Gen. for Canada*,

(1912) A.C. 571.

(3) *McLeod v. Att.-Gen. for New South Wales*, (1891) A.C. 455.

(4) *Wallace Bros. v. I. T. Commr.*, (1948) 1 D.L.R. (P.C.) 248.

(5) *Siddique v. Province of Bihar*, (1948) 4 D.L.R. (Pat.) 29.

(ii) Laws imposing taxes on persons not resident within the State, and in respect of property which has no proximate territorial connection with that State.<sup>10,11</sup>

Though a State Parliament may affect property situated within its territorial limits wherever the owner may be,<sup>10</sup> and may also tax a foreign company in respect of its business within the State,<sup>12</sup> it cannot tax a non-resident person in respect of a property as regards which there is no sufficient territorial connection with the State concerned.<sup>11</sup> But a State tax is valid if either the asset or the person taxed has some proximate territorial connection with the State.<sup>13</sup>

*Illustration.*

A resident of New South Wales can be taxed in New South Wales in respect of his income wherever derived, his property wherever situated, or of any other circumstance. The property in New South Wales of any person can be taxed in such manner as the Parliament of New South Wales determines. . . . But it does not follow that any relation to or connection with New South Wales can be utilised as a basis for any taxation. . . . It is beyond the territorial competence of the Parliament of New South Wales to impose a death duty in respect of shares which belonged to a person who died resident and domiciled outside New South Wales where his only connection with New South Wales, in respect of the taxation in question, was that the company the shares of which he held, though *incorporated out of* New South Wales and having *no share* registered in the State, carried on mining business in the State.<sup>14</sup>

**POWER OF TAXATION OF AN AMERICAN STATE.**—This subject is treated separately inasmuch as the difference in the nature of the entries relating to taxation in Lists I and II of *our* Constitution will obviate the application of the American precedents in many cases. The power of taxation of a State in the United States is necessarily limited to subjects within the territorial jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, it must relate to one of those subjects.<sup>15</sup> When there is jurisdiction neither as to person nor property, the imposition of a tax by a State is *ultra vires* and void.<sup>16</sup>

Thus,—

(i) A State cannot tax bonds issued by a company incorporated or doing business within its when such bonds are held by non-residents of that State,—the bonds being held as 'property' in the hands of their holders' who are creditors of the corporations. "The bonds possess value only in the hands of the creditors"<sup>16</sup>,

(ii) A State cannot tax the rolling-stock of a company incorporated in that State, if the rolling stock is permanently located in another State, and there used for carrying on the company's business<sup>17,18</sup>. Similarly, in taxing the capital stock of a coal mining domestic corporation, a State cannot include the value of coal which was mined within that State but situated within other States, awaiting sale, when the appraisalment was made.<sup>19</sup>

"The arguments in favour of the taxation of *intangible* property at the domicile of the owner have no application to *tangible* property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs, that there is a consensus of opinion that it is taxable in the State where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicile of the owner."<sup>17,18</sup>

(iii) A State cannot tax ferry-boats belonging to a company incorporated in another State, which were laid up on the store of that other state when not in use.<sup>20,21</sup>

(iv) On the same principle, a State cannot tax a ship of a foreign registry which was only temporarily or *in transitu* in the port of the State seeking to tax it.<sup>22</sup>

(10) *Commissioner of I. T. v. Union Trustee Co.*, (1931) A.C. 258.

(11) *Wallace Brothers v. Commissioner of I. T.*, (1948) 2 D.L.R. 849 (P.C.).

(12) *Australasian Scale Co.'s Case*, (1935) 53 C.L.R. 534.

(13) *Colonial Gas Association v. Fed. Commissioner*, (1933) 51 C.L.R. 172.

(14) *Broken Hill Ltd. v. Commissioner of Taxation*, (1937) 56 C.L.R. 337; *Commissioner of Stamp Duties v. Milar*, 48 C.L.R. 618. (Entry 48 of List II of the 7th Schedule of *our* Constitution,—'Duties in respect of succession to agricultural land' avoids such a conflict as regards succession

duty, for it is leviable by the State only in respect of agricultural land situate within the State.)

(15) *Cleveland R. R. Co. v. Pennsylvania*, 15 Wall. 300.

(16) *St. Louis v. Wiggins Ferry*, 11 Wall. 423.

(17-18) *Union Refrigerator Co. v. Kentucky*, 199 U.S. 194.

(19) *Delaware R. R. Co. v. Pennsylvania*, 198 U.S. 341.

(20-21) *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423.

(22) *Haynes v. Pacific Steamship Co.*, 17 How. 596.

(iv) A State cannot tax an incorporeal hereditament which has its situs in another State, *e.g.*, Kentucky cannot tax the value of a franchise granted by the State of Indiana to a Kentucky company, the franchise granted by Indiana being held to have its situs in Indiana just like real estate held by the Kentucky company in Indiana.<sup>23</sup>

(vi) The situs of immovable property vested in trustees is no doubt in the State where property is situate, but the situs of the income from the property is in the State where the beneficiary to whom the income belongs, resides.<sup>24</sup>

STATE LEGISLATURE NOT A DELEGATE OF THE UNION PARLIAMENT.—The State Legislature under our Constitution is not a delegate of the Union Parliament. Both Legislatures derive powers from the same Constitution. Within its appointed sphere, the State Legislature has plenary powers.<sup>25</sup> Thus, there is no bar to its delegating legislative power to some person or authority<sup>1</sup>, on the ground of '*delegate potestas non potest delegare* (a delegated power cannot be delegated), or to its enacting 'conditional' legislation.

"When plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is not an uncommon thing; and in many circumstances, it may be highly convenient".<sup>2</sup>

In a case under the British North America Act, 1867, again, the Judicial Committee observed—

"When the British North America Act enacted that there should be a legislature for Ontario and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow."<sup>3</sup>

So, a Provincial Legislature of Canada is not a subordinate of the Dominion Parliament but 'continues to be free from the control of the Dominion and as supreme as it was before the passing of the British North America Act.'<sup>4</sup>

For the same reason, when a State Legislature has the power to legislate with respect to any subject it is competent to pass either *general or special* Acts relating to that subject. Thus, as regards a Provincial Legislature of Canada, the Privy Council held that if the Legislature be competent to pass a general moratorium law, directing stay of an action relating to 'property and civil rights' within the Province, there is no reason—

"why its sovereign powers should be so limited as not to enable it to impose if it so desired a moratorium limited to a special class of action or suitor or to ■ particular action or suitor. There appears to be no authority and no reason for the opinion that legislation in respect of property and civil rights must be general in character and not aimed at ■ particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring ■ particular right or property from private hands to a public authority for public purposes".<sup>5</sup>

Of course, *our* Constitution enables the Union to issue administrative directions upon the States and to supersede ■ State Government in case it refuses to carry out any of these directions (pp. 30-1, *ante*) and also enables the Union to assume the powers of the State Government in case of emergencies (*ibid.*). Nevertheless, the normal framework of the Constitution involves a federal distribution of powers between the Union and the States, which it would be the duty of the Courts to guard with vigilance that distribution and to refuse to enforce as valid any law of the Union that encroaches upon the sphere allotted to the States for normal times [p. 31, *ante*]. As has been observed at the outset, while exercising these powers, the State Legis-

(23) *Louisville Ferry v. Kentucky*, 188 U.S. 385.

(24) *Maguire v. Trefry*, 253 U.S. 12.

(25) Cf. *Emperor v. Burah*, (1877) 4 Cal. 172 (P.C.); *Hodge v. Queen*, (1884) 9 A.C. 117 (132); *Powel v. Apollo Candle Co.*, (1885) 10 A.C. 282.

(1) Cf. *Shannon v. Dairy Products Board*, A.I.R. 1939 P.C. 36 (39).

(2) *R. v. Burah*, (1879) 4 Cal. 172 (P.C.).

(3) *Hodge v. The Queen*, (1883) 9 A.C. 117 (132).

(4) *Liquidators of Maritime Bank v. Receiver-General*, (1892) A.C. 437 (442).

(5) *Abitibi Paper Co. v. Montreal Trust Co.*, A.I.R. 1944 P.C. 7.



lature is not acting as a subordinate, and the legitimate powers of the States cannot be curbed on any theory of national interest, apart from the provisions of the Constitution to that effect (e.g., Art. 249, *post*).

*Cl. (1) 'Make laws'.*—The power to enact includes the power to repeal or amend the laws made by the Legislature itself<sup>6-7</sup>. It has already been pointed out that when the President or the Governor exercises powers of the Union or State Legislature, as the case may be [under Art. 123 or 213, or 357 (a)], the President or the Governor shall be competent to repeal or amend Acts of the Legislature concerned [p. 372 *ante*]<sup>8</sup>.

A Legislature may repeal or amend its own permanent enactment by another enactment of a permanent or temporary nature. If the repealing or amending statute is a temporary one, it would be construed as suspending for a limited period of time the operation of the earlier permanent statute<sup>9</sup>.

*Repeal and Amendment.*—Whereas repeal means the destruction of the whole, amendment means destruction of a part, followed, may be but not necessarily, by the creation of a substitute<sup>9</sup>. An amendment does not amount to repeal<sup>10</sup>.

"The effect of a repealing statute is to obliterate it completely from the records of Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."<sup>11</sup> Nor does it deprive persons of 'vested' rights.<sup>11</sup>

Courts lean against *implying* a repeal.

"The Court does not construe a later Act as repealing an earlier Act unless it is *impossible* to make the two Acts or the two sections stand together, i.e., if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act."<sup>12</sup>

For example, special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together.<sup>13</sup> This rule follows from the maxim—*generalia specialibus non derogant*,—general words do not affect special words. Again, where a statute is incorporated by reference into a second statute, the repeal of the first by a third does not affect the second.<sup>14</sup>

But the use of the word 'repeal' is not necessary to effect the repeal of a previous enactment.<sup>15</sup> It may be effected by implication by providing a necessary inconsistency.

**SOME ASPECTS OF LEGISLATIVE POWER IN GENERAL.**—It is clear from the foregoing discussions that both the Union Parliament and the State Legislatures have within their constitutional limits, plenary powers of legislation like any other sovereign Legislature. Hence, either Legislature shall have the power to exercise its legislative powers in the following ways, *inter alia*,—

(i) It may legislate either absolutely or conditionally,—in the latter case leaving to the discretion of some external authority the *time* and *manner* of carrying its legislation into effect, as also the *area* over which it is to extend<sup>16</sup> [see p. 543 *post*].

(ii) It may authorise subordinate bodies to make bye-laws or regulations under the Statute, for its detailed administration (see p. 543 *post*).

(6) *Shibnath v. Porter*, A.I.R. 1943 Cal. 377 (384) (S.B.).

(7) *Emperor v. Benourilal* (1945) 49 C.W.N. 178 (P.C.).

(8) *Jnan Prasanna v. Province of West Bengal*, (1949) 4 D.L.R. 20 (33) Cal.

(9) *Shibnath v. Porter*, A.I.R. 1943 Cal. 377 (387) (S.B.).

(10) *Director of Public Prosecution v. Lamb*, (1941) 2 A.E.R. 499.

(11) *Kay v. Goodwin*, (1830) 6 Bing. 576. (See sec. 6 of our General Clauses Act (X of

1897).

(12) *In re Berrey*, (1936) 1 Ch. 274.

(13) *Kutner v. Phillips*, (1891) 2 Q. B. 267 (272); *Seward v. Vera Cruz*, (1884) 10 App. Cas. 59 (68).

(14) *Clarke v. Bradlaugh*, (1881) 8 Q.B.D. 63; *Secretary of State v. Hindustan Insurance*, (1931) 35 C.W.N. 794 P.C.

(15) *Moakes v. Blackwell Colliery*, (1925) 2 K.B. 64.

(16) *Queen v. Burah*, (1878) 5 I.A. 178.

(iii) It can make either a permanent or a temporary Act.

“ Every statute for which no time is limited is called a perpetual Act and continues in force until it is repealed. If an Act contains a proviso that it is to continue in force only for a certain specified time, it is called temporary Act. As a general rule and unless it contains some special provisions to the contrary, after a temporary Act has expired, no proceedings can be taken upon it as it ceases to have any further effect. In England, it is the practice to pass an Expiring Laws Continuance Act each session and to put into a schedule each temporary Act which it is intended to continue. When, however, an Act is not continued by a further statute, before the expiration of the time mentioned in the temporary Act, but a bill has been introduced for its extension which has not been passed and therefore has not become a statute, it is provided by the Acts of Parliament Expiration Act, 1808, that if the bill subsequently becomes a statute it would be considered as if it had been a statute from the date the bill was introduced. The necessity of passing those Acts in England lends strong support to the view that once a temporary Act ceased to be in operation, because the period mentioned in it had passed, if the measure has to be brought into operation again, fresh legislation must be resorted to.”<sup>17</sup>

As to the effects of expiry of a temporary statute, the general rule is that “ unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can be taken upon it and it ceases to have any further effect. Therefore offences committed against temporary Acts must be prosecuted and punished before the Act expires and as soon as the Act expires, any proceedings which are being taken against a person will *ipso facto* terminate.”<sup>18</sup> It may legislate with reference to the enactment of another legislative body.<sup>19</sup>

(iv) It may enact a ‘Validating’ Act, validating an Act done under an invalid statute, if the Act done is such as is within its legislative competence.<sup>20</sup> But it cannot ratify an *ultra vires* enactment of its own, by passing a validating Act.<sup>21</sup> Further, where it is desired to legalise something illegally done, the words of the legalising statute must be very clear.<sup>22</sup>

(v) Where the Constitution empowers a Legislature to make laws with respect of a particular subject, *generally*, the Legislature is entitled to legislate with respect to a part of the subject covered by the entry, leaving the other part outside its legislation.<sup>23</sup>

(vi) It may legislate either prospectively or retrospectively. The only limitation upon the power of retrospective legislation is that imposed by Art. 20 (1), pp. 104-5, *ante*.

But though it is within the competence of a Legislature to legislate retrospectively (subject to the above constitutional limitation), Courts lean against a retrospective construction as may impair vested rights<sup>24</sup>. So, unless there is something in the language, context or object of a statute showing a contrary intention, the duty and practice of courts of justice is to *presume* that the Legislature enacts prospectively and not retrospectively<sup>25</sup>. In other words, when a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken to apply to

(17) *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (230).

(18) *Gas Co. v. King Emperor*, (1947) 52 C.W.N. (F.R.) 25 (37).

(19) *Onimet v. Bazin*, (1912) 46 S.C.R. 502.

(20) *Trustees v. Quebec Bank*, A.I.R. 1919 P.C. 9.

(21) *Ashbury Ry. v. Riche*, (1875) 7 H.L. 653.

(22) *Phillips v. Eyre*, ((1870) 6 Q.B. 1.

(23) *Hulas Narain v. Province of Bihar* (1942) 46 C.W.N. (F.R.) 21. (Hence, the Bihar Agricultural Income-tax Act, 1938, was not invalid for imposing a tax on some categories of agricultural income and not on others).

(24) *Thomson v. Lack*, (1846) 3 C.B. 540 (550).

(25) *Kerr v. Alisa*, (1854) 1 Macq. 736.

a state of facts coming into existence after the Act.<sup>1-2</sup> The principle applies not only as regards legislation taking away existing rights, but also to legislation which *creates new rights*<sup>3</sup>, or imposes a new duty or attaches a new disability in respect of past transactions or considerations<sup>4</sup>. Again, the presumption applies not only to substantive rights, but also to rights of action<sup>5</sup>. *e.g.*, the right to continue a duly instituted suit<sup>6</sup> Provision which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force were final, are provisions which touch existing rights.<sup>7</sup> Hence, there cannot be any right of appeal by the retrospective application of a statute against an order which was final when it was passed.<sup>8</sup> On the same principle, a statute abolishing a right of appeal, or transferring it to an inferior Court, should not be deemed to be retrospective<sup>8</sup>. The presumption applies only as regards 'vested' rights. A vested right may be created not only by statute but also by judicial decision<sup>9</sup>.

But while the presumption applies against the retrospective operation of a statute so that persons may not have their *rights* affected by laws passed subsequently, there is no vested right as regards mere *procedure* so none can complain if during his litigation the procedure is changed provided that no injustice be done<sup>10</sup>. But when the change in procedure is complicated by the divestment of a pre-existing right, the presumption against retrospectivity revives in its full strength. Thus, to deprive a suitor in a pending action of the right of appeal to a superior Court which belonged to him as of right is a very different thing from one regulating mere procedure<sup>8</sup>. In short, the application of the presumption is confined to change in the substantive law as opposed to adjective law<sup>11</sup>. Declaratory Acts,<sup>12</sup> statutes against tax evasion<sup>13</sup> and emergency legislation,<sup>14</sup> are, in proper circumstances, treated as exceptions to the presumption.

On the other hand, if there are words in the enactment which either expressly or by necessary intendment [*e.g.*, from the object of the statute] imply that the statute is to be given retrospective operation even in respect of substantive rights or pending actions, the Courts have no other alternative than to give such operation to the statute even though the consequences may appear to be unjust or hard.<sup>15</sup> Thus, if the Act itself requires that it should apply to pending proceedings, it will be so applied, unless there is any saving clause in the Act to the contrary.<sup>16</sup>

On the other hand, even when a retrospective intention clearly appears from the statute itself, the Courts are slow to give any larger retrospective effect than appears to be necessary, by a proper construction of its language<sup>17</sup>.

It is to be noted in the present context, that there is in our Constitution, no guarantee of *contractual* rights as exists in Art. 1, Sec. 10 (1) of the Constitution of the United States<sup>18</sup>. So, there is no bar against our Legislatures (*vide* Entry 7 of List III, 7th Sch.) making any retrospective legislation, 'impairing' existing

(1) *Queen v. Guardian*, (1877) 2 Q.B.D. 269.

(2) *Pitambar v. Tkakorsidas*, 7 Mad. 109 P.C.; *Delhi Cloth Mills v. I. T. Commissioners*, (1927) 32 C.W.N. 237 (P.C.).

(3) *Lalmohan v. Jogendra*, (1887) 14 Cal. 636 (F.B.).

(4) *In re Pulborough School Board*, (1894) 1 Q.B. 725 (737); *Sadarali v. Dalimuddin*, (1928) 52 Cal. 512 (S.B.).

(5) *Wright v. Hale*, (1861) 30 L.J. Ex. 40.

(6) *Venugopala v. Krishnaswami*, A.I.R. 1943 F.C. 24.

(7) *Delhi Cloth Mills v. I. T. Commissioners*, (1927) 32 C.W.N. 237 (P.C.).

(8) *Colonial Sugar Refining Co. v. Irving*, (1905) A.C. 369.

(9) *Re A Debtor*, (1936) 1 Ch. 237 (243).

(10) *Republic Costa Rica v. Erlanger*, (1876) 3 Ch. D. 62 (69).

(11) *Hitchcock v. Way*, (1837) 6 A.& E. 943  
*In re Joseph Ltd.*, (1875) 1 Ch. D. 48.

(12) *A. G. v. Theobald*, (1890) 24 Q.B.D. 557.

(13) *Howard v. Revenue Commissioners*, (1942) 1 K.B. 389 (398).

(14) *Bank Line v. Capel*, (1919) A.C. 435.

(15) *In re Williams & Stephney*, (1891) 2 Q.B. 257. *Quilter v. Mapleson*, (1883) 9 Q.B.D. 672.

(16) *K. C. Mukherjee v. Ramratan*, A.I.R. 1923 P.C. 49.

(17) *Reid v. Reid*, (1886) 31 Ch. D. 402;  
*Lauri v. Renad*, (1892) 3 Ch. 402 (421).

(18) *Sturges v. Crowninshield*, (1819) 4 Wh. 122; *Von Hoff v. Quincy*, (1867) 4 Wall. 535;  
*Frisbie v. U.S.*, (1895) 157 U.S. 160; *Home Building Association v. Blaisdell*, (1933) 290 U.S. 398.



contractual rights and obligations, *e.g.*, as to rate of interest, remedies for breach of contract and so on<sup>19</sup>.

**DELEGATED AND CONDITIONAL LEGISLATION.**—It has already been pointed out [pp. 53, 204-10, *ante*], that though the doctrine of Separation of Powers has not been imported into *our* Constitution in the American sense, and though the legislative power as such has not been 'vested' in Parliament or the State Legislature (as the case may be), the view has been already taken in India that though either Legislature may delegate the function of making subordinate regulations, neither can delegate the function of '*making laws*' itself,<sup>20</sup> which is given to it by the Constitution. [Art. 245].

We should first distinguish subordinate and conditional legislation from 'delegated' legislation in the strict sense. It is now admitted on all hands that the former two are within the competence of any Legislature under any Constitution of modern times.

(A) *Subordinate Legislation.*—We have already discussed some aspects of this subject (pp. 49, 52-3, *ante*). This means that the Legislature can confer power upon a subordinate agency (administrative or legislative, such as a municipal body), to make regulations for the better carrying out in detail of the scheme of any enactment. By delegation of such a subordinate function, the Legislature does not efface itself.

"It retains its powers in tact and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law to determine."<sup>21</sup>

The limit to such delegation of subordinate powers is the limit to the legislative competence of the Legislature itself. It cannot delegate what it itself does not possess<sup>22</sup>. On the other hand, the validity of the bye-laws or regulations made by the subordinate agencies is strictly measured by the Courts with reference to the powers actually conferred by the statute which empowered the subordinate authority to make the subordinate legislation (p. 49, *ante*). For the same reason, when a statute is repealed, all bye-laws, rules or regulations made thereunder cease to operate, unless there is a saving clause in the new statute, preserving the old bye-laws, etc.<sup>23</sup>

(B) *Conditional Legislation.*—A Legislature legislates *conditionally* when it enacts that ■ legislation shall come into operation at all or in some particular area only upon an Executive declaration or upon the happening of ■ particular event.<sup>24</sup> In such a case, the Legislature makes the law itself, but simply authorises another body to declare *when* or *where* it shall have its effect. Here there is no delegation of the essential legislative function, but of the power of determining the *time* and *manner* of carrying the legislation into effect as well as the *area* over which it is to extend.<sup>25</sup> In other words, though the Legislature cannot delegate its power to make law, it can make a law to delegate ■ power to determine some fact or state of things upon which the law makes or intends to make its own action depend.<sup>1</sup>

#### Illustrations.

1. The Canadian Temperance Act, 1878, provided that the Act was to be brought into force in any county or city, if upon a vote of a majority of electors of that county or city favouring such ■ course, the Governor-General by Order in Council declared the relative part of the Act to be in force.

(19) The position under *our* Constitution is the same as in England. Cf. *Brewster v. Kitchell*, (1678) 1 Raym. 317; *Bank of Athens v. Royal Exchange Association*, (1938) 1 K. B. 771.

(20) *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (230) F.C.

(21) *Hodge v. The Queen*, (1883) ■ App.Cas. 117.

(22) *Liquor Prohibition Appeal*, (1896) A.C. 343 (364).

(23) *Watson v. Winch*, (1916) 1 K.B. 688.

(24) *Hodge v. Queen*, (1883) ■ App. Cas. 117 (132).

(25) *Queen v. Burah*, (1878) 5 I.A. 178.

(1) *Lockes' Appeal*, 13 Am. Rep. 716, quoted in *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (248).

*Held*, by the Privy Council, that this provision did not amount to a delegation of the legislative power to a majority of the voters in a city or county.<sup>2</sup>

2. The Governor-General, acting under paragraph 72 of Sch. IX of the Government of India Act, 1935, promulgated an Ordinance providing for the setting up of special criminal courts for the trial of certain offences, laying down the jurisdiction, procedure etc. of such courts. The Ordinance, however, provided that it would come into force in any Province only if the Provincial Government being satisfied as to the existence of any emergency declared it to be in force in that Province. *Held*, the Ordinance did not delegate the legislative power to the Provincial Government but was merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity.<sup>3</sup>

Again, delegation of the legislative power should be distinguished from *administrative* delegation, i.e., to power to entrust the administration of a legislation to subordinate agencies.

Thus a Legislature may lay down the principles and the rate according to which a duty was to be levied and leave it to an external authority to determine whether a particular article or merchandise was dutiable.<sup>4</sup> That is not delegation of the power of taxation.

(C) *Delegated Legislation*.—But *our* Legislatures shall not be entitled to delegate the law-making power itself to any other body, not even to a portion of the Legislature itself. Thus, neither House of the Legislature nor both the Houses together, have any power to make laws by resolutions. Laws, under *our* Constitution, can be made by the Union Parliament or a State Legislature only in the process laid down by the Constitution (Arts. 107-111 ; 196-200), or by the President (Art. 123) or a Governor (Art. 213) during recess of the respective Legislatures. These bodies cannot delegate their law-making powers to any other body. The question thus arises,—what acts are properly comprised within the function of law-making? (See pp. 205-9, *ante*).

In *India*, it has already been held that—

(i) The power to *extend* the duration or operation of an Act beyond the period mentioned in the Act itself is a legislative power. It is for the Legislature to state *how long* a particular legislation will be in operation. This cannot be left to the discretion of some other body.<sup>5-7</sup>

#### Illustrations

The Bihar Maintenance of Public Order Act, 1947, was enacted by the Bihar Legislature for the period of one year only, but a Proviso provided that its duration might be extended for a further period of one year by the *resolutions* of the two Houses of the Legislature. *Held*, that the power to *extend* the life of the Act beyond the period of one year prescribed by the Act itself was a legislative Act and that the Legislature had no power to delegate this power to the two Houses of the Legislature which had no power to make laws by resolutions. Hence, the Proviso was *ultra vires*.<sup>5-7</sup>

(ii) Again, the power to *modify* an Act *without any limitation* on the extent of the power of modification is a legislative power.<sup>5-7</sup> For, in making modification, the whole aspect of an Act or a section may be changed.<sup>8</sup> Transfer of an essential legislative function to another body is delegation of legislative power and not conditional legislation.<sup>5-7</sup>

“Distinction between delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring discretion or authority as to its execution to be exercised under and in pursuance of the law is a true one and has to be made in all cases where such a question is raised. In cases of conditional legislation, on fulfilment of the condition the legislation becomes absolute. But in cases of delegated legislation, the delegate has to take a decision whether that legislation is to continue or has to be modified, amended or varied.”<sup>8</sup>

(2) *Russell v. Queen*, (1882) 7 A.C. 839 (825).

(3) *Emperor v. Benoarilal*, (1945) 49 C.W.N. 178 (P.C.).

(4) *Powell v. Apollo Candle Co., Ltd.*, (1885) 10 A.C. 282.

(5-7) *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (220, 239).

(8) *Chhaturam v. I. T. Commr.*, (1947) F.L.J. 92 (F.C.).

“ Modification of statute amounts to re-enacting it partially. It involves the power to say that certain parts of it are no longer parts of the statute and that a statute with X sections is now enacted with Y sections. In the act of modification is involved a legislative power as a discretion has to be exercised whether certain parts of the statute are to remain law in future or not or have to be deleted from it. The power to modify may even involve a power to repeal parts of it. A modified statute is not the same as original statute. It is a new Act and logically speaking, it amounts to enacting a new law. The dictionary meaning of the word ‘modify’ is to make something existing much less severe or to tone it down or to make partial changes in it. What modifications are to be made in a statute or whether any are necessary is an exercise of law making power and cannot amount merely to an act of execution of a power already conferred by the statute.”<sup>9</sup>

*Cl. (2) : Extra-territorial operation of Union laws.*—By the present clause, the Constitution confers unlimited extra-territorial jurisdiction upon the Union Parliament and removes the fetter imposed upon the federal Legislature by the Government of India Act, 1935. Whenever it shall appear, by a proper construction of an Act of Parliament, that extra-territorial operation was intended, the Courts of India must give effect to such an Act, without questioning the competence of Parliament with reference to any rule of international law.<sup>10</sup> It is to be noted in this connection that Entry 57 of List I of the 7th Schedule expressly empowers the Union Parliament to legislate with respect to fishing and fisheries ‘beyond territorial waters.’

*All legislation is prima facie territorial.*—Primarily the legislation of each State is presumed to be territorial, according to the comity of nations. Hence, in the absence of an intention clearly expressed or to be inferred from its language, or from the object, subject-matter, or history of the enactment, the general presumption is that the Legislature does not design its Statutes to operate beyond the territorial limits of the State.<sup>11</sup> Territorial jurisdiction, however, is not confined to subjects only, but attaches (with special exceptions,<sup>12</sup>) upon all persons, including foreigners, either permanently or temporarily resident within the territory, while they are within it.

Under the general principles of International Law, the ‘territories’ of a State include not only the land extending up to the sea lying along its borders, but also extends to a portion of the sea lying along and washing its coast up to a distance of three miles from the shore [see p. 33, *ante*]. ‘Territory’ of a State also includes its ships, whether armed or unarmed, and the *private* ships of its subjects on the high seas or in foreign tidal waters; and foreign private ships while within its ports.<sup>13</sup>

As regards public vessels, the rule is—

“ A public ship of war belonging to a State with which amicable relations exist is exempt from the jurisdiction of the State in whose territorial waters she may happen to be ”.<sup>14</sup>

*Extra-territorial operation.*—The enforcement of law is by its nature territorial, for no State allows other States, as a general law, to exercise powers of government within it.<sup>15</sup> Thus, subject to the provision for extradition (by agreement with other States) an offender may be tried by England only if he is found within the territory of England.

But though the enforcement of law is territorial by its nature, the operation of law may sometimes extend to persons, things and acts outside its territory.

Extra-territorial operation, thus, means—

[“ the effect to be given in the Courts and within the territory of the enacting State as against ] persons without that State or in respect to property situate or transactions happening abroad ”<sup>16</sup>.

(9) *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (240).

(10) This fetter was subsequently removed by section 6 (1) of the Indian Independence Act, 1947, followed by the deletion of sub-section (2) of section 99 of the Government of India Act, 1935.

(11) Maxwell, 9th Ed., p. 149; *Jeffreys v.*

*Boosey*, (1854) 4 H.L.C. 815 (970).

(12) See p. 51, *ante*.

(13) *R. v. Lewis*, 7 Cox. C. C. 277.

(14) Pitt Cobbett, Vol. I, p. 282. (See on this subject, generally, *ibid*, pp. 278-313.)

(15) Salmond's Jurisprudence, 1948, p. 75.

(16) Clement, Canadian Constitution, p. 66.



Thus, English Criminal Law will apply if an English subject commits bigamy or murder in any part of the world. In such cases, even though a statute may not expressly declare extra-territorial operation, it may be inferred by the Court from the *nature* of the enactment. Thus, if an Indian statute declares marriages within certain prohibited degrees to be void, it creates a personal incapacity, which attaches to Indian subjects wherever they may be for the time being, and such a marriage, between Indian subjects, even if performed in a foreign country, would be void.<sup>17</sup>

Of course, in International Law, it is not competent for a State to enact laws for foreigners beyond the jurisdiction of the State<sup>18</sup> or for vessels on the high seas.<sup>19</sup> But whatever be the weight of an extra-territorial law in international law, the *municipal Courts* of the State which passed the law are bound to obey them, leaving it to the Government to justify its action with other countries. This view has been taken in England,<sup>20</sup> though of course extra-territorial operation will not be presumed unless that arises from the statute expressly or by necessary implication.<sup>20</sup> Nor are the municipal Courts concerned with the question whether the extra-territorial law is capable of *execution*.

"A Legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be *directly* enforced, but the Act is not invalid on that account and the Courts of its country must enforce the law with the machinery available to them."<sup>21</sup>

*Rules of Construction.*—It has already been pointed out (p. 203, *ante*), that it is an established rule of construction that municipal Courts will interpret and apply every statute, so far as its language admits, so that it may not conflict with the rights of other States or the established rules of international law, and that is why (*see above*) every statute will be *prima facie* construed as territorial in its operation. At the same time, it has also been pointed out, that when a sovereign Legislature expressly or impliedly manifests an intention to legislate with extra-territorial effect, the municipal Courts of that State must give effect to it, regardless of any law of the comity of nations.

The question, therefore, arises, when would the Courts construe such an implied intention. It may be expected that our Courts would follow the English principles on this matter. Such a construction, according to English judicial decisions, would be made as regards our own citizens in respect of properties and objects wherever situate, other than foreign land<sup>22</sup> and in matters of personal status and capacity<sup>23</sup>. [Actions regarding foreign land must be brought in the Courts of the State where the land is situated, but the jurisdiction as regards Indian land will always belong to the Indian Courts although the owner be outside the territory of India<sup>24</sup>]. On the other hand, an Indian statute may be held to confer *rights*<sup>25</sup> on foreigners outside the territory of India, but no such presumption would be made as regards *obligations*<sup>1</sup>, because that would be *prima facie* violating the rights of other States according to the comity of nations. As regards *movables* of foreigners, the law of England is that they are not governed by the *lex rei situs* but they are governed by the law of the domicile of the owner, even though the property may be situated in England.<sup>2</sup>

The presumption against extra-territorial operation has its most rigid application as regards criminal or penal laws. Acts committed by foreigners outside the territory of the enacting State are not taken to be covered by a criminal<sup>3</sup>

(17) Cf. Maxwell, 9th Ed., p. 151.

(18) *Lopez v. Burslem*, 4 Moo. P.C. 300.

(19) *R v. Keyn*, (1876) 2 Ex. D. 220.

(20) *Jeffreys v. Boosey*, (1854) 4 H.L. 815

(1939).

(21) *Br. Columbia E. R. Co. v. The King*, A.I.R. 1946 P.C. 181.

(22) *Brook v. Brook*, 9 H.L.C. 193.

(23) *The Sussex Peerage Case*, 11 Cl. & F.

146.

(24) *Br. South Africa Co. v. Companhia de Mocambique*, (1893) A.C. 602.

(25) *Davidson v. Hill*, (1901) 2 K.B. 601.

*Jeffreys v. Boosey*, (1855) 4 H.L. 815.

(1) *A.G. v. Campbell*, 5 H.L. 524.

(2) *Harding v. Commissioners of Stamps*, (1898) A.C. 769 (774).

(3) *R. v. Jameson*, (1896) 2 Q.B. 245.

or penal<sup>4</sup> law unless such construction is irresistible. One exception to this rule is piracy *jure gentium*.<sup>5</sup>

"All criminal statutes are in their terms general; but they apply only to offences committed within the territory or by British subjects. When the Legislature intends the statute to apply beyond the ordinary territorial authority of the country, it so states expressly in the statute. . . ."<sup>6</sup>

A legislation relating to shipping should in the first instance be taken as referring simply to the ships of the nation whose legislature made the legislation.<sup>7</sup>

**246.** (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

Subject-matter of laws made by Parliament and by the Legislatures of States.

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State specified in Part A or Part B of the First Schedule also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in Part A or Part B of the First Schedule notwithstanding that such matter is a matter enumerated in the State List.

CLAUSE (1) :

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sub-sec. (1) of Sec. 100 provided—

"(1) Notwithstanding anything in the two next succeeding sub-sections, the *Federal Legislature* has, and a Provincial Legislature has *not*, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "*Federal Legislative List*").

*Burma.*—Sec. 92 of the Burmese Constitution, 1948, provides—

"(1) The Parliament shall have power to make laws of the whole or any part of the Union except in so far as such power is assigned by the next succeeding sub-section exclusively to the State Councils.

For greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, notwithstanding anything in the next succeeding sub-section, the exclusive legislative authority of the Parliament shall extend to all matters enumerated in List I of the Third Schedule to this Constitution (hereinafter called "the Union Legislative List").

Any matter coming within any of the classes of subjects enumerated in the said List, shall not be deemed to come within the class of matters of a local or private nature comprised in the list of subjects assigned by the next succeeding sub-section exclusively to the State Councils.

(4) *Cooke v. Vogeler Co.*, (1901) A.C. 102.

(5) *R. v. Walkem*, (1908) 14 B.C. 1.

(6) *Niboyet v. Niboyet*, (1879) 48 L.J. P. 1

(7) *Cope v. Doherty*, (1858) 2 Deg. & J. 614

(2) Each State Council shall have power exclusively to make laws for the State or any part thereof with respect to any of the matters enumerated in List II of the said Schedule (hereinafter called 'the State Legislative List')."

### INDIA

*Predominance of Union Power in case of overlapping.*—The words 'notwithstanding anything . . . . . ' in the beginning of Cls. (1) and (2) and the words 'subject to Cls. (1) and (2)' at the beginning of Cl. (3) of the present Article, secure the predominance or supremacy of the Union legislature in case of overlapping as between Lists I, II and III [see p. 519, *ante*]. To be more particular—

"(i) If there is *overlapping* between a matter falling within the Federal List and the Provincial List, the subject to the extent of the overlapping is one exclusively Federal on which the Province cannot legislate. (ii) If there is any overlapping between the Federal List and the Concurrent List it is again similarly treated as being exclusively Federal, so as to shut out Provincial legislation on the subject. (iii) If there is overlapping between the Concurrent and the Provincial Lists, the subject is treated as within the Concurrent List thus giving the Federal Legislature to legislate over the matter with the attendant consequences."

But the doctrine of Union supremacy is not to be readily admitted, to defeat the legitimate powers of the State Legislature. The principle underlying the *non-obstante* clause may be invoked only in the case of 'irreconcilable conflict.'<sup>9</sup> And here the doctrine of 'pith and substance' [p. 245, *ante*] comes into play. If an enactment, according to its 'pith and substance', clearly falls within any of the matters assigned to the State Legislature, it is valid notwithstanding its *incidental* encroachment on a Union subject.<sup>10</sup> In this case,<sup>10</sup> the Privy Council observed—

"No doubt where they come in conflict, List I has priority over Lists III and II and List III has priority over List II, but . . . . . the priority of the Federal Legislature does not prevent the Provincial Legislature from dealing with any matter which may *incidentally* affect any item in List . . . . ."

In the words of the Federal Court—

"The Federal Legislature has full and exclusive power to legislate with respect to matters in List I, and has also power to legislate with respect to matters in List III. A Provincial Legislature (*i.e.*, State Legislature under the Constitution) has exclusive power to legislate with respect to List II, *minus* matters falling in List II or List III; has concurrent power to legislate with respect to matters in List III, *minus* matters falling in List I . . . . . The dominant position of the Central Legislature with regard to matters in List I and List III is thus established. But the rigour of this literal interpretation is relaxed by the use of the words 'with respect to' which signify 'pith and substance' and do not forbid a mere incidental encroachment."<sup>11,12</sup>

In the same case, Gwyer, C.J., observed<sup>13</sup>—

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that *blind adherence* to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance' or its true nature and character' . . . ."

It has already been pointed out [p. 530 *ante*], that where the two Lists appear to conflict with each other, an attempt should be made to reconcile them by reading them together, and applying the doctrine of 'pith and substance'. It is only

(8) Aiyangar, Government of India Act, 1935, p. 125.

(9) *Kishori v. The King*, A.I.R. 1950 F.C. 69.

(10) *Prafulla v. Bank of Commerce*, A.I.R. 1947 P.C. 28.

(11-12) *Subramanian v. Muttuswami*, (1940) 45 C.W.N. (F.R.) 1 (14).

(13) *ibid.*, at p. 6.

These observations were approved by the Privy Council in *Prafulla v. Bank of Commerce*, A.I.R. 1947 P.C. 28.



when such attempt to reconcile fails, that the *non-obstante* clause should be applied as a matter of *last resort*<sup>14</sup>. If they cannot be fairly reconciled, the power enumerated in List II must give way to List I.<sup>15</sup>

*Illustration.*

Entry 31 of List II of the Government of India Act, 1935, was

"Intoxicating liquors . . . . .", that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors . . . . ."<sup>16</sup>

Entry 19 of List I of the Act was—

"Import and export across customs frontiers . . . . ."<sup>17</sup>

The Bombay Abkari was a Provincial law relating to " . . . . . transport, manufacture, sale and possession of liquor in the Presidency of Bombay", and the appellant was charged with having in her possession a quantity of *foreign* liquor in excess of the limit permitted under a notification issued under the Bombay Act. It was contended on behalf of the appellant that in view of Entry 19 of List I, the Provincial Legislature had no power to legislate with respect to possession of foreign liquor, i.e., liquor imported 'across the customs frontier.' It was argued that if Entry 31 of List II were held to include also liquors imported from abroad, then the Provincial Legislature, by prohibiting possession of such liquors by all persons, whether private consumers, common carriers or warehousemen, could defeat the power of the Federal Legislature to regulate imports of foreign liquors across the frontiers. *Held*, there was no such irreconcilable conflict between the two entries as would necessitate recourse to the principle of federal supremacy in Sec. 100. Item 31 of List II was expressed in wide and unqualified terms and there was nothing in Entry 19 of List I to cut down the full meaning of the Provincial entry by excluding foreign liquors from its purview. It is far fetched to suggest that in so far as a legislation purports to deal with *possession* of foreign liquors, it is legislation with respect to the import of liquors across the customs frontiers."<sup>17-a</sup>

'*With respect to.*'—This expression is used in all the clauses of the present Article as well as in several other Articles of this Chapter. These words indicate the ambit of the power of the respective Legislatures to legislate as regards the subject-matters comprised in the various entries included in the Legislative Lists. The expression is borrowed from Sec. 51 of the Australian Constitution<sup>18</sup>, while the expression 'in relation to' is used in Secs. 91-2 of the British North America Act<sup>19</sup>. They explain the nature of connection that must exist between a legislation and the subject-matter of an Entry, i.e., the legislative power under which the legislation purports to have been made. As the Federal Court observed, in interpreting the same expression in the Government of India Act, 1935 :

"In view of the large number of items in the three legislative lists, it is almost impossible to prevent a certain amount of overlapping. Absolutely sharp and distinct lines of demarcation are not always possible . . . . . To avoid such difficulties, Parliament has thought fit to use the expression 'with respect to' which obviously means that *looking at the legislation as a whole*, it must *substantially* be with respect to matters in one list or the other. A remote connection is not enough."

On the other hand, the expression extends the legislative power to all *ancillary* or subsidiary matters which can fairly and reasonably be said to be comprehended in that topic or category of legislation<sup>21</sup>. In short thus, the expression invokes the principle of 'pith and substance' in the matter of interpreting the Legislative

(14) In re C. P. & Berar Taxation Act, A.I.R. 1939 F.C. 1.

(15) Governor-General v. Province of Madras, A.I.R. 1945 P.C. 98.

(16) This is Entry 31 of List II of the Constitution.

(17) This forms part of Entry 41 of List I of the Constitution.

(17-a) This decision would hold good in the interpretation of Entries 8 of List II and 41 of

List I of the Constitution.

(18) Meyer v. Poynton 27 C.L.R. 436; Commonwealth v. Queensland, 29 C.L.R. 1 (21); Ex parte Walsh, 37 C.L.R. 36.

(19) A.-G. of Saskatchewan v. A.-G. of Canada, A.I.R. 1949 P.C. 190.

(20) Subramaniam v. Multuswamy, A.I.R. 1941 F.C. 47.

(21) United Provinces v. Atiqah Begum, A.I.R. 1941 F.C. 16 (25).

Lists<sup>21-a</sup>. It is the nature and character of the legislation and not its ultimate economic or other consequences that determines whether it is with respect to one subject-matter or another<sup>22</sup>.

#### CLAUSE (2) :

##### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sub-sec. (2) of Sec. 100 provided—

“(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the ‘Concurrent Legislative List’).”

#### INDIA

*Cl. (2) : Need of ■ Concurrent List.*—The need of a Concurrent List of subjects, over which the Centre and the Units have concurrent powers, is *uniformity*. Since the plan of three Lists in the Constitution has been adopted from the Government of India Act, 1935, it would be profitable to refer to the observations of the Joint Parliamentary Committee<sup>23</sup>, on the point :

“Experience has shown, both in India and elsewhere, that there are certain matters which cannot be allocated exclusively either to a Central or to a Provincial Legislature, and for which, though it is often desirable that Provincial legislation should make provision, it is equally necessary that the Central Legislature should also have a legislative jurisdiction, to enable it in some cases to secure *uniformity* in the main principles of law throughout the country, in others to *guide and encourage* provincial efforts, and in others again to provide *remedies for mischiefs* arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province.

Instances of the first are provided by the subject-matter of the great Indian Codes ; of the second by such matters as labour legislation, and of the third by legislation for the prevention and control of epidemic disease.

It would in our view be disastrous if the uniformity of law which the Indian Codes provide were destroyed or whittled away by the unco-ordinated action of Provincial Legislatures. On the other hand, local conditions necessarily vary from Province to Province, and Provincial Legislatures ought to have the power of adapting general legislation of this kind to meet the particular circumstances of a Province”.

#### CLAUSE (3) :

##### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sub-sec. (3) of Sec. 100 provided—

“(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature *has not*, power to make laws for ■ Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the ‘Provincial Legislative List’).”

*Burma* :—Sub-sec. (2) of Sec. 92 of the Burmese Constitution says—

“Each State Council shall have power exclusively to make laws for the State or any part thereof with respect to any of the matters enumerated in List II of the said Schedule (hereinafter called ‘the State Legislative List’).”

#### INDIA

‘Subject to Cls. (1) and (2).’—See under ‘Predominance of Union power’, at p. 548, *ante*. Of course, the words ‘and the Federal Legislature *has not*’ which occurred in Sec. 100 (3) of the Government of India Act, 1935, has not been adopted in Cl. (3) of the present article, but that omission has been compensated by the addition of the word ‘exclusive’. Hence, the position is, as under the Government of India Act, 1935. If the Union Parliament legislates in respect of a matter coming in its ‘pith and substance’ within the State List that law will be *ultra vires*, unless it is upheld by some other provision of the Constitution, *e.g.*, Arts. 249-253. The question of predominance of Union legislation by the application of the *non-obstante* clauses arises only in the case of genuine *overlapping* of subject-matter of different entries (see p. 548, *ante*).

(21-a) *Subramaniam v. Muttuswami*, A.I.R. 1941 F.C. 47.

(22) *A.-G. of Saskatchewan v. A.-G. of Canada*,

A.I.R. 1949 P.C. 190.

(23) Joint Parliamentary Committee on Indian Constitutional Reforms 1934 para, 51.

## CLAUSE (4) :

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sub-sec. (4) of Sec. 100 of that Act provided—

“The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.”

## INDIA

*Cl. (4): Parliament's power to legislate as regards States in Part C and other territories.*—This clause makes it clear that the distribution of legislative powers provided by the preceding three clauses of Art. 246 is meant only as between the Union and the States in Part A or B. As regards States in Part C or any other territory (Part D)—not included in Parts A and B, Parliament shall be competent also to legislate with respect to matters included in List II, as well [see p. 535, *ante*]. In other words, the Legislatures of these territories, if any, shall have no exclusive jurisdiction over any List.

**247.** Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

Power of Parliament to provide for the establishment of certain additional Courts.

## OTHER CONSTITUTIONS

*Canada.*—Sec. 101 of the British North America Act says—

“The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the establishment of any additional courts for the better administration of the laws of Canada.”

The scheme of the British North America is that justice should in the main be administered throughout Canada through the medium of Courts constituted and maintained under provincial legislation. But this section empowers the Dominion Parliament to create additional Courts and to confer any jurisdiction upon such Courts<sup>24</sup>. It may be noted that no such additional Court has yet been established in Canada.

## INDIA

*Art. 247: Creation of Additional Courts by Parliament.*—The constitution and organisation of the Supreme Court and the High Courts are exclusive powers of the Union Parliament [Entries 77-8, List I], while the power of constitution and organisation of all other Courts belongs to the State Legislature. [Entry 3, List II). So, the scheme of our Constitution is similar to that of the Canadian Constitution, *viz.*, that judicial organisation below the Supreme Court and the High Courts shall be the subject of State legislation and that the same system of State Courts shall administer both Union and State laws [see p. 30, *ante*]. But the power to provide for the administration of laws is regarded as incidental to the power to make laws relating to a subject<sup>25</sup>. Hence, the present article empowers Parliament to create additional Courts for the administration of laws enacted by it with respect to any matter enumerated in List I. Such additional Courts, thus, would deal exclusively with Union laws. This power would be exercised by Parliament only if it finds that the administration of any particular Union laws could not be conveniently or properly be made by the State Courts.

(24) *Valin v. Langlois*, 3 S.C.R. 22 (74).

C.L.R. 25.

(25) Cf. *Peacock v. Newton Society*, (1943) 67



**248.** (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

#### OTHER CONSTITUTIONS

*U. S. A.*—It has already been pointed out [p. 515, *ante*], that the federal government, under the American Constitution has got only enumerated powers, while the residue was vested in the States. The 10th Amendment provides—

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . . . .”

As Tocqueville observed—

“Government by the Centre was the *exception*, while Government by the States was the rule.”

But judicial interpretation has reversed this plan<sup>1-2</sup>, and federal power has been expanded at the cost of what would have been regarded by the framers of the Constitution as residual State power [*see also* pp. 521-2, *ante*].

*Australia.*—Australia adopted the American plan<sup>3</sup> of vesting the residuary power in the State Legislatures. Sec. 107 of the Australian Constitution Act provides—

“Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.”

So, the Commonwealth has only enumerated powers<sup>4</sup> like the American Congress.

*Canada.*—The framers of the Canadian Constitution supposed that the American system of vesting residuary powers in the States resulted in weakness of the Federal Government and so they reversed the process, by leaving the residue to the Dominion Parliament<sup>5</sup>, conferring on the Provincial Legislatures only such powers as might be required for local purposes. Sec. 51 of the British North America Act provides—

“It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Province . . . . .”

*Burma.*—This Constitution also vests the residuary power in the Union. Sec. 90 says—

“Subject to the provisions of this Constitution, the sole and exclusive power of making laws in the Union shall be vested in the Parliament . . . . .”

This is supported by item 40 of List I (Union Legislative List) which is as follows :—

(1-2) See my article—‘Indian Constitution through American Eyes’ in (1949) F.L.J. (Journal), p. 177.

(3) *Peterswald v. Bartley*, (1904) 1 C.L.R. 497 (507).

(4) *S. Australia v. The Commonwealth*, (1942)

65 C.L.R. 373 (442); *James v. Commonwealth* (1936) A.C. 578 (611).

(5) See my article on ‘The Indian Constitution through American Eyes’ in (1949) F.L.J. p. 172 (Journal).

“Any other matter not enumerated in List II.”

*Government of India Act, 1935.*—The provision in this Act as regards the vesting of the residual power was novel. That power was given neither to the Federation nor to the Provinces. It was vested in the Governor-General, acting in his discretion. Sec. 104 was—

“(1) The Governor-General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

(2) In the discharge of his functions under this section the Governor-General shall act in his discretion.”

### INDIA

*Art. 248 : Scope of Residuary Power.*—It has already been pointed out that the aim of the Constitution, like that of the Government of India Act, 1935, is to make the Legislative Lists as exhaustive as possible. As regards the Act of 1935, it was observed that the Lists were made—

“so exhaustive as to leave little or nothing for the residuary field.”<sup>6</sup>

The above observation is even more pertinent as regards the Constitution, the Lists of which are even more elaborate than those in the Act of 1935. Thus, List I of the Constitution contains 97 entries against 59 of List I of the Act, while List II of the Constitution contains 66 entries as against 54 of List II of the Act. Even List III is larger in the Constitution. Hence, as under the Act of 1935, so under the Constitution,—

“Resort to the residual power should be the very last refuge. It is only when all the categories in the three Lists are absolutely exhausted that one can think of falling back upon a non-descript.”<sup>7</sup>

The scheme of vesting the residuary power in the Union instead of the States (following the Canadian model), has a history. When the Constituent Assembly first sat, its members were inspired by the American model of leaving the residue to the States and making the States masters of their own house<sup>8</sup>. But by the time the Constituent Assembly re-assembled as a sovereign body after August 14, 1947, India had been partitioned into two halves, and her problem of defence had been complicated by creating a foreign State within her own compound. It became thus essential to build a strong Central Government and this could be effected only by giving the Centre more powers as well as by giving it the residue.

*Analogous Provision.*—In a sense, the provisions of this article may be regarded as redundant, for, even without the present article, Entry 97 of List I of the 7th Schedule would have given the Union Parliament the residuary power. That entry relates to—

“Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.”

(6) *Governor-General v. Province of Madras*, A.I.R. 1945 P.C. 98. [So did Gwyer, C.J., observe in *In re C. P. Motor Spirit Taxation Act*, A.I.R. 1939 F.C. 1.—“The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects

has made the Indian Constitution Act unique among federal Constitutions in the length and details of its legislative lists.”]

(7) *Subramanyan v. Muttuswami*, A.I.R. 1948 F.C. 47 (55).

(8) See the Objectives resolution, at p. 3, ante.

**249.** (1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

Power of Parliament to legislate with respect to a matter in the State List in the national interest.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein :

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

#### OTHER CONSTITUTIONS

*U.S.A.*—The principle underlying the American federation is that one of the parties to the federation cannot, by its unilateral action, alter the distribution of powers effected by the Constitution. The division of powers in the American federation is *rigid*. Notwithstanding the revision of the borders by judicial interpretation, from time to time, the power does not lie in the hands of the federal Government, *acting alone*, to transfer to itself the powers that were substantially given to the States by the Constitution. Congress cannot formally transfer to itself any of the powers belonging to the States. The only way to effect it is the process of amendment which would involve obtaining the consent of the States to such transfer of power.

*Australia.*—In Australia, too, this is not possible without amendment of the Constitution.

*Canada.*—Though the Constitution assigns an exclusive sphere to the Provincial Legislature, the Judiciary has enabled the Dominion Parliament to legislate as regards Provincial or local subjects whenever they assume a national importance, under the residuary power of the Dominion Parliament to legislate for “the peace, order and good Government of Canada” (Sec. 91).

In a recent case<sup>9</sup>, it has been laid down by the Privy Council that the exercise by the Dominion of the above residual power is not dependent upon the existence of some *emergency* or *peril* to the national life of Canada as a whole,—as might be supposed from an earlier pronouncement of the Judicial Committee<sup>10</sup>—but upon

(9) *A.-G. for Ontario v. Canada Temp. Federation*, (1946) 50 C.W.N. 534 (538) : (1946) F.L.J. 50 (P.C.).

(10) *Toronto Electric Commissioners v. Snider*, (1925) A.C. 396.



the nature of the subject-matter of legislation, *viz.*, whether it is of national importance :

" The true test is to be found in the real subject-matter of the legislation ; if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the *concern of the Dominion as a whole*, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good Government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures " <sup>11</sup>.

Thus, the Dominion Parliament is competent to combat an epidemic of pestilence both for its cure as well as its prevention <sup>11</sup> or to control the sale of intoxicating liquor though ' licensing ' is a Provincial subject <sup>11</sup>; to prohibit or restrict the sale or exposure of cattle having a contagious disease. <sup>12</sup>

But the Canadian Parliament has no power to legislate on a matter which comes *directly* within the exclusive Provincial list given by section 92 of the British North America Act <sup>11</sup> and the Dominion Parliament has no power to upset the constitutional distribution of powers, by its unilateral action <sup>13</sup>.

Of course, in the classification of the subject-matter of legislation, the Courts may be influenced by the existence of an emergency. In times of emergency, what was originally a matter of local importance, may assume national importance :

" The general control of property and civil rights for normal purposes remain with the Provincial Legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good Government of Canada as a whole " <sup>14</sup>.

" Some matters, in their origin local and Provincial, might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interests of the dominion but great caution must be observed in *distinguishing* between (a) that which is local and provincial and therefore within the jurisdiction of the Provincial Legislatures and (b) that which has *ceased* to be merely local or provincial and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada " <sup>15</sup>.

When the crisis is over, the matter may again cease to be of national importance and the subject would then revert to the local jurisdiction :

" It may be that the crisis which arose is wholly at an end, and that there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for. In such a case, the law as laid down for the distribution of powers in the ruling instrument would have to be invoked " <sup>16</sup>.

It is for the *Courts* and not for the Dominion Parliament to lay down the line of necessity in each case <sup>16</sup>.

*Government of India Act, 1935.*—There was no provision in the Act of 1935, corresponding to the present Article.

#### INDIA

*Scope of Arts. 249-253.*—While Art. 246 (3) confers exclusive jurisdiction upon the State Legislature to legislate with respect to matters enumerated in List II, Arts. 249-253 provide certain cases in which the Union Parliament shall be competent to invade the State List and legislate with respect to matters in List II, which are normally forbidden to it. Thus, Art. 249 empowers the Union Parliament to make temporary legislation with respect to any matter included in List II whenever a special majority of the Council of States (Upper Chamber of Parliament) resolves that that is necessary in the *national interest*. The ground of Union legislation, under Art. 250 is Proclamation of Emergency (see under Art. 353). The basis of Union legislation with respect to the State List, under Art. 252 is agreement between two or more States to that effect. Art. 253, on the other hand, empowers Parliament overriding powers of legislation for the purpose of giving effect to the international obligations of India.

(11) *A.-G. for Ontario v. Canada Temp. Federation*, (1946) 50 C.W.N. 534 (538); (1946) F. L.J. 50 (P.C.).

(12) *Russel v. The Queen*, (1882) 7 A.C. 829.

(13) *Montreal Street Ry. v. Montreal*, (1912) A.C. 333.

(14) *Pulp and Power Co. v. Manitoba Free Press*, (1923) A.C. 695 (704).

(15) *A.-G. for Ontario v. A.-G. for Canada*, (1896) A.C. 332 (361).

(16) *Montreal Street Ry. v. Montreal*, (1910) 43 S.C.R. 197, affirmed by (1912) A.C. 333.

*Object of Art. 249 : Power of Parliament to legislate with respect to State List in national interest.*—It has been pointed out at the outset (p. 31, *ante*), that it has been the object of the framers of *our* Constitution to impart as much strength to the Central Government as possible, within the framework of a federal Constitution. In carrying out this object, they have gone beyond the fathers of the Canadian Constitution. We have seen that though the Canadian Parliament is competent to make laws as regards local matters when they assume a national importance, it has no power to legislate on a matter which directly comes under the Provincial List contained in Sec. 92 of the British North America Act. But the present Article of *our* Constitution empowers the Union Parliament to take up for legislation by itself *any matter* which is specifically enumerated in List II, whenever the Council of States resolves, by a 2/3 majority, that such legislation is 'necessary or expedient in the national interest'. In other words, whenever any such resolution is passed, Art. 246 (3) will cease to be a fetter on the power of the Union Parliament, to the extent that the resolution goes. This power is to be distinguished from that conferred by Art. 250, for under the present Article no emergency is necessary for the assumption of the State powers by Parliament. 'National interest' is wide enough to cover any matter which has incidence over the country as a whole as distinguished from any particular locality or section of the people.<sup>17</sup>

Of course, such laws will remain in force only while the resolution remains in force, and this period is one year only for each resolution [Cl. (2)]. Again, it may be said that the Upper Chamber of Parliament, *viz.*, the Council of States will be composed of State representatives, so that practically the resolution of the Council will indicate the consent of the States. But, under the Fourth Schedule there will be *no equality of State representation* in the Council of States. So, under a two-thirds vote of one Chamber of the national Legislature, the Union is capable of functioning, though temporarily, or partially, as a unitary State (the executive function of the Union being co-extensive with its legislative functions).<sup>18</sup>

*Cl. (2) : Duration of resolutions.*—By passing successive resolutions, the Council of States shall be able to retain its powers under Art. 249 for an unlimited period. But each resolution shall have a limited duration of one year only. Laws made under the resolution shall continue in operation up to six months after the expiry of a resolution, or the last of such resolutions.

*Cl. (3) : Effects after expiration of such laws.*—This clause and Cl. (2) of Art. 250 are to the same effect. The effects of expiry of a temporary law have already been discussed at p. 541, *ante*.

"The present clause expressly lays down the effects of expiry of the temporary laws made by Parliament with respect to List II. These laws will cease to have effect on the expiration of the resolution (or Proclamation as the case may be). So, after that date, such Union laws shall have no effect at law, but actions as regards *rights or liabilities* for acts or omissions committed *during* the operation of such laws will lie even after expiration of such laws.

The general rule is that no actions or proceedings under temporary statutes lie after their expiry, in the absence of express provision to the contrary, and even pending proceedings terminate."<sup>19</sup>

*Analogous Provision.*—When Parliament assumes State powers under the present Article, the State Legislature is not suspended. It continues to have its powers over the State List, but State laws will then operate subject to Union laws made

(17) It is interesting to note that on 12-8-50, the Provisional Parliament has passed a resolution under the present Article, assuming powers included in Entries 26 and 27 of List II, for the effective control of black-marketing:—"That this House do resolve, in pursuance of Article 249 of the Constitution, as adapted by the President under Article 392 thereof and as at present in force, that it is necessary in the national interest that Parliament should, for a period of one year from the 15th August, 1950, make laws with respect to the following matters

enumerated in the State List:—(1) trade and commerce within the state subject to the provisions of Entry 33 of List III and (2) production, supply and distribution of goods subject to the provisions of Entry 33 of List III." [By a Removal of Difficulties Order under Art. 392, the President has adapted Art. 249 (1), substituting 'Parliament' for 'Council of States'].

(18) Art. 73 (1) (a); p. 244, *ante*.

(19) *Miller's case*, 1 Wm. Bl. 451.

under the present article, and the law of repugnancy, as laid down in Art. 251, *post*, will come into action even as regards such matters of List II.

**250.** (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of emergency is in operation.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

#### OTHER CONSTITUTIONS

*U.S.A. & Australia.*—As regards these two countries, what has been said in regard to 'national interest' (p. 554, *ante*), holds good as regards any 'emergency' as well, *viz.* that it does not suspend the federal distribution of powers as laid down by the Constitution, nor does it enable the federal legislature, of its own will, to assume powers over the State subjects. Of course, the Courts, under either Constitution, have helped the federal Government, in times of war, to assume as much power as necessary for the safety of the realm or effective prosecution of war, by a liberal interpretation of its 'defence' or 'war' power. But the verdict of competence has always rested with the Courts and not with the Federal Legislature itself. The doctrine upon which the Courts in either country have acted is that emergency may furnish the reason for the exercise of a legitimate power of the federal Government which may not be called for during peace,<sup>20</sup> [p. 18, *ante*] but emergency does not increase granted powers nor remove<sup>20, 22</sup>, or diminish restrictions imposed by the Constitution. It does not enable the Federal Legislature to supersede the federal structure of the Constitution<sup>21</sup>. Again, whether a particular legislative act falls within this category of subject-matter or that may be determined by the Courts upon different considerations in time of war than in time of peace<sup>23</sup>, but never has the Federal Legislature been allowed to assume powers which have no legitimate connection with its power of 'defence' or 'war'<sup>24</sup> or any other power granted to it by the Constitution.

*Government of India Act, 1935.*—Sub-sec. (1) of Sec. 102 of the Act of 1935 was as follows :

"(1) Notwithstanding anything in the preceding sections of this chapter, the Federal Legislature shall, if the Governor-General has declared by Proclamation (in this Act referred to as a 'Proclamation of Emergency') that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List:

Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency."

Sub-sec. (4) of Sec. 102 was exactly similar to Cl. (2) of the present Article.

(20) *Andrews v. Howell*, (1941) 65 C.L.R. 255.

(21) *Ex parte Victoria*, (1942) 66 C.L.R. 488 (506).

(22) *Home Building Association v. Blaisdell*, (1934) 290 U.S. 398; *Schechter v. U.S.*, (1935) 295

U.S. 495.

(23) *Farey v. Burvett*, (1916) 21 C.L.R. 483.

(24) *The Public Service Case*, (1942) 66 C.L.R. 488 (506).



## INDIA

*Cl. (1): Power of Parliament over State List, under Proclamation of Emergency.*—This Article provides that under a Proclamation of Emergency<sup>25</sup> [see Art. 352, *post*], the Union Parliament shall have the powers of the Legislature of a Unitary State [p. 31, *ante*], in order that it may adequately cope with the situation. Herein the Constitution follows the plan of the Government of India Act, 1935.

*Analogous Provision.*—In this connection, see Art. 353 (b), *post*.

*Cl. (2): Effects after expiration of such laws.*—This clause is similar to Cl. (3) of Art. 249, see p. 556, *ante*.

*Analogous Provision.*—The nature and effects of Union laws passed under the present article are similar to those under Art. 249, *ante*.

**251.** Nothing in Articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

Inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the Legislatures of States.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sub-sec. (2) of Sec. 102 was the same as Art. 251 of the Constitution, excepting that there was no provision corresponding to Art. 249, in the Act of 1935.

## INDIA

*Scope of Art. 251: Supremacy of Union laws under Arts. 249-50.*—The provisions of the present article are similar to those of Art. 254 (1), *post*, but the scope of the present Article is confined to Union laws made under Arts. 249-50. While Parliament exercises powers over List II, under either Art. 249 or 250, the State Legislature is not suspended or superseded (as it is under Art. 356 (1)(b), *post*). But State laws will then be valid only so far as they are not 'repugnant' to Union laws made under either Art. 249 or 250.

As to 'repugnancy', see under Art. 254, *post*.

**252.** (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.

(25) It is not necessarily confined to war [see *post*].

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

#### OTHER CONSTITUTIONS

*Australia.*—Sec. 51 (xxxvii) gives the Commonwealth Parliament power to legislate with respect to—

“Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.”

*Burma.*—Sec. 95 of the Burmese Constitution, 1948, provides—

“If it appears to the State Councils of two or more States to be desirable that any of the matters enumerated in the State Legislative List should be regulated in these States by an Act of the Parliament, and if resolutions to that effect are passed by those State Councils, it shall be lawful for the Parliament to pass an Act for regulating that matter accordingly; but any Act so passed may, as respects any State to which it applies, be amended or repealed by an Act of the State Council.”

*Government of India Act, 1935.*—Sec. 103 of that Act was—

“If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.”

#### INDIA

*Art. 252 : Power of Parliament to legislate for States by consent.*—While Art. 263 provides for the creation of an Inter-State Council for effecting co-ordination between the States in matters of common interest, the present Article provides the legislative means to attain that object. There are many subjects in the State List, e.g., public health, agriculture, forests, fisheries, which would require common legislation for two or more States. So, this article makes it possible to make such laws relating to State subjects, ■ regards such States whose Legislatures empower Parliament in this behalf, by resolutions.

Cl. (2) differs from the provision in Sec. 103 of the Government of India Act 1935 (quoted above). Under the present clause it will not be possible for a State Legislature to repeal or amend such an Act of Parliament, relating to that State. It may be amended or repealed only by another Act of Parliament passed or adopted in the manner provided in Cl. (1), i.e., by resolutions (for amendment or repeal) of those State Legislatures in whose interest the Act was passed, followed by an Act of Parliament.

**253.** Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Legislation for giving effect to international agreements.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. VI of the Constitution declares—

“... all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding”.

The result of this provision is that ■ treaty which ■ made by the Federal Executive with the assent of the Senate must be supreme even though it trenches upon the

normal sphere of the States as outlined by the other provisions of the Constitution. Thus, the migratory Bird Treaty Act passed by the Congress to implement the treaty between that U.S.A. and Great Britain was held valid notwithstanding the fact that States have a constitutional title to migratory birds within them<sup>1</sup>.

*Canada.*—Sec. 132 of the British North America Act provides—

“The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.”

The Dominion Parliament has, thus, the exclusive power to implement a treaty when the treaty comes within Sec. 132 or where the general residuary power under Sec. 91 is applicable<sup>2</sup>. But if the international convention was signed by Canada not as a member of the British Commonwealth, but as an independent nation, and the matter of the convention relates to the classes of Provincial subjects included in Sec. 92, the Dominion cannot legislate to implement the agreement without the consent of the Provinces<sup>3</sup>.

*Australia.*—In the Australian Constitution Act, there is no separate provision as regards the treaty-making power or the implementation of treaties. Sec. 51 (xxxix) of the Act gives the Commonwealth power over—

“External affairs”.

This power has been interpreted to extend to agreements entered into by Australia on its own international responsibility and Commonwealth legislation to give effect to such agreement is valid despite its effects on State control of transport within its borders<sup>4</sup>.

*Government of India Act, 1935.*—“The implementing of treaties and agreements with other countries” was a federal subject under item 3 of List I of Sch. VII, but this power was restricted by Sec. 106 of the Act which laid down that in the exercise of the above power, the Federal Legislature could not make any law for any Province or Federated State without the consent of the Governor of the Province or the Ruler of the State, as the case may be.

## INDIA

*Art. 253 : Legislation for giving effect to international agreements.*—This article is in conformity with the object declared by Art. 51 (c), p. 202, *ante*. Treaty-making and implementing of treaties, etc., is a subject of Union legislation, under Art. 14, List I, *post*. But it would have been difficult for the Union to implement its obligations under treaties or other international agreements had it not been able to legislate with respect to State subjects in so far as that may be necessary for that purpose. Hence, this Article by the words ‘notwithstanding the foregoing provisions’, empowers the Union Parliament to invade List II, in so far as that may be necessary for the purpose of implementing the treaty obligations of India.

**254.** (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legis-

Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

(1) *Missouri v. Holland*, (1920) 252 U.S. 416.

(2) *In re Aeronautics*, (1932) A.C. 54.

(3) *A.-G. for Canada v. A.-G. for Ontario* (1937)

A.C. 326.

(4) *King v. Burgess*, (1936) 55 C.L.R. 608.



ture of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State, shall if it has been reserved for the consideration of the President and has received his assent, prevail in that State :

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

#### OTHER CONSTITUTIONS

*Australia.*— Sec. 109 of the Australian Constitution (see p. 518, *ante*), deals with 'inconsistency' between State and Commonwealth laws.

*Government of India Act, 1935.*—Cls. (1) and (2) of the present Article of the Constitution substantially reproduce sub-secs. (1) and (2) of Sec. 107 of the Government of India Act, 1935. The Proviso to Cl. (2) of the article substitutes the corresponding Proviso of the Act of 1935 which was as follows<sup>5</sup>—

" Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General, shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor-General."

#### INDIA

SCOPE OF ART. 254 : REPUGNANCY BETWEEN UNION AND STATE LAWS.— The question of repugnancy properly arises in connection with the Concurrent List (List III, 7th Sch.). Under Art. 246 (2), *ante*, both the Union and the State Legislatures have concurrent powers to legislate with respect to this List. Logically therefore, legislation by both legislatures relating to the same subject-matter within List III shall be valid. But the question arises, which one shall prevail in case the Act of the one Legislature is in conflict with the other, relating to the same subject.

Cl. (1) lays down the general rule that in case of repugnance of a State law with a Union law relating to the same matter in the Concurrent List, the Union law will prevail and the State law will fail to the extent of the repugnancy, whether the Union law is prior or subsequent to the Union law. But to this general rule, Cl. (2) engrafts an exception, viz. that if the President assents to a State law which has been reserved for his consideration (Art. 200), it will prevail notwithstanding its repugnancy to an earlier law of the Union. This exception, again, is to be read subject to the Proviso.

Though the general principle is that ■ State law will fail in whole or in part in case of its being repugnant to ■ Union law within the meaning of Art. 251 or 254,—the Union Parliament has no power to directly repeal ■ state law on account of repugnancy<sup>6</sup>. [The case is, of course, different when Parliament would be duly exercising powers of the State Legislature itself, e.g. under Arts. 249-250, 252, or 253.] But the Proviso to Cl. (2) of the present article empowers the Union Parliament to repeal or amend a repugnant State law which has become valid by virtue of the President's assent. This power, however, may be exercised by Parliament, only by making another law relating to the same concurrent subject.

(5) As amended in 1947.

(6) Cf. *A.G. of Ontario v. A.G. for Canada*, (1896)

A.G. 549.

**SOME GENERAL RULES RELATING TO REPUGNANCY.**—(i) Repugnancy is a question to be determined by the Courts and not by either of the two Legislatures concerned.<sup>7-8</sup>

(ii) When a statute is challenged as repugnant to a paramount law, the onus of showing the repugnancy and the extent thereof is on the party who attacks the validity of that legislation<sup>9</sup>. For, the presumption is that a Legislature does not exceed its jurisdiction<sup>10</sup> (see p. 537, *ante*), and the Court should make every attempt to reconcile the provisions of the apparently conflicting enactments.<sup>10</sup>

(iii) Repugnancy must exist *in fact* and not depend on a possibility<sup>9</sup>. Every effect should be made to reconcile the two provisions [p. 534, *ante*].

(iv) In case of repugnancy, the State law becomes void 'to the extent of repugnancy'. Hence, when the repugnancy is removed,—by *repeal* of the Union law itself, the State law would revive and become again operative.<sup>11-12</sup> In short, the State law, in so far as it is repugnant, 'shall remain in abeyance' until the Union law is repealed by Parliament.<sup>12</sup>

(v) Any attempt on the part of the State Legislature to save a repugnant statute by excluding the jurisdiction of the Courts to question its validity will be regarded by the Courts as an attempt to do by indirect means something which the State Legislature was not entitled to do and the bar against jurisdiction would be disregarded.<sup>13</sup>

#### CLAUSE (1):

**CL. (1) EFFECT OF REPUGNANCY.**—The conditions for the attraction of this clause are—

(i) The State law must be *with respect to* a matter in the concurrent List. This clause will have no application if the State law in its 'pith and substance' relates to a matter in List II, and there is no need to invoke a concurrent power<sup>14</sup> even if the State law *incidentally* trenches upon some item in the Concurrent List.<sup>15-16</sup>

#### Illustration.

The Punjab Restitution of Mortgage Lands Act which enabled a mortgagor to redeem a usufructuary mortgage of lands without payment of the mortgage debt was impugned as repugnant to the Contract Act, which came under item 10 of List III of the Government of India Act, 1935. *Held*, by the Privy Council, negating the contention, that the Punjab Act in its pith and substance fell entirely within the Provincial item relating to 'land' (item 21 of List II), and that there was no need for the Provincial Legislature to rely on any item in the Concurrent List, in order to give its validity. Hence, no question of repugnance arose.<sup>16-16</sup>

(ii) The State law must be 'repugnant' to an existing law or a law of Parliament.

"The Concurrent List is not a forbidden field to the Provincial Legislature and the mere fact that the Provincial Legislature has legislated on any matter in the Concurrent List is not enough to attract the mischief of S. 107 of the Government of India Act, 1935. There must be repugnancy between such legislation and an existing law, and then and then only would the existing law prevail, unless the procedure laid down in sub-sec. (2) of S. 107 was followed."<sup>14</sup>

In short, the doctrine of 'occupied field'<sup>17</sup> is not to be applied to test the validity of a State law relating to List III. It is not true, in India, that a State law relating to a Concurrent List will be valid only so long as the Union Parliament does not legislate with respect to the same matter: the State law will be invalid only if it

(7) *Sibnath v. Porter*, A.I.R. 1935 Cal. 377.

(8) *A.G. of Ontario v. A.G. for Canada*, (1896) A.C. 348.

(9) *Shyamkant v. Rambhajan*, A.I.R. 1939 (F.C.) 74 (83).

(10) *In re Hindu Women's Property Act*, (1941) 45 C.W.N. (F.R.) 81.

(11) *Carter v. Egg and Pulp Board*, (1942) 66 C.L.R. 557.

(12) *A.G. for Ontario v. A.G. for Canada*, (1896) A.C. 348 (367).

(13) *Megh Raj v. Alla Rakhia*, (1942) 46 C.W.N. (F.R.) 61 (65).

(14) *Lakhi Narayan v. Provincial of Bihar*, (1950) 5 D.L.R. 17 (23) F.C.

(15-16) *Megh Raj v. Alla Rakhia* (1947) 1 D.L.R. 425 (427) (P.C.).

(17) See p. 518, *ante*.

is 'repugnant' to the Union law, whether prior or subsequent to it, in point of time.<sup>18</sup>

'REPUGNANCY', MEANING OF.—'Repugnant' literally means 'inconsistent with'. Etymologically,—

"things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the *command* or power or provision in the one law conflicts directly with the command or power or provision in the other . . . as when one Legislature says 'do' and the other says 'don't'".<sup>19</sup>

So, a State law is not inconsistent with a Union law if it is possible to obey the State law without disobeying the Union law.<sup>20</sup> Technically, this is called the 'test of obedience'. But the test of obedience is not a satisfactory one, for there may be inconsistency between two laws though both say "don't", e.g., when both impose prohibitions against the same act, but one of them is more stringent than the other.<sup>21-22</sup>

A State law may be inconsistent with a Union law in any of the following ways—

(i) There may be *express* inconsistency in the actual terms of the State law.<sup>23</sup>

(ii) The inconsistency may be *necessary* in effect, e.g. when the State law makes something unlawful which the Union law says is lawful<sup>24</sup>. This is known as the doctrine of *Implied Repeal*. But there is no such inconsistency merely because a State law makes an act an 'offence' which is not declared to be an 'offence' by the Union law<sup>24</sup>.

"A repeal by implication is only effectual when the provisions of the later<sup>25</sup> enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together. Unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied; or unless there is a necessary inconsistency in the two Acts standing together".<sup>1</sup>

(iii) Though there may be no direct conflict, a State law may be inoperative if the Union law is intended to be a complete and exhaustive code.

"If, however, a competent legislature expressly or impliedly evinces its intention of covering the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field."<sup>2</sup>

"When a State law, if valid, would alter, impair, or detract from the operation of the law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the *terms, nature or the subject-matter* of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights or duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent."<sup>3</sup>

#### Illustration.

The Victorian Motor Car Act prohibited any person from driving a motor car on a public high way without being licensed for the purpose. There were Commonwealth Acts which required members of the Defence Forces to obey the lawful commands of their superior officers, but there was no Commonwealth law exempting members of the Defence Forces from the requirement of obtaining licence for driving cars. Held, that the Commonwealth Acts did not exclude the operation of the State Motor Car Act in relation to the Defence Forces, and so the State law was valid.<sup>4</sup>

On the other hand, if the paramount legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying

(18) Cf. *Prafulla v. Bank of Commerce*, (1947) 1 D.L.R. (P.C.) 274 (280).

(19) *Clyde Engineering Co. v. Cowburn*, (1926) 37 C.L.R. 466.

(20) *Whybrow's case*, (1909) 10 C.L.R. 266.

(21) *A.G. for Ontario v. A.G. for Canada*, (1896) A.C. 348; *Grand Trunk Ry. v. A.G. for Canada* (1907) A.C. 65.

(22) *Stewart v. Brojendra*, A.I.R. (1939) Cal. 628 (638).

(23) *R. v. Brisbane Licensing Court*, (1920) 28

C.L.R. 23.

(24) Cf. *Gentel v. Phillips*, (1902) 1 K.B. 160.

(25) Art. 254 (1) of our Constitution hits the State law in such a case, even though it may be prior to the Union law in point of time.

(1) *Kutner v. Phillips*, (1891) 2 Q.B. 267.

(2) *Clyde Engineering v. Cowburn*, (1926) 37 C.L.R. 466 (489).

(3) *Victoria v. Commonwealth*, (1937) 5 C.L.R. 618 (630).

(4) *Pirrie v. McFarlane*, (1925) 36 C.L.R. 170



the general provision made in it, it cannot be said that any qualification or restriction introduced by a State law is repugnant to the provision in the paramount law.<sup>5</sup>

#### Illustrations.

1. Section 4 of our Code of Civil Procedure provides that—

“In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.”

Hence, the provisions of the Agra Tenancy Act which barred civil remedy in cases of remission of rent coming under that Act were not repugnant to the Code of Civil Procedure.<sup>6</sup> Similarly, the Punjab Restitution of Mortgaged Lands Act which barred the jurisdiction of the Civil Court regarding mortgages coming within the scope of that Act, was valid, for the same reason.<sup>5</sup>

2. Similarly, S. 1 (2) of the Code of Criminal Procedure lays down that “the provisions of this Code would not affect any special form of procedure prescribed by any law for the time being in force.” Hence, the provisions for arrest without warrant in the Police Act, Arms Act, Explosive Act, Indian Railways Act, or the Public Safety Acts are not void for repugnance with the Code of Criminal Procedure.<sup>7-9</sup>

‘Any provision which Parliament is competent to enact.’—It may seem that this expression covers also laws made under List I, but this is not so. It refers only to Union laws made under the Concurrent List (III), as the words “subject to the provisions of Cl. (2)”, in Cl. (1) indicate<sup>7-9</sup>. Hence, Art. 254 is confined only to repugnancy between State and Union laws within the Concurrent field.

‘Existing law’—See definition in Art. 366 (10), *post*. A State law will be affected by repugnancy not only with laws made by Parliament under the Constitution, but also with laws made by the Dominion or Central Legislature, prior to the Constitution, relating to List III.

‘To the extent of’.—This expression refers to the *Doctrine of Severability*. The expression is used not only in the present article, but also in Arts. 13 and 251 (see p. 382, *ante*). The doctrine signifies the object of the Courts to save as much as possible of a statute which is impugned as *ultra vires* or repugnant to a paramount law.

It often happens that though a statute relates to a subject which is within the legislative competence of the Legislature enacting it, some particular provision of the Act is *ultra vires* by reason of touching or covering some matter which is beyond the powers of that Legislature or by reason of being repugnant to some paramount law. In such cases, the question arises whether the whole Act shall fail by reason of the repugnancy of some particular provision, or only that particular portion should be regarded as invalid. The doctrine of ‘severability’<sup>10</sup> says that if the offending provision is *severable*<sup>11,12</sup> from the rest of the Act, only that provision will fail and not the entire statute. Our Constitution expressly imports this doctrine by the use of the words ‘to the extent of’.

But still the question would arise<sup>13</sup>,—when is an invalid provision ‘severable’ from the rest of the impugned statute.

(5) *Megh Raj v. Alla Rakhia*, (1942) 46 C.W.N. (F.R.) 61 (64).

(6) *United Provinces v. Atiq Begum*, (1940) 45 C.W.N. (F.R.) 27 (41, 44).

(7-9) See also *Lakhinarayanan v. Province of Bihar*, (1950) 5 D.L.R. (F.C.) 17 (23).

(10) This doctrine, as explained below, is also followed in the United States, in declaring a law unconstitutional [see Cooley, Constitutional Law, p. 197; Willoughby, Constitutional Law,

Vol. I, p. 36.].

(11) *King v. Commonwealth Court*, (1889) 11 C.L.R. 1 (22).

(12) *Punjab Province v. Daulat*, (1946) 50 C.W.N. 429 (437) P.C.

(13) Cf. Lefroy, *Federal system*, p. 82; *Australian Railways v. Victorian Railways*, (1930) 44 C.L.R. 319 (386); *Pidoto v. Victoria*, (1943) 68 C.L.R. 87.

The *test* of severability is whether "what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive ;<sup>14</sup> or whether the statute with the invalid portions omitted would be substantially different as to the subject-matter dealt with by the remaining statute from what it would be with the omitted parts forming part of it<sup>15</sup>.

If the offending provisions are so interwoven into the Act and are not severable, the whole Act is *ultra vires*<sup>16</sup>. Thus,

"A particular section of an Act may not be an isolated and independent clause, and may form part of one connected indissoluble scheme for the attainment of a definite *object* ; in which case it would have to be considered as an inseparable part of the whole. A law which is *ultra vires* in part only may thereby become *ultra vires* in whole, if the *object* of the Act cannot at all be attained by excluding the bad part".<sup>17</sup>

In applying the doctrine of severability, the Court cannot 'make a new law.'<sup>18</sup>

Thus, the invalid portions are not separable—<sup>19</sup> (i) If the Act discloses a *connected* scheme ; (ii) If the valid portions are merely *ancillary* to the valid provisions ; (iii) If the object of the Act is single.

If, however, on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part which is *ultra vires*, the Act, excluding the offending part, would be upheld<sup>14</sup>.

"If the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless of course the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former, while *intra vires* in the latter."<sup>17</sup>

For the application of the rule of severability, it is immaterial that the valid and offending sections are contained in the same *section*, for, the distribution into sections is artificial. The question is one of *substance* and not of form<sup>20, 22</sup>.

#### CLAUSE (2):

CL. (2) : VALIDATION BY PRESIDENT'S ASSENT.—This clause is confined to a case of 'repugnancy' between a State and a Union law relating to the Concurrent List. In such a case, the State law shall prevail notwithstanding such repugnancy, if it receives the assent of the President. It has no application to any State law which is *ultra vires*, e.g. if it substantially relates to a subject in List I. In such a case the State law is void *ab initio* and no consent of the President can validate it.

'Legislature in a State in Part A or Part B'.—This clause is confined to these States, because Art. 200, which provides for reservation for President's assent, governs only States in Parts A and B.

*Proviso*.—Under the Act of 1935, once a repugnant Provincial law became valid with the assent of the Governor-General, the Federal Legislature could not repeal or amend such Provincial law without the previous sanction of the Governor-General (p. 561, *ante*). There is no such limitation upon the power of Parliament under the Constitution. Under the present Proviso, though the State law shall become valid by the President's assent, Parliament itself shall be competent to make a law relating to the same matter, either 'adding to, amending, varying or repealing the law so made by the State Legislature.' In short, under the

(14) *A.G. of Alberta v. A.G. of Canada*, (1947) 52 C.W.N. 236 (244) (P.C.).

(15) *The King v. Commonwealth Court*, (1889) 11 C.L.R. 1 (22).

(16) *In re Initiative and Referendum Acts* A.L.R. 1919 P.C. 145 ; *A. G. for Commonwealth v. Colonial Sugar Refining Co.*, (1914) A.C. 237.

(17) *Shyamkant v. Rambhajan*, A.I.R. 1939

(F.C.) 74 (83).

(18) *U.S. v. Reese*, 92 U.S. 214 (221) ; *Kalibia v. Wilson*, (1910) 11 C.L.R. 689.

(19) Wynes, *Legislative and Executive Powers*, p. 51.

(20-22) Cooley, *Constitutional Limitations*, 246-7, Wynes, *Legislative and Executive Powers*, p. 51.

Constitution, Parliament is empowered to override the effect of the President's assent, by direct legislation. While a State has no means of protecting itself against Union legislation if that legislation is valid,—the Union Parliament is in a position, by virtue of this article, to protect the Union against State legislation which, in the opinion of Parliament, impairs or interferes with the performance of Union functions<sup>23</sup> or is against the interests of the Union.

**255.** No Act of Parliament or of the Legislature of a State specified in Part A or Part B of the First Schedule, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—

Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.

(a) where the recommendation required was that of the Governor, either by the Governor or by the President ;

(b) Where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President ;

(c) where the recommendation or previous sanction required was that of the President, by the President.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 255 practically reproduces, with verbal changes, Sec. 109 (2) of the Government of India Act, 1935, which followed the proviso to Sec. 80-A (3) of the Act of 1919.

#### INDIA

*Art. 255 : Assent cures want of previous sanction or recommendation.*—This Article lays down the principle that in cases where the Constitution requires that a Bill cannot be introduced without the recommendation or previous sanction of the Governor, Rajpramukh or President, the subsequent assent<sup>24</sup> of that authority or the higher authority (in the case of Governor or Rajpramukh) shall save the law from invalidity.

The provisions of the Constitution which require previous sanction or recommendation of the President, Governor or Rajpramukh for a Bill are :

<i>Recommendation of President.</i>		<i>Recommendation of Governor or Rajpramukh.</i>
Proviso to Art. 3.		Art. 207, Cls. (1), (3).
Art. 117 (1), (3).		
Art. 274 (1).		

## CHAPTER II.—ADMINISTRATIVE RELATIONS

### General

RELATIONS BETWEEN UNION AND STATES AND BETWEEN STATES inter se.—Any federal scheme involves [see p. 30, ante], the setting up of dual governments and

(23) Cf. *Uther v. Federal Commissioner*, (1947) 74 C.L.R. 508 (520).

(24) Cf. Arts. 111, 200-1.



division of powers. But the success and strength of the federal polity depends upon the maximum of co-operation and co-ordination between the governments. This topic may be discussed under two heads:

#### (A) TECHNIQUES OF UNION CONTROL OVER STATES.

It has already been pointed out [p. 31, *ante*] that in 'emergencies' the Government under the Indian Constitution will work as if it were a Unitary government. But even in normal times, it has devised techniques of control over the States by the Union to ensure that the administration of the State governments does not interfere with the legislative and executive policies of the Union and also to ensure efficiency and strength of each individual unit which is essential for the strength of the Union.

These methods and agencies of Union control over the States under the Indian Constitution are—

- (i) Directions to the State government.
- (ii) Delegation of Union functions.<sup>25</sup>
- (iii) All India Services.<sup>1</sup>
- (iv) Grants-in-aid.<sup>2</sup>

Of these, directions by the Union require a separate treatment. The idea of the Union giving directions to the States is foreign and repugnant to the American Constitution [see p. 30, *ante*]. This idea was taken by the framers of our Constitution from the Government of India Act, 1935. Apart from emergencies [see Part XVIII, *post*], the Union shall have the power to give directions to the State Government in the following matters :

- (i) To ensure due compliance with Union laws and existing laws.<sup>3</sup>
- (ii) To ensure that the exercise of the executive power of the State does not interfere with the exercise of executive power of the Union.<sup>4</sup>
- (iii) To secure construction and maintenance of means of communication of military importance, by the State.<sup>5</sup>
- (iv) To ensure protection of railways within the State.<sup>6</sup>

As to the *sanction* behind these directions, the Constitution even goes beyond the Act of 1935. Under that Act, there was no penalty provided for non-compliance by a Province with the directions issued by the Centre, but compliance was sought to be secured through the Governor's special responsibilities. [Sec. 52 (1) (g)]. There being no special responsibilities of the Governor under the Constitution, provision has been made in the Constitution for ■ direct sanction. Art. 365, *post* says, that in case of non-compliance, the President shall be competent to make a Proclamation under Art. 356, whereupon the coercive provisions of that Article will come into operation.

#### (B) INTER-STATE COMITY.

Though ■ federal Constitution involves the sovereignty of the Units within their respective territorial limits, it is not possible for them to remain in complete isolation from each other and the very exercise of internal sovereignty by ■ Unit would require its recognition by, and co-operation of, other Units of the federation. All federal Constitutions, therefore, lay down certain rules of comity which the Units are required to observe, in their treatment of each other. These rules and agencies relate to such matters as—

- (a) Recognition of the public acts, records and proceedings of each other.
- (b) Rendition of criminals.

(25) See under Art. 258.

(1) See under Art. 312.

(2) See under Art. 275.

(3) Art. 256.

(4) Art. 257 (1).

(5) Art. 257 (2).

(6) Art. 257 (3).

- (c) Extra-judicial settlement of disputes.
- (d) Co-ordination between States.
- (e) Immunity from mutual taxation.
- (f) Freedom of inter-State trade, commerce and intercourse.

In *our* Constitution, inter-State rendition of criminals is left to concurrent legislation under Entry 4 of List III. The other three matters are dealt with in Arts. 261, 262 and 263, 285-289, 301-7, respectively. See, further, under those Articles.

**256.** The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Obligation of States and the Union.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 122 of the Act was as follows:

122. “(1) The executive authority of every Province and Federated State shall be so exercised as to secure respect for the laws of the Federal Legislature which apply in that Province or State.

(2) The reference in sub-section (1) of this section to laws of the Federal Legislature shall, in relation to any Province, include a reference to any existing Indian law applying in that Province . . . . .”

#### INDIA

*Art. 256 : Enforcement of Union laws by the States.*—It has been pointed out early (p. 30) that though the Indian Constitution divides the legislative and executive powers between the Union and the States, there is no such logical division as to the administrative machinery and that the Union shall have no exclusive administrative organisation for executing its own laws. Since the Union has legislative authority over the whole of the territory of India (Art. 245 (1)), any law enacted by Parliament shall have the force of law in every State, unless the contrary is expressed by the enactment. The present article provides that it shall be constitutional duty of every State to enforce Union laws as are applicable in that State. Not only that, the Executive of the Union shall have the power to give directions to the State Government to ensure the due compliance with the above duty, viz., the enforcement of the Union laws. While enacting a law, Parliament may provide that the law shall be enforced by any Union public service (*vide* Entry 70, List I), or it may leave it to the State Executive to enforce that law. But whether there is such express delegation of power to administer a Union law or not, it shall be the duty of every State Government to ensure due compliance with Union laws, as are applicable in that State.

‘Existing law’.—See Art. 366 (10), *post*.

‘Directions to a State’.—See p. 567, *ante*.

**257.** (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Control of the Union over States in certain cases.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance :

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 126 of the Government of India Act, 1935, was as follows :—

“(1) The executive authority of every Province shall be so exercised ■ not to impede or prejudice the exercise of the executive authority of the Federation, and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose.

(2) The executive authority of the Federation shall also extend to the giving of directions to a Province ■ to the carrying into execution therein of any Act of the Federal Legislature which relates to a matter specified in Part II of the Concurrent Legislative List and authorises the giving of such directions :

Provided that a Bill or amendment which proposes to authorise the giving of any such directions ■ aforesaid shall not be introduced into or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) The executive authority of the Federation shall also extend to the giving of directions to a Province as to the construction and maintenance of means of communication declared in the direction to be of military importance:

Provided that nothing in this sub-section shall be taken ■ restricting the power of the Federation to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(4) If it appears to the Governor-General that in any Province effect has not been given to any directions given under this section, the Governor-General, acting in his discretion, may issue as orders ■ the Governor of that Province either the directions previously given or those directions modified ■ such ■ as the Governor-General thinks proper.

(5) Without prejudice to his powers under the last preceding sub-section, the Governor-General, acting in his discretion, may at any time issue orders to the Governor of a Province ■ to the ■ in which the executive authority thereof is to be exercised for the purpose of preventing any grave ■ to the peace or tranquillity of India or of any part thereof.”



## INDIA

*Art. 257 : Control of the Union over States in certain cases.*—While Art. 256 provides that the Executive power of a State shall secure compliance with Union laws, Cl. (1) of Art. 257 lays down that the Executive power of the State even within its proper sphere, must be so exercised as not to impede or prejudice the exercise of the executive power of the Union and, subject to directions issued by the Union Executive in this behalf. The object is to prevent any conflict between the executive policy of the States and that of the Union. So, even within the sphere covered by List II (*see* Art. 162, p. 443, *ante*), the Executive of the Union shall have the power to give directions to the State Executive so that the exercise of the State power may not prejudicially affect the exercise of the executive power of the Union, *i.e.*, the administration of Union or Concurrent<sup>7</sup> subjects (Art. 73, pp. 245-6, *ante*).

Cls. (2)-(4) empower the Union Executive to give directions to the States on particular matters.

*Cl. (2) : Directions as to means of communication.*—Communications, generally, is a State subject (Entry 13 of List II). The present clause, however, empowers the Union to direct the State to construct and maintain means of communication which that Executive direction may declare to be of 'national' or 'military importance'. In other words, while the Union may itself construct and maintain means of communication directly necessary for the exercise of its power over 'naval, military and air force works' [Entry 4 of List I and Proviso to Art. 257 (2)], the Union may also direct the States to construct and maintain other means of communication which may be of importance from the military standpoint, subject to contribution of costs, as provided in Cl. (4) of this Article. The power may also be exercised in respect of means of communication deemed to be of national importance, even though may not be so extensive as to be declared 'national highways' within the scope of the Proviso.

The Proviso refers to the legislative power in Entries 23-4 of List I. Cl. (2) of Art. 257 empowers the Executive to declare a means of communication to be of 'national or military importance' by means of a direction issued to the State, the Proviso saves the legislative power of the Union which it has by virtue of Entries 23-4 of List I, *viz.*, the power to declare a highway or waterway to be a 'national' highway or waterway and to regulate its user. The Proviso also reserves the power of the Union to construct and maintain means of communication as incidental to its power over naval, military and airforce works (Entry 4 of List I).

*Cl. (3) : Directions for protection of Railways.*—'Railways' are a Union subject (Entry 22 of List I), but 'Police, including railway police' is a State subject (Entry 2 of List II). Hence, this clause empowers the Union Executive to give directions to the State to employ its police for the proper protection of the railways and their property and to employ additional police, if necessary, subject to contribution under cl. (4).

**258.** (1) Notwithstanding anything in this Constitution, the

Power of the Union to confer powers, etc., on States in certain cases.

President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer

(7) In so far as the Union chooses to administer them [*see* p. 245, *ante*]. In the present Article, no distinction is made between

different parts of the Concurrent List as was made by sub-section (2) of s. 126 of the Government of India Act.

powers and impose duties, as authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 124 of the Act, as adopted in 1947, provided—

“124. (1) Notwithstanding anything in this Act, the Governor-General may, with the consent of the Government of a Province or the Ruler of an Acceding State, entrust either conditionally or unconditionally to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Dominion extends.

(2) An Act of the Dominion Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties or authorise the conferring of powers and the imposition of duties upon a Province or officers and authorities thereof.

(3) An Act of the Dominion Legislature which extends to an Acceding State may confer powers and impose duties or authorise the conferring of powers and the imposition of duties upon the State or officers and authorities thereof to be designated for the purpose by the Ruler.”

#### INDIA

*Art. 258 : Delegation of Union functions by consent of State.*—This Article follows Sec. 124 of the Act of 1935, with the addition of Cl. (3), which provides for contribution by the Union to the State concerned in respect of the extra cost incurred by the State by reason of such delegation.

‘*Functions.*’—Under the corresponding Sec. 124 of the Act of 1935, it has been held by the Allahabad High Court<sup>8</sup> that the word ‘functions’ is not qualified by the word ‘executive’ and hence, it includes the delegation of *legislative* functions as well. It is submitted that this view will not be sound under the Constitution inasmuch as Part XI of the Constitution divides itself into two Chapters—I. Legislative relations; II. Administrative relations. Art. 258 being included in Ch. II, it cannot include legislative powers; it means the delegation of administrative functions.

**259.** (1) Notwithstanding anything in this Constitution, a State specified in Part B of the First Schedule having any Armed Forces immediately before the commencement of this Constitution may, until Parliament by law otherwise provides, continue to maintain the said Forces after such commencement subject to such general or special orders as the President may from time to time issue in that behalf.

(2) Any such Armed Forces as are referred to in clause (1) shall form part of the Armed Forces of the Union.

(8) *Amir Khan v. State*, A.I.R. 1950 All. 423 (426).

*Art. 259 : Armed Forces of States in Part B.*—This is one of the special provisions [see p. 508 ante] made for States in Part B. The Armed Forces belonging to these States at the commencement of the Constitution<sup>9</sup> are allowed to be maintained by these States—(a) as parts of the Union forces, (b) subject to the orders of the President, and (c) Until Parliament by law otherwise provides.

**260.** The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

Jurisdiction of the Union in relation to territories outside India.

*Art. 260 : Jurisdiction of Union in relation to territories outside India.*—This Article enables the Union to assume powers (executive, legislative or judicial) in respect of any territory outside India, by agreement with that State. Such agreement shall be subject to, and governed by, laws made under Entry 16 of List I, relating to 'foreign jurisdiction.'

**261.** (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

Public acts, records and judicial proceedings.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. IV, Sec. 1 of the Constitution of the U.S.A. says—

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effects thereof."

The States being independent units, without such a provision, the acts, records, etc., of one State would not be recognised by another.

Without this clause, the 'judgments of one State' would have been regarded as a 'foreign judgment' [see under Art. 367 (3), *post*] in every other State. But this rule provides that a judgment rendered by a competent Court of one State is conclusive on the merits<sup>10</sup> in another State and that it will receive the same credit as the judgments of that other State itself.

At the same time, the judgment of another State is not exactly in the same position as a domestic judgment, for, it is not executable by itself. It may be executed in another State only if an action is brought upon it in the latter State and a new judgment obtained thereon (as in the case of a foreign judgment)<sup>11</sup>. Again, in such action, the defendant may show that the judgment is barred by

(9) See White Paper on Indian States, M.S. 331.  
6, p. 77.

(10) *Mutual Life Insurance v. Harris*, 97 U.S.

(11) *Thompson v. Whitman* (1873) 18 Wall 457.



the law of limitation of the State where it is sought to be enforced, though the statute of limitation of the State which passed the judgment be otherwise.<sup>12</sup>

*Australia.*—Sec. 118 of the Australian Constitution Act provides—

“Full faith and credit shall be given throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.”

The Australian Parliament has enacted the State and Territorial laws and Records Recognition Act, 1901 to 1928, under the above Section.

#### INDIA

ART. 261 : RECOGNITION OF PUBLIC ACTS, ETC.—This article follows Art. IV, Sec. 1 of the American and Sec. 118 of the Australian Constitution, subject to differences to be noted in proper places.

Since the jurisdiction of each State is confined to its own territory [Art. 245 (1); p. 535 *ante*], the acts and records of one State might be refused to be recognised in another State, without a provision such as the present Article. Cl. (2) of the Article, however, shows that Cl. (1) merely lays down a rule of *evidence*, while the substantive effect of the acts, records, etc., is to be as determined by Parliament by law

‘*Public acts.*’—These refer not only to the statutes but also all other legislative and executive acts of the Union and the States,<sup>13</sup> such as orders, regulations, etc.<sup>14</sup> It should be noted in this connection that in Entry 12 of List III, the words ‘laws’ and ‘public acts’ are both mentioned together.

‘*Public records.*’—The definition in Sec. 35 of the Indian Evidence Act, 1872, may be referred to for the interpretation of this expression. It would include any ‘official book, register or record,’ ‘made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept.’

See also the definition of a ‘public document’ in Sec. 74 of the same Act :

“The following documents are public documents :—

(1) Documents forming the acts or records of the acts—(i) of the sovereign authority, (ii) of official bodies and tribunals, and (iii) of public officers, legislative, judicial and executive . . . ;

(2) public records kept in India of private documents.”

So, the following may be cited as instances of public records : Register of births and deaths<sup>15</sup> ; Land Record Register<sup>16</sup> ; Village crime note-book, kept under law<sup>17</sup> ; Maps or plans made under the authority of Government<sup>18</sup> ; public records of original wills and registered documents ; Register of powers of attorney<sup>19</sup>.

‘*Of the Union and of every State.*’—In the corresponding American provision only ‘every State’ is mentioned, for, the applicability of the rule as regards Union acts and proceedings is assumed. Our Constitution is more explicit and mentions the Union expressly.

Cl. (2) : *Power of Parliament.*—While Cl. (1) lays down that the public acts, etc., shall receive the same credit in another State as at home, Cl. (2) gives power to Parliament to lay down by law—(a) the *mode* of proof, as well as (b) the *effects* of such acts and proceedings in that other State.

It is to be noted that the *power* given by Entry 12 of List III—

“recognition of laws, public acts and records, and judicial proceedings,”—

(12) *McElmoyle v. Cohen*, 13 Pet. 312.

(13) Cf. *Willis*, Constitutional Law, p. 461.

(14) Thus, the rule in Art. 166 (2), p. 447 *ante*, will apply not only in the State where the order or instrument has been made, but also outside it.

(15) *Ramalinga v. Kotayya*, (1917) 41 Mad. 26 ; *Anwari v. Baldua*, A.I.R. 1936 All. 218.

(16) *Gangbai v. Fakirgouda*, (1929) 54 Bom.

336 (P.C.).

(17) *Amudimyan v. Crown*, I.L.R. (1937) Nag. 315 (F.B.).

(18) *Jagan v. Gaya Municipality*, A.I.R. 1937 Pat. 567 ; *Sitanath v. Manoranjan*, A.I.R. 1939 Cal. 148.

(19) *Pattu K. v. Nirmal*, A.I.R. 1939 Cal. 569.

is concurrent. So, the State Legislatures shall also have the power to make laws on this subject, but subject to the exclusive power of Parliament on the two matters specified in Cl. (2) and the general provision in Cl. (1).

*Existing Law.*—Sec. 37 of the Indian Evidence Act, 1872, says—

“When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in . . . any Act of the Central Legislature, or of any other legislative authority in India constituted by any laws for the time being in force or in any Government notification . . . appearing in the Official Gazette . . . is a relevant fact.”

Sec. 81 then says—

“The Court shall presume the genuineness of every document purporting to be . . . any Official Gazette . . . and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.”

Then Sec. 57 says—

“The Court shall take judicial notice of the following facts—

(1) All Indian laws . . . (4) The course of proceeding . . . of the legislatures established under laws for the time being in force in India . . . (6) the seals of all Courts of India . . . all seals which any person is authorised to use by any . . . Act or Regulation having the force of law in India. . . .”

Cl. (3) : *Execution of judgments or orders.*—This clause provides a rule which is contrary to that in the *United States*, where it has been held (*see* p. 572) that though one State will not question the validity of the judgments of another State, such judgments are not directly executable. The present clause provides that under *our* Constitution, any executable *civil* judgment or order of any State shall be readily executable in any other State or territory within India without requiring a fresh action upon that judgment.

The word ‘civil’ makes clear what has been established in the *United States* by judicial decisions, *viz.*, that *penal* laws of one State are not enforceable in another. It is a general rule of comity of nations that “the Courts of one State will not aid in the enforcement of the criminal or penal law of another State”.<sup>20</sup> This rule is applied also between the units of a federal State.

‘*Final judgments or orders.*’—*See* p. 399, *ante*.

‘*According to law*’.—‘Law’ includes the law of the State where the decree is sought to be executed. So, if any special enactment of that State bars execution, *e.g.*, relating to money-lending, the decree will not be executable<sup>21</sup>. But the law referred to must be a law relating to execution<sup>22</sup>. In no case will the judgment be re-examinable on the merits<sup>23</sup>.

*Existing Law.*—Sec. 40 of the Code of Civil Procedure, 1908, provides—

“When a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.”

Decrees of Indian States shall no longer be regarded as ‘foreign decrees’.<sup>24, 25</sup> Nor will the notifications referred to in Sec. 44 of the Code of Civil Procedure be required, for execution of such decrees.

### *Disputes relating to Waters*

Adjudication of disputes relating to waters of inter-State rivers or river valleys.

**262.** (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(20) *Folliott v. Ogden*, 1 H. & Bl. 123.

(21) *Cf. Nabibhai v. Dayabhai*, (1916) 40 Bom.

504.

(22) On other matters, the law of the State which passed the decree shall prevail, *Tincowri*

*v. Debendro*, (1899) 17 Cal. 491.

(23) *Cf. Willis*, *Constitutional Law*, p. 455.

(24-25) *Cf. Musa v. Parmanund*, (1891) 15

Bom. 261; *Panch Kari v. Giridhari*, A.I.R. 1925 Cal. 955.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—The provisions of Secs. 130-3 of the Government of India Act, 1935, relating to 'interference with water supplies' were very elaborate. As to adjudication of complaints relating to such interference, the provision of Sec. 131, in short, was that the Governor-General acting in his discretion, was to decide the dispute, after considering the report of an advisory Commission appointed by him.

### INDIA

*Art. 262 : Adjudication of disputes relating to inter-State waters.*—Since the States, in every federation, normally act as independent units in the exercise of their internal sovereignty, conflicts of interests between the units are sure to arise. Hence, in order to maintain the strength of the Union, it is essential that there should be adequate provision for judicial determination of disputes between the units and for settlement of disputes by extra-judicial bodies as well as their prevention by consultation, and joint action. While Art. 131, *ante*, provides for the judicial determination of disputes between States by vesting the Supreme Court with exclusive jurisdiction in the matter, Art. 262 provides for the adjudication of *one class* of such disputes by an extra-judicial tribunal, while Art. 263 provides for prevention of inter-State disputes by investigation and recommendations by an administrative body.

The present Article empowers Parliament to exclude the adjudication of any 'dispute or complaint with respect to the use, distribution or control' of the waters of or in any inter-State river or river valley, from the jurisdiction of the Supreme Court or any other Court and provides for the adjudication of such disputes by any other authority and in any manner provided by Parliament. The word 'adjudication' read with Cl. (2) makes it clear that Parliament may confer judicial powers upon such authority.<sup>1</sup> In short, the jurisdiction of this authority shall be such as Parliament determined by law.

*Analogous Provisions.*—Under Entry 17 of List II, the States have exclusive power over 'water supplies' but 'subject to the provisions of Entry 56 of List I', which gives the Union power of—

"regulation and development of inter-State rivers and river valleys . . . ."

### Co-ordination between States

**263.** If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—

Provisions with respect to an Inter-State Council.

(a) inquiring into and advising upon disputes which may have arisen between States ;

(1) It is to be noted that in our Constitution there is no provision corresponding to S. 71 of the Australian Constitution Act, and there is nothing to prevent the conferring of judicial powers on other than 'Courts', and hence, the principle enunciated in *N. S. W. v.*

*Commonwealth*, (1915) 20 C.L.R. 54 (*see* p. 576, *post*), will not be applicable to the inter-State authority created under Art. 262 of our Constitution. [See, in this connection, *Bharat Bank v. Employees of Bharat Bank*, A.I.R. 1950 S.C. 88].



(b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest ; or

(c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,  
it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

#### OTHER CONSTITUTIONS

*U.S.A.*—There is no provision in the Constitution itself for the establishment of any authority, for securing inter-State co-ordination, but Congress has created an 'Inter-State Commerce Commission' by the Inter-State Commerce Act of 1887, under its 'commerce power.' The functions of this body will be dealt with under Art. 307, *post*.

*Australia.*—Sec. 101 of the Australian Constitution Act provides—

"There shall be an inter-State Commission with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of laws made thereunder."

According to the above provision, an inter-State Commission was created by the Inter-State Commission Act, 1912, conferring powers on the Commission to deal with complaints relating to the navigability of inter-State rivers, the rates charged in inter-State traffic and the like, and declaring it to be a Court of record. But in 1915, the High Court held<sup>2</sup> that the inter-State Commission was not a judicial tribunal and could not exercise 'judicial power,' [Cf. Sec. 71], such as the granting of an injunction. As to 'adjudication' in Sec. 101 of the Constitution Act, it was observed that it simply meant that the Commission had the power of determining facts before it exercised any administrative power which Parliament might confer upon it. In view of this decision, the Commission was not reconstituted after the 7-year term of the Commission appointed in 1912 expired, and since then Sec. 101 of the Australian Constitution Act remains a dead letter.

*Government of India Act, 1935.*—Art. 263 of the Constitution substantially reproduces Sec. 135 of the Act of 1935. Since the plea of federation itself was not given effect to, no such Council came into being under this Act.

#### INDIA

*Art. 263 : Inter-State Council.*—The President is empowered to establish an Inter-State Council if at any time it appears to him that the public interests would be served thereby. Though the President is given the power to define the nature of the duties to be performed by the Council, the Constitution outlines the three-fold duties that may be assigned to this body. One of these is—

"the duty of *inquiring into and advising upon disputes* which may have arisen between States."

So, it appears that this Council shall have no power itself to adjudicate any dispute like the tribunal set up under Art. 262 in relation to inter-State waterways. But there are many disputes which may be settled by a mere enquiry and report by such an inter-State body, and litigation may be obviated by its efforts. The ambit of the jurisdiction of this Council will be very wide inasmuch as any disputes which may have arisen 'between States' may be referred to it. The creation

of this Council would not oust the jurisdiction of the Supreme Court under Art. 131, *ante*.

The other functions of this Council would be to investigate and discuss subjects of common interest between the Union and the States or between two or more States *inter se*, e.g., research in such matters as agriculture, forestry, public health and to make recommendations for co-ordination of policy and action relating to such subject.<sup>3</sup> So far as inter-State co-ordination is concerned, this function of the Council would be complementary to the provision in Art. 252, *ante*, providing for Union legislation on inter-State matters by consent of the States concerned.

## PART XII

### FINANCE, PROPERTY, CONTRACTS AND SUITS

#### CHAPTER I.—FINANCE

##### *General.*

Interpretation.

**264.** In this Part, unless the context otherwise requires,—

(a) “Finance Commission” means a Finance Commission constituted under article 280 ;

(b) “State” does not include a State specified in Part C of the First Schedule ;

(c) references to States specified in Part C of the First Schedule shall include references to any territory specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule.

*Cl. (b) : State in Part C excluded unless context otherwise requires.*—As a result of this clause, the financial arrangements provided in Arts. 268-270 shall be confined only to States in Parts A and B, and will not apply to States in Part C (including territories in Part D and any other territory forming part of India but not specified in the First Schedule). Hence, in Part C states and these territories—

(a) The Union stamp duties and excise duties will be appropriated by the Union instead of being appropriated by the States under Art. 268.

(b) Similar will be the case of the duties and taxes mentioned in Art. 269.

(c) Similarly, the Union will exclusively appropriate the income-tax levied within such States (Art. 270).

(d) Art. 272 will not apply to such States and territories.

Taxes not to be imposed save by authority of law.

**265.** No tax shall be levied or collected except by authority of law.

(3) Cf. Report of the Joint Committee on Indian Constitutional Reforms, H.C. 53 Part I, pp. 123-4.

## OTHER CONSTITUTIONS

*England.*—The principle that the Crown has no power to tax save by grant of Parliament has its origin in the demand of the Magna Carta (1215)—

“No scutage or aid is to be levied without the consent of the commune concilium excepting the three customary feudal aids”,

which was affirmed and finally established by the Bill of Rights, 1689 :—

“Levying money for the use of the Crown by pretence of prerogative without grant of Parliament, is illegal.”

It was this principle which established Parliamentary government in England, for the King was obliged to summon Parliament annually in order to obtain supplies, as Parliament would not grant more than sufficient to meet the requirements of one year. In modern times, of course, many taxes are imposed by permanent Acts (subject to modifications from year to year according to needs of the administration), but the income-tax is levied only by the *annual* Finance Act, which also embodies the annual modifications of the permanent taxation laws.

The above principle of ‘no taxation without the authority of law’ is so jealously guarded by the Courts that they would not infer the grant of a power to tax from any legislation in the absence of a clear expression<sup>4</sup>. Again, though the Crown may make an agreement to receive payment for a *service* which cannot be demanded as of right<sup>5</sup>, no taxation in any form may be imposed by the Executive without statutory authority.<sup>4</sup>

## INDIA

*Art. 265 : No taxation save by authority of law.*—This article embodies the English principle of ‘no taxation without representation’, explained above. There was no provision in the Government of India Acts, corresponding to this Article. Not only levy but also collection of a tax must be under the authority of some ‘law’, the provisions for making which are provided by Arts. 110, 117, 199, 123, 207 and 213. This cannot be done by mere resolution of the Houses of the Legislature or any executive action.

**266.** (1) Subject to the provisions of article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled “the Consolidated Fund of India”, and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled “the Consolidated Fund of the State”.

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(4) *Att-General v. Wilt's United Dairy Co.*, (1922) 91 L.J.K.B. 897.

(5) *China Steam Navigation Co. v. Att-General*, (1932) 2 K.B. 197.



(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

#### OTHER CONSTITUTIONS<sup>6</sup>

*England.*—The Consolidated Fund is the foundation-stone of the system of Parliamentary supervision and control over finances in England. As *Dicey* explains—the control of the House of Commons is exercised in three respects—(a) the *source* of the public revenue, (b) the *authority* for expending the revenue, and (c) the *securities* for the appropriation of the revenue.

*Firstly*, all taxes are now imposed by statute, either permanent or temporary. No one can be forced to pay a shilling by way of taxation which is not due under an Act of Parliament.

*Secondly*, the whole of the public revenue is paid into the 'Consolidated Fund' at the Bank of England, and not a penny of this revenue can be expended from this account except under the authority of some Act of Parliament. But though we say 'an Act of Parliament', both the above functions are exclusively the business of the House of Commons, for the House of Lords have ceased to have any power ■ regards money bills since the Parliament Act, 1911. The business of the House of Commons is twofold—(a) to get money *into* the Consolidated Fund, i.e., to levy taxes, and (b) to get money *out* of the Fund, i.e., to grant money for the public expenditure.

*Thirdly*, there is an elaborate system of control and audit which secures that the moneys so granted are spent according to the intentions of Parliament. The centre of this system of Parliamentary control is the Comptroller and Auditor General—an official who is absolutely independent of the Cabinet, whose duty it is to see that no money is paid out of the Exchequer except under the authority of some Act of Parliament, and to submit reports to the Public Accounts Committee of the House of Commons.

*Australia.*—Sec. 81 of the Australian Constitution Act provides—

"All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by the Constitution."

Sec. 83 says—

"No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."

*Government of India Act, 1935*<sup>7</sup>—Sec. 136 of the Government of India Act, 1935, was—

"Subject to the following provisions of this chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to Provinces and Federated States, and subject to the provisions of this Act with respect to the Federal Railway Authority, the expression 'revenues of the Federation' includes all revenues and public moneys raised or received by the Federation and the expression 'revenues of the Province' includes all revenues and public moneys raised or received by a Province."

Hence, all taxes and other revenues raised by the Federation were included within the expression 'Revenues of the Federation', even though some of the taxes were eventually assigned to or appropriated by Provinces. The sources of revenue and their distribution, under the Act of 1935, would be illustrated by the following Tables :

(6) See also p. 358, *ante*.

(7) There ■ no provision for any 'Consoli-

dated Fund' in the Government of India Acts.

Tables showing 'Revenues of the Federation' and 'Revenues of the Province,' under the Government of India Act, 1935.  
(1) REVENUES OF THE FEDERATION.

(1) From Taxes.		(2) From commercial operations.	(3) Sovereign Functions and 1. Coinage and currency. 2. Escheat lapse in areas administered by Federal Government.	(4) Contribution from States by His Majesty Tributes and other payments.
A. Levied and collected by the Federation but belonging wholly to the Provinces or Units. 1. Duties on Succession to property other than agricultural land. 2. Stamp Duties on Bills of Exchange, Cheques, Promotes, Bills of Lading, Letters of Credit, Policies of Insurance, Proxies and Receipts. 3. Terminal taxes on goods or passengers carried by Railway or air. <sup>10</sup> 4. Taxes on Railway fares and freights. [Subject to the right of the Federation to raise Federal revenue by a surcharge on all the items in this list].	B. Levied and collected by the Federal Government of which a portion is or may be assigned to the Provinces.			
	(a) Assigned by the Act.			
	(b) May be assigned by Federal Law.			
	1. Income-tax other than Corporation Tax. [Subject to Federal Surcharge.] 2. Jute Export Duty.			
		C. Levied and collected by Federation and, belonging wholly to the Federation. 1. Taxes in Lists A and B in areas administered by the Federal Government. 2. Customs. 3. Corporation Tax. 4. Surcharges mentioned in Lists A & B. 5. Taxes on capital values of assets of individuals and companies. 6. Miscellaneous receipts from fees in respect of matters in Federal List (including fees taken in the Federal Court).		
(a) Assigned by the Act.		(b) May be assigned by Federal Law.		
1. Income-tax other than Corporation Tax. [Subject to Federal Surcharge.] 2. Jute Export Duty.		1. Duty on Salt. <sup>11</sup> 2. Other duties of Excise on Tobacco and on other Goods manufactured or produced in India except— (a) alcoholic liquor for human consumption. (b) opium, hemp, and other narcotics and non-narcotic drugs. (c) medicinal and toilet preparations. <sup>12</sup> 3. Duties of Export <sup>12</sup> (other than on jute and jute products).		

(8) Not levied at all.

(9) In fact, continued to be both levied and collected by the Province.

(10) Levied for the benefit of local bodies.

(11) Abolished in 1947.

(12) No law assigning these to the Provinces was passed.

## (II) REVENUES OF THE PROVINCE.

## A. By Taxes.

## A. Directly raised by the Province.

1. Land Revenue.
2. Duties of excise on alcoholic liquors, etc., excluded from Federal Provinces.

## 3. Taxes on Agricultural income.

4. Taxes on lands and Buildings,<sup>12-a</sup> Hearths and Windows.

## 5. Succession to agricultural land.

6. Taxes on mineral rights.

## 7. Capitalization taxes.

8. Taxes on Professions, Arts, Trades and callings<sup>12-a</sup>

9. Animals and Boats<sup>12-a</sup>

10. Sale of Goods and advertisements.

## 11. Octroi.

12. Taxes on luxuries, entertainments, etc.<sup>12-a</sup>

## 13. Stamps—other than Stamps in Federal list.

14. Taxes on Passengers and Goods in inland water ways.

15. Tolls<sup>12-b</sup>

16. Miscellaneous Receipts from fees including fees taken in Courts other than the Federal Court).

## B. Levied and Collected by the Federation and wholly allocated to the Provinces.

which was or might be allocated in part to the Province.

## Items in List A of Table (I).

## A. By the Government of India.

- Income-tax.<sup>12-c</sup>
- Export Duty on Jute.<sup>12-d</sup>
- Salt.<sup>12-e</sup>
- Federal Excise duty.<sup>12-f</sup>
- Export Duties.<sup>12-f</sup>

## B. By Federal Legislation.

- C. Commercial Operations.
- D. Grants-in-aid and subventions from the Centre.

<sup>12-a</sup> These Taxes were raised by Municipal and other Local Authorities for their needs.

<sup>12-b</sup> Subsequently abolished—but before abolition a sum of Municipal Taxation.

<sup>12-c</sup> By Order in Council, 50 percent. of net proceeds of income-tax (other than Corporation tax), exclusive of proceeds attributable to Chief Commissioner's Provinces and in respect of Federal emoluments were

distributable in accordance with a prescribed ratio.

<sup>12-d</sup> By Order in Council, 62½ per cent. assigned to and distributed among jute-growing Provinces in proportion to the respective amounts of jute grown in them.

<sup>12-e</sup> Abolished in 1947.

<sup>12-f</sup> No share allotted to the Provinces by legislation.



## INDIA

**Art 266 : Consolidated Fund.**—As pointed out already there was no provision for any Consolidated Fund under the Government of India Acts. This is an innovation introduced by the Constitution. The Union as well as each of the States shall have such a Fund. Following the English precedent, all the resources of the Union [as specified in Cl. (1) of Art. 266] are to be placed into this reservoir, *viz.*, the Consolidated Fund of India, while the resources of a State are to be placed into a similar Fund, to be known as the Consolidated Fund of that State. No moneys can be issued out of this Fund except in accordance with a valid law made by the Legislature concerned [Cl. (3)]. Subject to the above, the operations of the Fund will be regulated by legislation (Art. 283).

[Besides the Consolidated Fund, the Constitution also provides for some other funds, such as the Public Accounts, Contingency Fund, as to which see *post.*]

**Cl. (1) : Consolidated Funds of India and the States.**—This clause differs materially from the corresponding Sec. 136 of the Act of 1935. Instead of the expressions 'revenues of the Federation' and the 'revenues of the Province,' we have the 'Consolidated Fund of India' and the 'Consolidated Fund of the State'. But the difference is not merely in terminology.

While under the Act, a tax which was levied by the Union was included in the expression 'revenues of the Federation' even though it was wholly assigned to the States,—under the Constitution, those taxes which will be assigned to the States in Parts A and B [Arts. 268 (2) ; 269 (2) ; 270 (2)] shall not form part of the Consolidated Fund of India.

**Cl. (2) : Public Accounts.**—This Article differentiates 'other public moneys' from—(a) revenues ; (b) moneys raised by loans ; and (c) moneys received in repayment of loans. While (a) - (c) will form the Consolidated Fund, "all other public moneys" shall be credited to the 'public account'. The provision is the same for the Government of India and the States.

Instances of such "other public moneys" are to be found in Art. 284, *post.* The difference between the Consolidated Fund and the Public Account lies in this that for the appropriation of any money out of the Consolidated Fund, there is the constitutional limitation as to authority and procedure, in Cl. (3) of Arts. 266, 114 and 204. But no such specific legislative authority is required for drawing moneys from the "public account". Another such fund at the disposal of the Executive is the Contingency Fund [Art. 267]. Of course, the operations of these Funds will be regulated by legislation [Art. 283].

**Cl. (3).**—See above ; p. 358, *ante.*

**267. (1)** Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of India" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under article 115 or article 116.

(2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor or Rajpramukh of

the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by the Legislature of the State by law under article 205 or article 206.

#### OTHER CONSTITUTIONS

*England.*—While no money can be issued out of the Consolidated Fund without the previous authority of an Act of Parliament such as a Consolidated Fund Act or the Appropriation Act, there are certain Funds available to the Executive from which it may meet unexpected expenditure in anticipation of Parliamentary sanction. One of such Funds<sup>13</sup>, is the Civil Contingencies Fund (the amount of which is fixed by statute). It provides funds for—(i) established services where the grant has not yet been formally voted ; (ii) departments for which Parliament has made no provision in the estimates for the year ; (iii) departments which have exhausted the sums appropriated under votes. The moneys spent by the Government from this Fund are later voted by Parliament and then repaid to the Fund either before or after the close of the financial year. The Accounts of the Fund are also scrutinised by the Public Accounts Committee.

#### INDIA

*Art. 267 : Contingency Fund.*—The provisions of Cls. (1) and (2) of this Article, relating to the Union and the State respectively, are exactly similar. They authorise the creation by Parliament<sup>13-a</sup> of a Contingency Fund for the Union (or by the Legislature of a State for that State). The amount of the Fund will be determined by laws made (by Parliament or the State Legislature as the case may be) from time to time. The Fund will be at the disposal of the Executive to enable advances to be made for the purpose of meeting *unforeseen* expenditure, *pending authorisation* of such expenditure by the Legislature as supplementary, additional, exceptional grant or the like (Arts. 115-6 ; 205-6).

*Analogous Provision.*—See Art. 283.

#### FUNDAMENTAL PRINCIPLES OF DISTRIBUTION OF REVENUES UNDER THE GOVERNMENT OF INDIA ACT AND THE CONSTITUTION.

(A) *Under the Government of India Act, 1935.*—The financial provisions of the Act of 1935 are to be read as supplemented by the Distribution of Revenues Order, 1936,—and Order in Council which was made on the report of Sir Otto Niemeyer who was appointed to examine the financial position of the Central and Provincial Governments under the distribution proposed by the Act and to make recommendations on the assignments proposed by Secs. 138, 140 and 142 of that Act. The salient principles of this distribution may be summarised as follows : [see Tables I and II at pp. 580-1, *ante*].

(i) The taxing jurisdictions of the Central and Provincial Legislatures were made entirely separate, but while the Provinces were to retain the whole of the proceeds of all taxes levied by the them, Central Government had to give away, either in whole or in part, the net proceeds of some of the taxes levied by it :

(a) The taxes, the net proceeds of which were to be given wholly to the Provinces were :—(1) Federal Estate and Succession duties ; (2) Federal Stamp duties ; (3) Terminal taxes ; (4) Taxes on Railway fares and freights.

(13) Keith, Constitutional Law, p. 397.

(13-a) Parliament has established a Contingency Fund with a sum of 15 crores of rupees,

by enacting the Contingency Fund of India Act (XLIX of 1950).

(b) The taxes, the net proceeds of which were to be shared with the Provinces were divided under two heads : (1) taxes, the sharing of the net proceeds of which was obligatory under the Constitution—*income-tax*<sup>14</sup> and *jute export duties*<sup>15</sup>; (2) taxes, the sharing of the net proceeds of which depended upon Federal legislation to that effect—*Central Excises, Salt, export duties* (except on jute and jute products).

(ii) Though the net proceeds of the above taxes were to be assigned wholly or in part to the Provinces, the Centre was given the power to levy a 'surcharge' on any or all of the above taxes, and to appropriate the proceeds of such surcharge wholly to itself.

(iii) The above scheme of distribution was not applicable to areas administered by the Federal Government, such as the Chief Commissioner's Provinces. The proceeds of the above taxes levied in such areas were to belong wholly to the Union.

(iv) Besides assignment of proceeds of taxes by the Centre to the Provinces, there was provision for the Centre making general or specific grants to the Provinces.

(B) *Under the Constitution.*—The Constitution adopts the main features of the above distribution under the Act of 1935. Thus, under the Constitution :

(i) There is the same plan of separation of resources between the Union and the States, by dividing the taxing powers between Lists I and II of the 7th Schedule, subject to similar provisions for the assignment, in whole or in part, of the proceeds of certain taxes levied by the Union, to the States in Parts A and B :

(a) The list of taxes wholly assigned to the States in Parts A & B are the same as those wholly assigned to the Provinces under the Act of 1935, with some *additions*. These are : Union estate and Succession duties ; Union Stamp duties ; Terminal taxes ; Taxes on Railway fares and freights ; *Excise duties on toilet and medicinal preparations* ; *Taxes on transactions in stock-exchanges (other than stamp duties)* ; *Taxes on sale of and advertisement in newspapers*.

(b) As to sharing of the net proceeds of some taxes, there is the same two-fold division :

(1) The sharing of net proceeds of one tax is provided by the Constitution itself, *viz.*, non-agricultural income-tax. (*Jute export duty is excluded* by the Constitution, from this category). (2) The sharing of net proceeds of some duties, again, is made to depend upon Union legislation, *viz.*, Union duties of excise other than on medicinal and toilet preparations. (The items *excluded* by the Constitution are—*Salt, export duties on other than jute and jute products*).

(ii) There is provision for Union surcharge exclusively for Union purposes (Art. 271), as under the Act of 1935.

(iii) The net proceeds of no tax levied by the Union in any territory other than the States in Parts A-B are to be assigned wholly or in part by the Union. In other words, the States and territories in Parts C and D are not to benefit from the above scheme of assignment.

(iv) There is similar provision for general and specific grants (Arts. 273, 275).

(14) 50 per cent. of net proceeds to be assigned to Provinces according to the Order in Council of 1935.

(15) 62½ per cent. of net proceeds to be assigned to Provinces exporting jute.



## Tables showing distribution of sources of Revenue between Union and States under the Constitution

## (I) REVENUES OF THE UNION.

Taxes.	Commercial operations	(i) Fees in respect of any matter in List I, excluding court-fees. <sup>24</sup>	Sovereign functions and rights : 1. Currency and coinage. <sup>25</sup>	Miscellaneous, e.g., contributions by States on account of Privy Purse. <sup>2</sup>
A. Levied and collected by the Union and distributed between the Union and the States A & B. <sup>16</sup>	1. Railways. <sup>19</sup> 2. Posts and telegraphs, etc. <sup>20</sup>	(ii) Fees taken in Supreme Court. <sup>24-a</sup>	2. Revenue from Union property. <sup>1</sup>	
B. Levied and collected by Union but may be distributed between Union and States A & B, by Union legislation. <sup>17</sup>	3. Banking. <sup>■</sup> 4. Manufacture of salt and opium. <sup>22</sup>		3. Property accruing by escheat, lapse, <i>bona vacantia</i> . <sup>2</sup>	
C. Levied, collected and appropriated, wholly by the Union. <sup>18</sup>	5. Other commercial operations, e.g., lotteries organised by Government of India. <sup>■</sup>			
(16) Art. 270.	(19) Entry 22, List I.	(23) Entry 40, List I.	(1) Entry 32, List I.	
(17) Art. 272.	(20) Entries 31, 39, List I.	(24) Entry 96, List I.	(2) Art. 296.	
(18) Other taxes in List I, and entry 97, List I.	(21) Entry 45, List I	(24-a) Entry 77, List I.	(3) Art. 292 (2).	
	(22) Entries 57-8, List I.	(25) Entry 36, List I.		

## (II) REVENUES OF THE STATES.

Taxes:	Fees:	Commercial operations, e.g., fisheries, <sup>11</sup> transport. <sup>12</sup>	Sovereign rights and functions.	Grants-in-aid from Union. <sup>13</sup>
1. Levied by the Union but collected and appropriated by States. <sup>4</sup>	1. Fees taken in all Courts other than Supreme Court. <sup>9</sup>		1. Revenue from works, lands and buildings vested in State. <sup>13</sup>	
2. Levied and collected by Union but assigned to States. <sup>5</sup>	2. Fees in respect of any matter in List II. <sup>10</sup>		2. Forests. <sup>14</sup>	
3. Levied by 'Union' but distributed between Union and States. <sup>6</sup>			3. Escheat, lapse and <i>bona vacantia</i> ; <sup>15</sup> treasure trove. <sup>16</sup>	
4. Levied by Union but <i>may be</i> distributed between Union and States. <sup>7</sup>			4. Pounds. <sup>17</sup>	
5. Directly raised and appropriated by States. <sup>8</sup>				
(4) Art. 268.	(8) Other taxes in List II.	(12) Entry 13, List II.	(16) Entry 4, List II.	
(5) Art. 269.	(9) Entry 3, List II.	(13) Entry 35, List II.	(17) Entry 16, List II.	
(6) Art. 270.	(10) Entry 66, List II.	(14) Entry 19, List II.	(18) Arts. 273, 275.	
(7) Art. 272.	(11) Entry 21, List II.	(15) Art. 296.		

## (III) TAX-REVENUE OF THE UNION.

A. Share of taxes levied by Union and distributed under Constitution between Union and States A & B.	B. Levied and collected by Union but may be distributed by Union law between Union and States A & B :	C. Belonging wholly to the Union:
Taxes on income other than agricultural. ■	Union duties on excise other than on medicinal and toilet preparations. <sup>80</sup>	1. Customs. <sup>21</sup>
		2. Corporation tax. ■
		3. Taxes on capital values of assets of individuals and companies. <sup>22</sup>
		4. Surcharge on taxes mentioned in Arts. 269, 270. ■
		5. Any tax not specified in Lists II and III (residuary taxation). <sup>23</sup>
		6. Taxes mentioned in heads A, B, C, D of Table (IV) below, in States and territories other than States in Parts A and B. <sup>1</sup>

(19) Art. 270 ; Entry 87, List I.	(21) Entry 83, List I.	(23) Entry 86, List I.	(25) Entry 97, List I.
(20) Art. 272 ; Entry 84, List I.	(22) Entry 85, List I.	(24) Art. 271.	(1) Art. 264 (b)-(c).



## (IV) TAX-REVENUE OF THE STATES.

A. Levied by Union but collected and appropriated by States A & B:	B. Levied and collected by Union but assigned wholly to States A & B within which levied:	C. Levied by Union but assigned in part to States A & B:	D. Levied by Union but may be assigned in part to States A & B by Union law:	E. Directly raised by States:
1. Stamp duties on bills of exchange and other documents specified in Entry 91, List I. <sup>2</sup> 2. Excise duties on toilet and medicinal preparations as specified in Entry 84, List I. <sup>3</sup>	1. Succession and estate duty on other than agricultural land. <sup>4</sup> 2. Terminal taxes on goods carried by railway, sea or air. <sup>5</sup> 3. Taxes on railway fares and freights. <sup>6</sup> 4. Taxes on transactions in stock-exchanges. <sup>7</sup> 5. Taxes on sale of and advertisements in newspapers. <sup>8</sup>	Taxes on income other than agricultural (excluding Corporation tax).	Union duties of excise other than on medicinal and toilet preparations. <sup>9</sup>	1. Land revenue. <sup>6</sup> 2. Taxes on agricultural income. <sup>7</sup> 3. Succession and estate duty on agricultural land. <sup>8</sup> 4. Taxes on lands and buildings. <sup>9</sup> 5. Taxes on mineral rights. <sup>10</sup> 6. Octroi. <sup>11</sup> 7. On sale of goods other than newspaper. <sup>12</sup> 8. On advertisements other than those published in newspapers. <sup>13</sup> 9. On consumption or sale of electricity. <sup>14</sup> 10. On goods and passengers carried by road or inland waterways. <sup>15</sup> 11. On vehicles. <sup>16</sup> 12. On animals and boats. <sup>17</sup> 13. Tolls. <sup>18</sup> 14. On professions, trades, etc. <sup>19</sup> 15. Capitation taxes. <sup>20</sup> 16. On luxuries, entertainments, etc. <sup>21</sup> 17. Duties of excise on alcoholic liquors, etc., excluded from List I. <sup>22</sup> 18. Non-judicial stamps other than those included in head A (1) above.
(2) Art. 268. (3) Art. 269. (4) Art. 272. (5) Entry 45, List II.	(6) Entry 46, List II. (7) Entry 47-8, List II. (8) Entry 49, List II. (9) Entry 50, List II.	(10) Entry 52, List II. (11) Entry 54, List II. (12) Entry 55, List II. (13) Entry 53, List II.	(14) Entry 56, List II. (15) Entry 57, List II. (16) Entry 58, List II. (17) Entry 59, List II.	(18) Entry 60, List II. (19) Entry 61, List II. (20) Entry 62, List II. (21) Entry 51, List II. (22) Entry 44, List III.

*Distribution of Revenues between the Union and the States*

Duties levied by the Union but collected and appropriated by the States.

**268.** (1) Such stamp duties and such duties of excise on medicinal and toilet preparations are mentioned in the Union List shall be levied by the Government of India but shall be collected—

(a) in the case where such duties are leviable within any State specified in Part C of the First Schedule, by the Government of India, and

(b) in other cases, by the States within which such duties are respectively leviable.

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

*Cl. (1) : Duties levied by the Union but collected and appropriated by States in Parts A and B.*—This clause means that though the excise duties and stamp duties specified in Entries 84 and 91 of List I will be levied by the Union,—the States in Parts A and B will collect these taxes within such States and appropriate the net proceeds.

In States in Part C and other territories, however, it is the Union which will collect these taxes as well as appropriate their net proceeds.

*Cl. (2).*—The net proceeds of the taxes specified in Cl. (1) being wholly appropriated by the States in Parts A and B, so far as they are levied in those States, such proceeds will not be entered into the Consolidated Fund of India, but will be directly allotted to those States and will form part of the Consolidated Funds of those States. The opening words of Art. 266 (1) also supports this conclusion.

*Analogous Provisions.*—See Cl. (2) of Arts. 269 and 270.

Taxes levied and collected by the Union but assigned to the States.

**269.** (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2),

namely :—

(a) duties in respect of succession to property other than agricultural land ;

(b) estate duty in respect of property other than agricultural land ;

(c) terminal taxes on goods or passengers carried by railway, sea or air ;

(d) taxes on railway fares and freights ;

(e) taxes other than stamp duties on transactions in stock-exchanges and future markets ;

(f) taxes on the sale or purchase of newspapers and on advertisements published therein.

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attri-

butable to States specified in Part C of the First Schedule, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 137 of the Act was as follows:—

“ Duties in respect of succession to property other than agricultural land, such stamp duties as are mentioned in the Federal Legislative List, terminal taxes on goods or passengers carried by railway, or air, and taxes on railway fares and freights, shall be levied and collected by the Federation, but the net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioners’ Provinces, shall not form part of the revenues of the Federation, but shall be assigned to the Provinces and to the Federated States, if any, within which that duty or tax is leviable in that year, and shall be distributed among the Provinces and those States in accordance with such principles of distribution as may be formulated by Act of the Federal Legislature :

Provided that the Federal Legislature may at any time increase any of the said duties or taxes by a surcharge for Federal purposes and the whole proceeds of any such surcharge shall form part of the revenues of the Federation.”

#### INDIA

*Cl. (1) : Taxes levied and collected by the Union but assigned to States A and B.*—While the States in Parts A and B will themselves collect and directly appropriate the taxes specified in Art. 268 (1),—the taxes specified in the present Article will be collected by the Union but the net proceeds raised from States A and B shall be wholly assigned to them and distributed amongst them according to principles formulated by Union legislation.

*Cl. (2) : ‘ Net proceeds.’*—As to the meaning of this expression, see Art. 279 *post*.

Taxes levied and collected by the Union and distributed between the Union and the States.

**270.** (1) Taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule or to taxes payable in respect of Union emoluments, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed.

(3) For the purposes of clause (2), in each financial year such percentage as may be prescribed of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Union emoluments shall be deemed to represent proceeds attributable to States specified in Part C of the First Schedule.

(4) In this article—

(a) “ taxes on income ” does not include ■ corporation tax ;

(b) “ prescribed ” means—



(i) until a Finance Commission has been constituted, prescribed by the President by order, and

(ii) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission ;

(c) " Union emoluments " includes all emoluments and pensions payable out of the Consolidated Fund of India in respect of which income-tax is chargeable.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—S. 138 of the Act, as amended in 1947, provided :—

" (1) Taxes ■ income other than agricultural income shall be levied and collected by the Federation, but ■ prescribed percentage of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioners' Provinces or to taxes payable in respect of Dominion emoluments, shall not form part of the revenues of the Dominion, but shall be assigned to the Provinces and to the Acceding States, if any, within which that tax ■ leviable in that year, and shall be distributed among the Provinces and those States in such manner ■ may be prescribed :

Provided that—

(a) the percentage originally prescribed under this sub-section shall not be increased by any subsequent Order in Council ;

(b) the Dominion Legislature may at any time increase the said taxes by ■ surcharge for Dominion purposes and the whole proceeds of any such surcharge shall form part of the revenues of the Dominion.

For the purpose of this sub-section, in each financial year such percentage as may be prescribed, of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Dominion emoluments shall be deemed to represent proceeds attributable ■ Chief Commissioners' Provinces<sup>22</sup>.

(2) Notwithstanding anything in the preceding sub-section, the Dominion may retain out of the moneys assigned by that sub-section to Provinces and States—

(a) in each year of a prescribed period such sum ■ may be prescribed or, if it is ■ prescribed, the whole of those moneys ; and

(b) in each year of ■ further prescribed period a sum less than that retained in the preceding year by ■ amount, being the same amount in each year, so calculated that the ■ to be retained in the last year of the period will be equal to the amount of each such annual reduction :

Provided that—

(i) neither of the periods originally prescribed shall be reduced by any Order of the Governor-General ;

(ii) The Governor-General may in any year of the second prescribed period direct that the sum to be retained by the Dominion in that year shall be the sum retained in the preceding year, and that the second prescribed period shall be correspondingly extended, but he shall not give any such direction except after consultation with such representatives of Dominion, Provincial and State interests as he may think desirable, nor shall he give any such direction unless he is satisfied that the maintenance of the financial stability of the Dominion Government requires him so to do.

(3) Where an Act of the Dominion Legislature imposes ■ surcharge for Dominion purposes under this section, the Act shall provide for the payment by each Acceding State in which taxes on income are not leviable by the Dominion of a contribution to the revenues of the Dominion assessed ■ such basis as may be prescribed with ■ view to securing that the contribution shall be the equivalent, ■ near as may be, of the net proceeds which it is estimated would result from the surcharge if it were leviable in that State, and the State shall become liable to pay that contribution accordingly.

(4) In this section—

" taxes on income " does not include a corporation tax ;

" prescribed " means prescribed by Order of the Governor-General ; and

" Dominion emoluments " includes ■ emoluments and pensions payable out of the revenues of the Dominion in respect of which income-tax is chargeable."

(22) This paragraph ■ added in 1947.

## INDIA.

*Cl. (1) : Taxes levied and collected by the Union and distributed between Union and States in Parts A and B.*—Art. 270 (1) differs from Art. 269 (1) in this that while under Art. 269 (1) the assignment to the States is of the *whole* of the net proceeds of the taxes mentioned therein, under the present Article it is only a share of the taxes mentioned herein (Entry 82, List I) that will be assigned to the States.

*Cl. (2).*—In determining the fund to be distributed between the Union and the States in Parts A and B, two items are to be excluded from the net proceeds of the income-tax—(a) proceeds of the tax attributable to States in Part C (including other territories), as determined under Cl. (3); (b) proceeds of the tax on Union emoluments as defined in Cl. (4) (c).

*Cl. (4) (b): Distribution prescribed by Order of President.*—The rules for distribution provided in Cls. (2) and (3) will be made clear by the Constitution (Distribution of Revenues) Order, 1950<sup>24</sup>, which the President has promulgated under Cl. (4) (b) of this Article. Paragraph 3 of this Order deals with the subject-matter of the present Article :

“3. (1) For the purposes of Cl. (2) of article 270, one per cent. of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Union emoluments shall be deemed to represent the proceeds attributable to Part C States in the financial year commencing on the first day of April, 1950.

(2) The percentage of the net proceeds of the taxes on income, except in so far as those proceeds represent proceeds attributable to Part C States or to taxes payable in respect of Union emoluments, which is to be assigned to Part A States and Part B States under the said clause in the said financial year shall be fifty per cent.

(3) The sums falling to be distributed under the said clause in the said financial year among Part A States and Part B States (hereinafter referred to as “the said sums”) shall be distributed in the following manner, namely :—

(a) each Part B State shall be entitled to receive out of the said sums a sum equivalent to *fifty per cent.* of the net proceeds of the taxes on income other than agricultural income levied and collected by the Government of India in that State in the said financial year :

Provided that if any such State is entitled to receive in the said financial year any grant of financial assistance by the Government of India by virtue of an agreement under Cl. (1) of Art. 278, then the sum payable to that State under this sub-paragraph shall be reduced by the amount of the said grant ;

(b) each Part A State shall be entitled to receive out of the said sums a sum equivalent to *fifty per cent.* of the net proceeds of the taxes on income other than agricultural income levied and collected by the Government of India in the merged territories within that State in the said financial year ; and

(c) after deducting the sums referred to in sub-paragraphs (a) and (b) from the said sums, the balance shall be distributed as follows :—

STATES	PER CENT.
Assam .. .. .	3
Bihar .. .. .	12.5
Bombay .. .. .	21
Madhya Pradesh .. .. .	6
Madras .. .. .	17.5
Orissa .. .. .	3
Punjab .. .. .	5.5
Uttar Pradesh .. .. .	18
West Bengal .. .. .	13.5 "

## 271. Notwithstanding anything in articles 269 and 270, Parliament may at any time increase any of the

Surcharge on certain duties and taxes for purposes of the Union.

duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

— (24) S.R.O. 7, dated 13th April, 1950, dated 15th April, 1950.  
Gazette of India, Extraordinary, Part II, Sec. 3,

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—See the Proviso to S. 137 and Proviso (b) to S. 138, quoted at p. 591, *ante*.

## INDIA

*Art. 271 : Union Surcharge.*—To counter-balance the losses to the Union by reason of assignments mentioned in Arts. 269—270, the Union is empowered to levy ■ surcharge on any of those taxes and appropriate the whole of the proceeds of such surcharge.

**272.** Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India, but if Parliament by law so provides, there shall be paid out of the Consolidated Fund of India to the States to which the law imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among those States in accordance with such principles of distribution ■ may be formulated by such law.

Taxes which are levied and collected by the Union and may be distributed between the Union and the States.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—S. 140 (1) of the Act provided—

“(1) Duties on salt, Federal duties of excise and export duties shall be levied and collected by the Federation, but, if an Act of the Federal Legislature so provides, there shall be paid out of the revenues of the Federation to the Provinces and to the Federated States, if any, to which the Act imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among the Provinces and those States in accordance with such principles of distribution as may be formulated by the Act.”

No such law was eventually passed.

## INDIA

*Art. 272 : Taxes which may be distributed.*—This article corresponds to S. 140 (1) of the Act of 1935, excluding duties on salt and export duties. Union duties of excise as mentioned in this article will be shared by the States in Parts A and B only if Parliament by law so provides.

**273.** (1) There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Orissa and West Bengal, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

Grants in lieu of export duty on jute and jute products.

(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of ten years from the commencement of this Constitution, whichever is earlier.

(3) In this article, the expression “prescribed” has the same meaning ■ in article 270.



## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—S. 140 (2) of the Act, as amended in 1947, provided—

“(2) Notwithstanding anything in the preceding sub-section, such proportion as the Governor-General may by order determine, of the net proceeds in each year of any export duty on jute or jute products shall not form part of the revenues of the Dominion but shall be assigned to the Provinces or Acceding States in which jute is grown in proportion to the respective amounts of jute grown therein.”

## INDIA

*Art. 273 : Grants in lieu of export duty on jute.*—Under S. 140 (2) of the Government of India Act, the Provinces were entitled to a share in the proceeds of export duty on jute. Under the Constitution, the States shall have no right to any such share as all export and import duties belong to the Centre. But since a sudden withdrawal of this source might create difficulties in the Budget of the States concerned, the present Article provides that for a period of 10 years from the commencement of the Constitution, the jute-growing States of West Bengal, Bihar, Assam and Orissa will receive grants-in-aid from the Centre in lieu of the above share of jute export duties, to the extent of such sums as the President may prescribe.

*Cl. (3) : Grants prescribed by the Constitution (Distribution of Revenues) Order, 1950.*<sup>25</sup>—Para. 4 of this Order provides—

“4. In accordance with the provisions of Cl. (1) of Art. 273 and Cl. (1) of Art. 275, there shall be charged on the Consolidated Fund of India, in the said financial year<sup>1</sup> as grants-in-aid of the revenues of each of the States specified below the sum or sums specified against it in addition to any sum payable to that State under either of the Provisos to Cl. (1) of Art. 275 :—

STATES	Under Art. 273.	Under Art. 275.
Assam	.. Rs. 40,00,000	.. Rs. 30,00,000
Bihar	.. Rs. 35,00,000	.. Nil.
Orissa	.. Rs. 5,00,000	.. Rs. 40,00,000
Punjab	.. Nil.	.. Rs. 75,00,000
West Bengal	.. Rs. 1,05,00,000	.. Nil.”

**274.** (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression “agricultural income” as defined for the purposes of the enactments relating to Indian Income-tax, or which affects the principles on which under any of the foregoing provisions

Prior recommendation of President required to Bills affecting taxation in which States are interested.

of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression “tax or duty in which States are interested” means—

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any State ; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

(25) S.R.O. 7=C.O. 12, dated 13th April, 1950, *Gazette of India, Extraordinary*, dated 15th April, 1950.

(1) The financial year commencing on the 1st day of April, 1950.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—This article reproduces sub-secs. (1) and (3) of Sec. 141 of the Act of 1935, with the following substantial changes—(i) The Governor-General used to exercise his discretion in the matter of giving the “previous sanction” required by sub-sec. (1). (ii) Though the power was exercisable in his discretion, sub-sec. (2) imposed a limitation upon the exercise of that power. This sub-section has not been reproduced in the Constitution. Sub-sec. (2) of Sec. 141 provided—

“(2) The Governor-General shall not give his sanction to the introduction of any Bill or the moving of any amendment imposing in any year any such Federal surcharge as aforesaid unless he is satisfied that all practicable economies and all practicable measures for otherwise increasing the proceeds of Federal taxation or the portion thereof retainable by the Federation would not result in the balancing of Federal receipts and expenditure on revenue account in that year.”

## INDIA

*Art. 274 : Bills affecting taxation in which States are interested.*—Since the alteration of the foregoing scheme of financial distribution is likely to affect the federal character of the Constitution, a bar is imposed by this article upon the introduction of such legislation by private members. The Article requires that Bills having the following objects shall not be introduced in Parliament without previous recommendation of President :

(i) imposing or varying any tax or duty, the proceeds of which are wholly or partly assigned to the States [Cl. (2) (a) of this Article] or the duties mentioned in Art. 273 [cl. 2 (b) of this Article];

(ii) varying the definition of “agricultural income” in the enactments relating to Indian income-tax [e.g. in Sec. 1 (1) of the Indian Income-Tax Act (XI of 1922)]<sup>2</sup> ;

(iii) affecting the principles on which moneys are or may be distributable to the States [under Arts. 270, 272];

(iv) imposing any surcharge, under Art. 271.

**275.** (1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States.

Grants from the Union to certain States.

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State :

Provided further that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to—

(a) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this

(2) See under Art. 366 (1), *post*, for the definition.

Constitution in respect of the administration of the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule ; and

(b) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that State.

(2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament :

Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission.

#### OTHER CONSTITUTIONS

*England.*—By the Local Government Act, 1929, the Central Government adopted a plan to aid the local governments in the matter of finance by making special grants for Police, education, roads, housing, air-raid precautions, unemployment, rural water-supplies, physical training. By this system of grants-in-aid, the Central government has come to exercise a very real control over the local authorities who are otherwise autonomous in many respects. Inspection by officers of the central departments is made a condition of important grants.

The distribution of grants amongst the counties and boroughs is made in consideration of various factors, such as—(a) density of population, (b) number of children under five in excess of 50 per 1000, (c) amount by which rateable value is less than £ 10 per head, and the like.

*U. S. A.*—The Federal Government makes liberal grants to the States in aid of agriculture, vocational education, child and maternity welfare, old age assistance, unemployment relief ; highway construction and similar functions which, though they belong to the sphere of the State, are deemed to be of national importance, in the judgment of Congress.

These grants are made subject to conditions and is followed by regulatory authority of the Federal Government. By these grants, the Federal Government has come to exercise a substantial control over the State Governments in recent years. It is a useful means of securing uniformity of action on the part of the States where that is necessary in the national interest even though the subject-matter be legally within the State jurisdiction. By this means, the nation seeks to remove the inequality of financial resources as between the States and the inability of weaker States to maintain the indispensable standards of national efficiency in matters of health, education, and the like. The federal Government may require minimum standards and may insist on supervision of State plans. The devices by which the Federal Government controls the expenditure of the grants are—(1) advance approval of State plans and budgets ; (2) Federal inspection of the work done ; (3) audits by Federal officers ; (4) the requirement of records and reports ; (5) the requirement that employees in the State administrative agency be chosen under the system ; (6) withdrawal of federal funds.

Of course, Congress has no power to compel a State to accept federal aid.<sup>3</sup> But a State which accepts such aid must accept it subject to the conditions imposed by Congress and to that extent surrender its powers to manage its affairs in its

(3) *Massachusetts v. Mellon* (1923) 262 U. 477.



own way. Federal aid has thus been ■ great centralising power'. That the States freely accept federal aid is obvious from the figure that in 1941 all the 48 States received federal aid to the extent of 12 per cent (in the average) of the total State revenue, while in 10 States it exceeded 20 per cent. They have been constrained to seek federal aid owing to inadequacy of State financial resources to pay for modern social services.

Of this centralising power of federal grants, an American writer<sup>1</sup> observes—

"Here is an attack on federalism, so subtle that it is scarcely realised. . . . Control of economic life and of these social services (*viz.*, unemployment, old-age, maternity and child welfare) were the two major functions of State and local governments. The first has largely passed into national hands; the second seems to be passing. If these both go, what we shall have left of State autonomy will be a hollow shell, a symbol."<sup>1</sup>

A grant for one purpose may not be diverted to another.<sup>2</sup>

*Canada.*—The tendency in Canada is towards a gradual reduction in the volume of subsidies to the Provinces, which have tended to develop recklessness and irresponsibility in expenditure on the part of the States.

*Australia.*—S. 96 of the Australian Constitution says—

"Parliament may grant financial assistance to any States on such terms and conditions as the Parliament thinks fit."

Under the above section, Commonwealth grants have been liberally made with a view to redress financial and economic inequalities between the States ■ well as for specific purposes, subject to conditions, such as, making roads, drought relief, rehabilitation of some industry.<sup>3-4</sup>

*Government of India Act, 1935.*—The first para. of Cl. (1) of Art. 275 of the Constitution corresponds to the first para. of S. 142 of the Act of 1935.

#### INDIA

Cl. (1) : *Grants-in-aid.*—Parliament is given power to make such grants as it may deem necessary to give financial assistance to any State which is in need of such assistance. Discrimination in the matter of making grants would not be unconstitutional, for grants to financially weak states cannot but be discriminatory in nature.

While the general power of making grants for rendering financial assistance is left to Parliament, the Constitution itself provides for specific grants on two matters : (a) The first Proviso provides for payment from the Consolidated Fund of India (without vote in Parliament) of sums necessary for schemes of development, for the welfare of Scheduled Tribes and for raising the level of administration of Scheduled Areas, as may have been undertaken by ■ State with the approval of the Government of India. (b) The second Proviso makes provision for similar payments to the State of Assam, for the development of the tribal Areas in that State.

Cl. (2) : *The Constitution (Distribution of Revenues) Order, 1950.*—See at p.595, *ante*.

**276.** (1) Notwithstanding anything in article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of ■ municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to ■ tax on income.

(1) Griffith, *The Impasse of Democracy*, 1939 p. 195, quoted in Godshall, *Government in the United States*, p. 114.

(2) *Evian v. U.S.* (1919) 251 U.S. 41.

(3-4) Nicholas, *Australian Constitution*, 1948. pp. 161-5.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum :

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 276 of the Constitution substantially reproduces S. 142-A<sup>5</sup> of the Government of India Act, 1935, substituting the words—

“shall not exceed two hundred and fifty rupees per annum,” for—

“shall not, after the thirty-first day of March, nineteen hundred and thirty nine, exceed fifty rupees per annum.”

#### INDIA

*Art. 276 : Taxes on professions, trades, callings and employments.*—This Article authorises a State or other local authority in a State to levy a tax on professions etc. Now, when imposed on a person, it would virtually amount to a tax on ‘income’ but income-tax (other than on agricultural income) is an exclusively Union subject [Entry 82, List I]. Hence, express provision is required in this Article to empower the State to levy a tax, on professions etc., declaring that such a tax will not be invalid on the ground that it is a tax relating to income. Cl. (3) makes a corresponding reservation in favour of Parliament to impose income-tax on incomes arising from professions etc.

*Cl. (1) : ‘Tax in respect of professions, trades, callings or employments’.*—This expression is very wide. The tax may be imposed on professions and employments, including service, even though the employee is already paying income-tax. It may be imposed on trades or callings, e.g. on persons carrying on the trade of husking, milling or grinding of grains<sup>6</sup>; or on the subject-matter of the trade, e.g. each bale of ginned cotton.<sup>7</sup>

*Cl. (2) : ‘Person’.*—‘Person’ in this clause includes a company or artificial person.<sup>8</sup>

(5) This section was added in 1940. In 1941, the Professions Tax Limitation Act [XX of 1941] was passed providing that—“notwithstanding the provisions of any law for the time being in force, any taxes payable in respect of any one person to a province or any local authority by way of tax on professions, trades, callings or employments shall, from and after

April, 1942, cease to be levied to the extent to which such taxes exceed fifty rupees per annum.”

(6) *District Council v. Kishorilal*, A.I.R. 1949 Nag. 190.

(7) *Municipal Committee v. N. E. Press Co.* A.I.R. 1949 Nag. 215.

(8) *Municipal Committee v. N.E.I. Press*, A.I.R. 1948 Nag. 971.

*Proviso to Cl. (2) : Saving of existing taxes exceeding Rs. 250 per annum.*—There was no limit as to the maximum amount of such tax prior to 31st March, 1939 (vide sub-sec. (2) of S. 142-A of the Government of India Act, 1935). Hence, the present Proviso saves those taxes imposed prior to 31st March, 1939, notwithstanding their exceeding the 250 limit, until Parliament legislates to the contrary.

**277.** Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of this State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.

Savings.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 277 corresponds to S. 143 (2) of the Act of 1935.

#### INDIA

*Art. 277 : Savings.*—This Article saves existing taxes levied by State or local authorities on subjects which may have been transferred by the Constitution from the State List to the Union List. For example, taxes on all advertisements were in List II under the Act of 1935, but taxes on newspaper advertisements are included in List I of the Constitution [Entry 92]. So, if any State Government had prior to the commencement of the Constitution levied any tax on newspaper advertisements, that tax shall, under the present Article remain valid until Parliament legislates to the contrary.

If Parliament does not completely supersede the power of the State to levy the tax but makes any partial entry, the State will continue to levy the tax *subject to the limit* imposed by the Union legislation<sup>8-a</sup>.

*'Taxes'.*—A tax is a charge levied upon a person or property for the support of Government<sup>9</sup>, or for public purposes. It is a demand of *sovereignty* and is thus distinguished from ■ *toll* which is founded on proprietorship. From this stand point, taxation is the taking of private property for public use under conditions determined by law.

As explained by the Australian High Court<sup>10</sup>—

"The primary meaning of taxation is raising money for the purposes of government by ■■■■■ of contributions from individual persons."

According to Cooley.—<sup>11</sup>

"Taxes are burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes."

It is ■ *compulsory* payment, and though the object of ■ tax is some public purpose or benefit, it has no necessary connection with the special benefit enjoyed by ■ individual tax-payer, from the object for which the tax is levied. Thus, a rich man cannot claim exemption from ■ tax to support public schools on the ground that he has no children.

(8-a) Cf. *District Board v. Prag Dutt*, A. 1948 A 1. 382 (F.B.).

(9) *U. S. v. Butler* (1936) 297 U. S. 1.

(10) *R. v. Barger*, (1908) 6 C.L.R. 38 (48).

(11) *Constitutional Limitations*, 7th Edn. p. 678.



“The essence of a tax, as distinguished from other charges by the Government, is the absence of a direct *quid pro quo* between the tax-payer and the public authority.<sup>12</sup>”

Nor are taxes adjusted to the amount of service rendered to, or to the benefit enjoyed by, the individual. The poor, who pay the least in taxes, sometimes receive the largest benefit from public services, such as police protection, public education, sanitation and the like. The reason is that the object of the State is to render these services to every citizen in the national interest, and for this purpose the burden is placed upon those who are best able to bear it.

‘Duties.’—Duties, broadly speaking, are levies other than direct taxes.

“A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.” (J. S. Mill)

‘Cesses’.—This word was used in item 49 of List II of the Government of India Act, 1935. But the word has been replaced by the word ‘taxes’ in the corresponding Entry 52 of List II of the 7th Schedule of the Constitution.

‘Fees’.—A fee is a payment levied by the State in respect of services performed by it for the benefit of the individual. It is levied on a principle just opposite to that of a tax. While a tax is paid for the common benefits conferred by the Government on all tax-payers, a fee is a payment made for some special benefit enjoyed by the payer<sup>13</sup> and the payment is usually proportional to the special benefit. Generally speaking, the amount of a fee should be equal to the cost of rendering the service. But at the same time, a fee is to be distinguished from a price realised by the Government for some commodity which the Government sells just like a private businessman, e.g., the timber from the public forests. The element of public purpose and of service is more prominent in the case of fees than in the case of prices.

A fee becomes indistinguishable from a tax, when it is levied at a rate higher than the cost of providing the services. Thus in India, Court-fees are levied not only by way of realising the cost of providing administration of justice but also of taxing the litigants, according to the value of the subject-matter involved.

Fines.—Fines, like taxes, are compulsory contributions levied by public authorities; but unlike taxes their object is not to obtain revenue, but mainly to deter people for certain acts. In fact, the revenue from fines should fall, if they succeed in their object.

#### GENERAL PRINCIPLES RELATING TO THE POWER OF TAXATION

(a) A tax is a compulsory levy for raising revenue for public purposes. Where the object of a tax is simply to some private purpose, e.g. to establish some individuals or corporation in a business<sup>14</sup>, it has been held to be invalid in the United States. But where private persons are sought to be benefited under some public policy, e.g. poor relief<sup>15</sup>, it would be upheld.

But the determination of what is a public purpose belongs primarily to the Legislature and the Court would not interfere so long as the action of the Legislature is not manifestly colourable, the presumption of validity being in favour of the Legislature<sup>16</sup>.

(b) Taxation differs from regulation in this, that the essential purpose of taxation is the raising of money while the object of regulation is the enforcement of a certain line of conduct.

(12) Taussig, Principles of Economics, Vol. II, p. 483.

(13) Cf. *Emperor v. Munna*, A.I.R. 1942 All. 156 (1966).

(14) *Loan Association v. Topeka*, (1874) 20

Wall. 655.

(15) Cooley, Constitutional Limitations, 8th Ed. 1026.

(16) Cooley, Constitutional Law, p. 68.

But in the U.S.A., the Courts have indeed sanctioned the use of the taxing power for purposes of regulation (as distinguished from revenue)—

(i) Of the sale of oleomargarine<sup>17-19</sup>, (ii) of the use of slot machines ; (iii) of the use of State highways by trucks and buses of 'out of the state' registration; and (iv) for purposes of a protective tariff<sup>20</sup>, to discourage use of harmful articles<sup>21</sup>, to regulate child labour<sup>22</sup>.

These taxes for other purposes have been generally upheld on the ground that there was a *primary* revenue element and that the regulatory purpose was subsidiary<sup>23</sup>.

But where the object of the levy is not to raise revenue, but to indirectly secure some other object, *e.g.* the regulation or destruction of some business which the Legislature is not competent to affect by direct legislation<sup>24</sup>, the levy would be held by the Court to be invalid<sup>25</sup>. But if the levy yields some revenue, it would not be nullified on the ground that it is protective in its object or even prohibitory in its effect<sup>23</sup>. Where the purpose and nature of a tax is unassailable, the Courts are not competent to enquire into the motives of the Legislature or the injurious effects of the tax. Taxation is an attribute of sovereignty and security against its abuse is to be found only in the responsibility of the Legislature to the electorate<sup>1</sup>.

As the Australian High Court<sup>2</sup> has explained this principle—

"In a State possessing plenary powers of legislation, any condition may be imposed as a basis of selection for taxation purposes, and it is immaterial whether the differentiation should properly be regarded as an exercise of the power of taxation or of some other power. But where the competency of Parliament is limited, as in a Federal State, to specific matters, it is . . . necessary to inquire whether the attempted exercise of the power of legislation falls within some one or more of the enumerated powers . . . . The grant of the power of taxation is an *independent* power which must be so construed as to be not inconsistent with the other provisions of the instrument (*i.e.*, Constitution). It is not an overriding power which would enable Parliament to invade any region of legislation."

(c) Taxation also differs from confiscation or the power of 'eminent domain'. While taxation is general and non-discriminating and establishes a contribution according to some rule of apportionment,—confiscation is characterised by differentiation as to the persons from whom or the things in respect to which the contribution is to be made<sup>2</sup>. But if confiscation is general and non-discriminating, it is taxation<sup>3-4</sup>. The power to tax necessarily involves the power to select the subjects of taxation; but taxation differs from exaction in that the obligation to contribute (in taxation) depends upon *prescribed* differentiations made with reference to *objective* facts or attributes of the subject-matter, so that all persons or things possessing those attributes are liable to tax.<sup>2</sup> [If the differentiation is arbitrary or there is discrimination within the same class, the tax would be invalid, being in contravention of the guarantee of equal protection ; see Art. 14, p. 56, *ante*].

**278.** (1) Notwithstanding anything in this Constitution, the Government of India may, subject to the provisions of clause (2), enter into an agreement with the Government of a State specified in Part B of the First Schedule with respect to—

Agreement with States in Part B of the First Schedule with regard to certain financial matters.

(17-19) *Mc Cray v. U.S.*, (1904) 195 U.S. 27.

(20) *Trustees of University of Illinois v. U.S.*, (1933) 289 U.S. 48.

(21) *U.S. v. Doremus*, (1919) 249 U.S. 86.

(22) *U.S. v. Darby Lumber Co.*, (1941) 312 U.S. 100, overruling *Bailey v. Drexel Co.*, (1922) 259 U.S. 20.

(23) *Hampton v. United States*, (1928) 276 U.S. 394.

(24) *Veazie Bank v. Fenno*, 8 Wall, 583 ; *Child Labour Tax Case*, (1922) 259 U.S. 20

(reversed by *U.S. v. Darby Lumber Co.*, (1941) 312 U.S. 100.

(25) Thus, the Supreme Court nullified a federal Act (Agricultural Adjustment Act, 1933), on the ground that the federal taxing power was being sought to be used to control agriculture, which belongs to the States [*U. S. v. Butler*, (1936) 297 U.S. 1.]

(1) *Veazie Bank v. Fenno*, 8 Wall 533.

(2) *Rex v. Barger*, (1908) 6 C.L.R. 41 (68-71) ; *Nichols v. Coolidge*, 274 U. S. 531.

(3-4) *Caron v. The King*, (1924) A.C. 999.

(a) the levy and collection of any tax or duty leviable by the Government of India in such State and for the distribution of the 'proceeds thereof otherwise than in accordance with the provisions of this Chapter ;

(b) the grant of any financial assistance by the Government of India to such State in consequence of the loss of any revenue which that State used to derive from any tax or duty leviable under this Constitution by the Government of India or from any other sources ;

(c) the contribution by such State in respect of any payment made by the Government of India under clause (1) of article 291, and, when an agreement is so entered into, the provisions of this Chapter shall in relation to such State have effect subject to the terms of such agreement.

(2) An agreement entered into under clause (1) shall continue in force for a period not exceeding ten years from the commencement of this Constitution :

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if after consideration of the report of the Finance Commission he thinks it necessary to do so.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Prior to the commencement of this Constitution, the financial relations between the Indian States and the Centre was different from that between the Provinces and the Centre. The main features of the financial relations between the Indian States and the Centre, founded on treaties and engagements, were—

(i) The Indian States used to pay various tributes and contributions to the Crown (under treaties and agreements) which formed part of the Central revenue.<sup>5</sup> These contributions were divided by the Davidson Committee<sup>6</sup> under seven heads, including—contributions in acknowledgment of suzerainty ; contributions in commutation of an obligation to provide military assistance to the Crown ; contributions in respect of maintenance by the Crown of a special force in connection with a State, local Military Force, and the like.

(ii) While the Centre had a number of sources of revenue reserved to itself so far as the Provinces were concerned, it had no power over these sources so far as the Indian States were concerned, without specific agreements. As a result of this, the States were free to follow their own policies in matters such as Customs, Income-tax, Railways, Posts and Telegraphs, etc., which had incidence also on British India. On the one hand, the States were free to impose their own internal customs duties, which could not but obstruct the flow of trade with the rest of India. On the other hand, the tariff policy of India in which every part of India was interested, was laid down by the Executive and Legislature of British India, in which the Indian States had no voice. This financial disintegration between the States and the rest of India was thus a source of weakness to both parts<sup>7</sup>.

(iii) Some of the States (less than 20) had the right to mint their own currency and coinage.

(5) S. 20 (3) (i) of the Government of India Act, 1915 and S. 146 of the Act of 1935. [See, Table I, at p. 580, *ante*.]

(6) Indian States Enquiry Committee (Financial) 1932.

(7) Cf. Para. 31 of the J.P.C. Report, Vol. I



(iv) Some States also enjoyed other privileges, *e.g.*, the right to receive free service-stamps from the Government of India, for their official correspondence ; immunity in respect of sea customs ; the privilege of importing sea-borne goods in bond.<sup>8</sup>

The Government of India Act, 1935, envisaged that the States would enter the scheme of Federation by giving up, by their Instruments of Accession, their right to and control over the sources of revenue placed in the Federal List, such as Customs, Income-tax, Posts and Telegraphs etc. On the other hand, it provided that the Crown, in signifying acceptance of the Instrument of Accession of a State, might agree to remit over a period not exceeding 20 years, the cash contributions payable by the State in excess of the value of the immunities and privileges enjoyed by the State (S. 146).

The federal scheme not having matured, the position, as outlined above, remained the same until the Indian Independence Act, 1947, under S. 7 (1) (b) of which, paramountcy, *i.e.*, all special relationship between the Crown and the Indian States lapsed<sup>9</sup>, and the Dominion of India inherited only a right to maintain the existing arrangements with the Indian States in matters of common concern, such as customs, posts and telegraphs, etc., by agreement. The Standstill agreements<sup>10</sup> maintained these arrangements until the acceptance of the Constitution by these States, by Proclamations.<sup>11</sup>

#### INDIA

*Art. 278 : Financial agreements with States in Part B.*—The framers of the Indian Constitution early realised that no scheme of federation could be successful in India unless the Indian States were placed on the same footing as the provinces, and that there would be no strength or unity of the nation unless the financial and fiscal policy and administration of the entire territory were co-ordinated. In 1948, the Indian States Finance Enquiry Committee was appointed, with a view to making recommendations for effecting a financial integration of the Indian States with the rest of India in matters of federal finance.

The Constitution substantially adopts the recommendations of this Committee, as a result of which, *under the Constitution*,—

(i) The Union is to perform the same function (with respect to Lists I and III) in the States in Part B as in the States in Part A (subject to exceptions noted at proper places in this work).

(ii) All existing revenues of the States from 'federal' sources and all expenditure on 'federal' services together with all assets and liabilities are to be transferred to the Union. (Art. 295 ; Art. 246, Part XII, in general).

(iii) States in Part II will enjoy no special privileges or immunities, except those that are conferred by the Constitution itself, and the provisions as regards distribution of revenues, grants, etc., are to be the same for States in Part B as in the case of States in Part A.

A sudden withdrawal of the 'federal' sources of revenue from the States in Part B might cause a serious dislocation in their administration. Hence, the present Article provides that special agreements may be made between the Union and the States in Part B, which would remain in force for not more than 10 years from the commencement of the Constitution, subject to revision after 5 years as provided in the Proviso to cl. (2).

(8) See Aiyangar's Government of India Act, 1937, pp. 187-8.

(9) Hence, the tributes and contributions ceased automatically.

(10) App. IX to the White Paper on Indian States, MS. 6, p. 173.

(11) App. LIV of the White Paper on Indian States, MS 6, p. 365 et seq.

The matters to which such agreements may make special arrangements with the States in Part B (*i.e.*, different from the foregoing provisions of Part XII of the Constitution) are—

(a) Levy and collection of any tax leviable by the Union and distribution of the proceeds thereof otherwise than according to the provisions of Arts, 270, 272.

(b) Financial assistance by the Government of India to compensate loss of revenue to such States on account of the scheme of financial integration, apart from the provisions of Art. 275.

(c) Contribution on account of Privy Purse of Rulers otherwise than in accordance with Art. 291 (2).

*Analogous Provision.*—Art. 306 makes provision for similar agreements for continuing the existing internal customs duties imposed by States in Part B.

**279.** (1) In the foregoing provisions of this Chapter, “net proceeds” means in relation to any tax or duty the proceeds thereof reduced by the cost of collections, and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Comptroller and Auditor-General of India, whose certificate shall be final.

Calculation of “net proceeds”, etc.

(2) Subject as aforesaid, and to any other express provision of this Chapter, a law made by Parliament or an order of the President may, in any case where under this Part the proceeds of any duty or tax are, or may be, assigned to any State, provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 279 reproduces s. 144 of the Act of 1935 with verbal changes.

#### INDIA

*Art. 279 : Computation of ‘net proceeds.’*—The expression ‘net proceeds’ occurs in Arts. 266 (1) ; 269 (2) ; 270 (2)-(3) ; 272 ; 273 (1) ; 274 (2). Cl. (1) of the present Article provides how such net proceeds are to be ascertained. A certificate of the Comptroller and Auditor-General of India will be final on this point.

Cl. (2) of this Article relates to the calculation of ‘proceeds’ under Art. 268 (2).

**280.** (1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

Finance Commission.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to—

(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds ;

(b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India ;

(c) the continuance or modification of the terms of any agreement entered into by the Government of India with the Government of any State specified in Part B of the First Schedule under clause (1) of article 278 or under article 306 ; and

(d) any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

**281.** The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

Recommendations of the Finance Commission.

*Arts. 280-1 : Finance Commission.*—These two Articles provide for the creation of a Finance Commission, within 2 years of the commencement of the Constitution, to make recommendations to the President as to how he should exercise his powers under—

*Arts. 270 (2)-(3) [see Cl. 4 (b) (ii) of Art. 270] ; 275 (2) ; 278 (2), Proviso ; 306, Proviso ;*

and also on any other matter referred to the Commission by the President, 'in the interest of sound finance.'

### *Miscellaneous Financial Provisions*

**282.** The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.

Expenditure defrayable by the Union or a State out of its revenues.

### *OTHER CONSTITUTIONS*

*Government of India Act, 1935.*—Art. 222 of the Constitution reproduces sub-sec. (2) of S. 150 of the Act of 1935.



## INDIA

*Art. 282 : Scope of expenditure by Union or State.*—This Article provides that the spending powers of the Union or the State Legislature is not limited to the legislative powers conferred upon it.<sup>12</sup> In other words, though the lists in the 7th Schedule define the legislative powers of the Union and the State, in the matter of expenditure, neither is circumscribed within the lists assigned to it. The only limit to the power of the Union or a State to spend on a purpose not included within its legislative power is that the purpose must be 'public.'<sup>13</sup> By virtue of this Article, it will be possible for a State to make grants in favour of the institution and Universities specified in Entries 63-4 of List I. On this point, our Constitution follows the American precedent<sup>12</sup> and departs from the Australian precedent<sup>13-a</sup>, according to which the spending power is coterminous with the legislative power.

**283.** (1) The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of India, their payment into the public account of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by Parliament, and, until provision in that behalf is so made, shall be regulated by rules made by the President.

(2) The custody of the Consolidated Fund of a State and the Contingency Fund of a State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of the State, their payment into the public account of the State and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature of the State, and, until provision in that behalf is so made, shall be regulated by rules made by the Governor or Rajpramukh of the State.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Sec. 151 of that Act as amended in 1947, provided—

"Rules may be made by the Governor-General and by the Governor of a Province for the purpose of securing that all moneys received on account of the revenues of the Dominion or of the Province, as the case may be, shall, with such exceptions, if any, as may be specified in the rules, be paid into the public account of the Dominion or of the Province, and the rules so made may prescribe, or authorise some person to prescribe, the procedure to be followed in respect of the payment of moneys into the said account, the withdrawal of moneys therefrom, the custody of moneys therein, and any other matters connected with or ancillary to the matters aforesaid."

## INDIA

*Art. 283 : Custody of public moneys.*—This Article differs from the corresponding provisions of section 151 of the Act of 1935 in the following respects—(a) Instead of one fund, viz., the 'revenues of the Federation' (or the 'revenues of the Province'), we have three funds—the Consolidated Fund; the Contingency Fund; the Public Account. (b) Though the sources of the three funds differ, their operations

(12) Cf. *U. S. v. Butler*, (1936) 297 U.S. 1; *Helvering v. Davis* (1937) 301 U.S. 619 (640).  
 (13) As to what is a 'public purpose', see. p. 154-5 ante.  
 (13-a) A.G. for Victoria v. Commonwealth (1946) 71 C.L.R. 237.

would be regulated by rules having the same authority, *viz.*, law made by the Legislature. Executive rules will remain in force only until the Legislature enters upon the field.

The object of this Article is to place the custody as well as payment of all public moneys under control of the Legislature, as in England :

"This is with a view to regularising the receipts of money . . . . . It is desired in the first place, to prevent any department making money on its own account. For instance, a department might sell land and then appropriate the proceeds of the sale to its own finances, and thereby upset the appropriations that had originally been authenticated for it, or the public works department might buy a piece of land and thereby increase the amount of the grants voted for the purpose of that department. Another object is to ensure that a Government officer can keep sums of money in his custody<sup>14</sup> . . .<sup>15</sup>

*Cl. (2) : Rules relating to State Consolidated Fund.*—The following rule<sup>16</sup> has been made by the Governor of West Bengal under the present clause—

"The custody of the consolidated fund of the State of West Bengal, the payment of monies into that fund, the withdrawal of monies therefrom, the custody of public monies other than those credited to that fund received by or on behalf of the Government of the State of West Bengal, their payments into the public account of the State of West Bengal and the withdrawal of monies from such account and all other matters, connected with or ancillary to the matters aforesaid shall be regulated by the rules made by the Provincial Government of the Province of West Bengal or by any person authorised by it in that behalf under section 151 of the Government of India Act, 1935, and in force on the 25th day of January, 1950, regulating such matters in relation to monies received on account of the revenues of the said Province, in so far as such rules are not inconsistent with the provisions of the said Constitution, and the said rules, in their application to the aforesaid matters, shall be read subject to all necessary modifications."

Custody of suitors' deposits and other moneys received by public servants and courts.

**284.** All moneys received by or deposited with—

(a) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be, or

(b) any court within the territory of India to the credit of any cause, matter, account or persons,

shall be paid into the public account of India or the public account of the State, as the case may be.

*Art. 284 : The Public Account.*—This Article provides that no public officer shall keep in his custody any money collected by him or deposited with him as an officer but shall pay the same into the public account of the Union or the State as the case may be. Similar is the provision as to receipts on Courts. [See, further, under Art. 283, above].

**285.** (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

Exemption of property of the Union from State taxation.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was

(14) See Art. 284, below.

(15) Cf. Parl. Debates, Vol. 300, Col. 1400.

(16) Notification No. 3468 (F.B.) dated 31st

March, 1950, Cal. Gazette, *Extraordinary*, dated 31st March, 1950, Part I, p. 399.

immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

#### OTHER CONSTITUTIONS

*U. S. A.*—In the United States Constitution, there is no specific provision like that in Sec. 114 of the Australian Constitution, 'prescribing immunity from mutual taxation, but the principle has been derived from the wider doctrine of 'Immunity of Instrumentalities.' The doctrine as propounded in *McCulloch v. Maryland*<sup>17</sup> exempts not only the property but also the functions and instrumentalities of the Federal Government, from State taxation. [See p. 526, *ante*]. Thus, the following Federal property has been held to be immune from States taxation :

- (i) Federal buildings and lands<sup>17-a</sup>.
- (ii) That portion of a bank's capital stock which is levied in Federal bonds<sup>18</sup>.
- (iii) Franchises granted by the Federal Government to corporations.<sup>19</sup>

But a State may impose a tax on a bequest to the Federal Government, on the ground that an inheritance tax is not a tax on property but on its transmission by will or descent<sup>20</sup>, even though the property bequeathed may consist of Federal bonds.<sup>21</sup>

Similarly, it has been held that the Federal Government may tax—a legacy to the State Government, on the ground that such tax is a tax not on property but upon *succession*<sup>22</sup>.

*Australia.*—Sec. 114 of the Commonwealth of Australia Act, 1900, says—

"A State shall not without the consent of the Parliament of the Commonwealth . . . impose any tax on property of any kind belonging to the Commonwealth, or shall the Commonwealth impose any tax on property of any kind belonging to a State".

The prohibition contained in this section is a different from the implied prohibition underlying the doctrine of 'immunity of Instrumentalities.' [See p. 527, *ante*]. The latter is a prohibition of interference with action while the present one is a prohibition of *taxation* of Governmental property<sup>23</sup>. (1) Thus, under Sec. 114, the Commonwealth was exempt from local rates in respect of property which it had occupied during war.<sup>24</sup>

"Property" in this section means merely "the physical substance of the thing possessed"<sup>25</sup>. The above section does not apply unless the duty or tax is imposed on the property itself. Thus rails *imported* by a State were held liable to the Commonwealth import duty [imposed under Sec. 51 (2)] because the duty was payable not on property *as property*, but on the *act of importation*,—the movement of property."<sup>25</sup>

*Canada.*—Sec. 125 of the British North America Act, 1867, says—

"No lands or property belonging to Canada or any province shall be liable to taxation".

Though the above section formulates the rule of immunity of the Dominion as well as the Provinces from mutual taxation, the section has been mostly applied to prevent the Provinces from taxing Dominion property. But the exemption has been allowed only to protect the Crown's interest in the property and not the

(17) *McCulloch v. Maryland*, (1819) 4 Wh. 316.  
 (17-a) *Wisconsin Ry. v. Price*, (1894) 133 U.S. 496.  
 (18) *Bank of Commerce v. N. Y. City*, (1862) 2 Bl. 620.  
 (19) *California v. Central Pacific Railroad*, (1888) 127 U.S. 1.  
 (20) *United States v. Perkins*, 163 U.S. 625.

(21) *Plummer v. Coler*, 178 U.S. 115.  
 (22) *Snyder v. Bettman*, 190 U.S. 249.  
 (23) Wynnes, Legislative and Executive Powers, p. 295.  
 (24) *Essendon Corporation v. Criterion Theatres*, (1947) 74 C.L.R. 1.  
 (25) *A. G. for Queensland v. A. G. for Commonwealth*, (1915) 20 C.L.R. 148.



beneficial interest that any private person or corporation may have in property, the legal title of which is vested in the Crown.<sup>1</sup> Again, though lands under lease to the Dominion Government for military purposes were held immune from municipal taxes<sup>2</sup>, the Dominion Government was held liable to pay city water rates on the ground that they were the *price* charged for a commodity furnished.<sup>3</sup>

*Government of India Act, 1935.*—Sec. 154 of that Act was—

“Property vested in His Majesty for purposes of the Government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within a Province or Federated State :

Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto.”

While the main paragraph exempted property of the Central Government from Provincial or local taxation, the Proviso maintained the liability existing on 1—4—37, until the Central Legislature provided otherwise. Now, before the Act of 1935, the scheme of Government was unitary, and there was no law, exempting Government property from taxation. Part III of the Act came into force on 1st April, 1937. Hence, properties belonging to the Crown and in existence<sup>4</sup> prior to that date were governed by the general law enunciated by the Courts.

Judicial opinion, however, was not uniform. In some cases<sup>5</sup>, it was held that statutes imposing duties or taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government. On the other hand, in some cases<sup>6</sup>, it was held that law was the same in India as in England, which may be summarised as follows :

In *England*, the principle of immunity of Crown property from taxation follows from the Prerogative that the Crown is not bound by any statute unless expressly named. Property owned and occupied by the Crown is exempt from taxation, unless rendered liable by express words or by necessary implication, by the taxing statute. The presumption is against a statute binding Crown property.<sup>7</sup>

This exemption would be available equally against taxes normally levied against *owners*, in cases where property was owned by the Crown, and against tax normally levied against *occupiers*, where the property was occupied for Crown purposes.

The following are some examples where Crown property has been held exempt from taxation, in the absence of ‘statutory provisions’ :

(i) Premises used as stables for the Regiment of the Horse Guards were not liable to taxation<sup>8</sup>. (ii) A building used for the County Police Station was free from liability for the poor rate<sup>9</sup>. (iii) Premises purchased by the Commanding Officer of a Volunteer Battalion and used for purposes of the Battalion<sup>10</sup> or houses taken for the occupation of Sergeants in the Regular Army<sup>11</sup>, were exempt from tax. (iv) A drill hall erected by a County Territorial Army Assessment Committee for the use of a local company was exempt from occupiers’ tax, even though the hall was used in winter for dances by members of the company and their relations<sup>12</sup>.

The immunity, again, does not depend upon the character or incidence of the tax.

(1) *Calgary Land Co. v. A. G. of Alberta*, (1911) 45 S.C.R. 171.

(2) *A. G. of Canada v. Montreal*, (1885) 13 S.C.R. 352.

(3) *A.-G. v. Toronto*, 18 O.A.R. 622.

(4) *Governor-General in Council v. Corporation of Calcutta*, A.I.R. 1948 Cal. 116 (119).

(5) *Bell v. Commissioners for City of Madras*, (1902) 25 Mad. 457.

(6) *Secretary of State v. Mathura*, (1890) 14 Bom. 213.

(7) *A.-G. v. Donaldson*, (1842) 10 M. & W. 117.

(8) *Amherst v. Sommers*, (1788) 2 T.R. 372 (C.A.).

(9) *Chamber v. Justices of Berks*, (1883) 9 A.C. 61.

(10) *Hornsey Urban Council v. Hennell*, (1902) 2 K.B. 73.

(11) *Wixon v. Thomas*, (1912) 1 K.B. 690.

(12) *Derbyshire T. A. A. v. Derbyshire Committee*, (1935) 1 K.B. 373.

"The exemption of the Crown from the incidence of rating statutes is a general privilege, and is nowise dependent upon the local or imperial character of the rate. It takes effect in all cases when the Crown is not named in the statute, or, in all cases where the enactments do not take away the privilege, either in express terms or by plain and necessary implication . . . . . In other words, the existence of the same kind and degree of interest, on the part of the Crown, which is deemed in law sufficient to protect an occupier from liability to the poor rate, must be held sufficient to shield the owner of the bare legal estate against any demand for payment of the income-tax".<sup>13</sup>

### INDIA

*Art. 285 : Exemption of property of the Union from State Taxation.*—The system of double government set up by a federal Constitution requires, for its smooth working, the immunity of the property of one Government from taxation by another. Though there is some difference between the several federal Constitutions as to the extent up to which this immunity should go, there is an agreement on the principle that mutual immunity from taxation would save a good deal of fruitless labour in assessment and calculation and cross-accounting of taxes between the two governments (Union and State).

Our Constitution embodies this principle in Arts. 285 and 289. The present Article deals with immunity of the property of the Union from State taxation.

The rule laid down in this Article is narrower than the doctrine of "Immunity of Instrumentalities" as propounded in the United States; inasmuch as it exempts only "property" and not the functions or instrumentalities of the Union [see p. 526, *ante*]. Cl. (2) of the Article corresponds to the Proviso to Sec. 154 of the Act of 1935 and maintains the *status quo* until Parliament legislates to the contrary.

### CLAUSE (1).

*Cl. (1) : "Property of the Union".*—The omission of the word "vest" which occurred in Sec. 154 of the Government of India Act, 1935, does not make much difference, for a property cannot be "of the Union", unless the owner of the property is the Union. Thus, property which has been "acquired" by the Union under Art. 24 (2) is a property of the Union, but not a property which has been merely "requisitioned", for ownership is not affected by an order of requisition<sup>14</sup>. But if the Union Government erects buildings on requisitioned lands, the buildings become "property" of the Union within the meaning of the present Article even though the Union is not the owner of the land upon which the building stands<sup>14</sup>.

The immunity depends not on the nature or purpose of the use but upon the ownership of the property. The modes in which a property may become a "property of the Union" are laid down in Arts. 294-298. These are—

- (i) Property acquired by succession from the Dominion of India [Art. 294 (a)].
- (ii) Property acquired by succession from the Indian States corresponding to the States in Part B, subject to the conditions provided in Art. 295 (1).
- (iii) Property accruing to the Union by escheat, lapse or *bona vacantia* [Art. 296].
- (iv) Things underlying the ocean within territorial waters of India [Art. 297].
- (v) Purchase or acquisition [Art. 31 ; Entry 33, List I] of property for the purposes of the Union [Art. 298].

"Property".—The expression "property" in this Article has been used in a perfectly general sense and would include land, building, chattels, shares, debts and in fact everything that has a money value in the market and comes within

(13) *Coomber v. Justices of Berks*, (1883) 9 A.C. 61.

(14) *Corporation of Calcutta v. St. Thomas'*

*School*, (1948) 53 C.W.N. 231, affirmed by (1949) F.L.J. 361 (F.C.).

the purview of any taxing statute<sup>15</sup>. Naval, Military and Air Force works, specified in List I (6), would come within this expression.

A receipt cannot be regarded ■ property for the purposes of this article<sup>16</sup>.

This article has no reference to the ultimate incidence of the burden of ■ tax<sup>17</sup> but on the nature of a tax, *viz.*, whether it is a *tax on property*. Hence, tenants of Union land would be exempt from ■ State or Union tax which is imposed and levied on "rateable land"<sup>18</sup>.

"*Save in so far as Parliament may by law otherwise provide*".—These words suggest that Parliament may by law permit a State or any authority within a State to impose a tax on Union property. The object of Cl. (1), thus is not to prevent State or local taxation of Union property altogether, but to bring it under control of Parliament.

"*All taxes*".—The word "tax" in this context is to be interpreted in ■ wide sense, including any imposition or levy in the nature of ■ tax. For, otherwise, the State Government would be able to do something indirectly what it cannot do directly<sup>19, 20</sup>.

"*Any authority within a State.*"—This expression makes it clear that the exemption relates not only to taxes imposed by the State itself, but also by subordinate bodies like Municipalities and other local authorities<sup>19, 20</sup>, who cannot possibly have a larger power than the State itself by which they are created.

#### CLAUSE (2).

Cl. (2) : *Saving of local taxation.*—This clause is in the nature of a Proviso upon clause (1). But it empowers Parliament to cut down the exception introduced by Cl. (2). Any local tax on Union property which is saved by Cl. (2) shall cease to be valid as soon as Parliament by law provides to that effect.

While Cl. (1) enunciates that property of the Union shall be exempted from any State or local taxation, Cl. (2) saves the existing power of local bodies to tax Union property so long as Parliament does not legislate otherwise. Thus the *status quo* as to local taxation is maintained, but Parliament is given the power to control such taxation. It is to be noted that Cl. (2) saves the power only of 'any authority within a State' and not that of the State legislature. Subject to legislation by Parliament, the power of a local authority to tax any particular item of Union property depends upon one question only, *viz.*, 'whether such property was liable or treated as liable to such taxation before the commencement of the Constitution.' If that question is answered ■ the affirmative, any local authority within any State would be entitled to levy such tax on such property even though so far as that particular authority is concerned, the tax is new.

Cl. (2) being an exception engrafted on the general provision in Cl. (1), has to be construed strictly.<sup>15</sup>

"*Liable or treated as liable.*"—These words mean that in order to come within the Proviso, the property must have been in physical existence immediately before the commencement of the Constitution. There could have been no liability attached to a non-existent thing; nor could there have been any treatment of a non-existent thing. New buildings and structures erected on the land after the aforesaid date are therefore exempt from tax though the land on which they have been erected may be liable to tax under Cl. (2).<sup>21, 22</sup>

Four conditions are necessary in order to bring a property within Cl. (2) in order to make it liable to taxation :

(15) *G.-G. in Council v. Corporation of Calcutta*, A.I.R. 1948 Cal. 116 (119).

(16) *Cf. D'Emden v. Pedder*, (1904) 1 C.L.R. 91.

(17) *A.-G. for Queensland v. A.-G. for Commonwealth*, (1915) 20 C.L.R. 148.

(18) *Coaldrake v. Brisbane City Council*, (1928)

4 Aust. Dig. 236.

(19-20) *Cf. Municipal Council v. Sydney*, (1904) 1 C.L.R. 208, Wynes, *Legislative and Executive Powers*, p. 298.

(21-22) *Governor-General v. Corporation of Calcutta*, (1947) 52 C.W.N. 173.



- (a) Physical existence of the property immediately before the commencement of the Constitution ;
- (b) Liability of the property to the tax on that date ;
- (c) Physical existence of the property now, *i.e.*, at the time when the tax is sought to be levied ;
- (d) Liability of the property to tax now.<sup>23</sup>

“ *Treated as liable.* ”—These words, as an alternative to ‘ liable ’ have been evidently used to obviate the contention that any taxes which had in fact been collected before the commencement of the Constitution, were not legally enforceable. All taxes which were in fact collected prior to the commencement of the Constitution will continue, unless the Union Parliament enacts any law to the contrary.<sup>24</sup>

“ *Before Commencement of Constitution.* ”—Cl. (2) says that properties which were liable or treated as liable to tax before the commencement of the Constitution, will continue to be so liable, until the Union Parliament legislates to the contrary.

As to what properties were treated as liable to taxation before the commencement of this Constitution, see the law under the Government of India Act, 1935, and before that Act, at p. 609, *ante*.

*Analogous Provision.*—The corresponding immunity of State property from Union taxation is laid down by Art. 289, *post*.

**286.** (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

Restrictions as to imposition of tax on the sale or purchase of goods.

- (a) outside the State ; or
- (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

*Explanation.*—For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(23) *C.-G. in Council v. Corporation of Calcutta*, (1947) 52 C.W.N. 173.

(24) *Cf. Governor-General in Council v. Corporation of Calcutta*, A.I.R. 1948 Cal. 116 (122).

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

*Art. 286 : Restrictions upon imposition of sales tax by a State.*—The power to impose taxes on 'sale or purchase of goods other than newspapers' belongs to the State (Entry 54, List II). But 'taxes on imports and exports' [Entry 83, List I] and 'inter-State trade and commerce' [Entry 42, List I] are exclusive Union subjects. Art. 286 is intended to ensure that sales taxes imposed by the States do not interfere<sup>25</sup> with imports and exports and inter-State trade and commerce, which are matters of national concern, and are beyond the competence of the States. Hence, the present Article lays down certain limitations upon the power of the States to enact sales tax legislation.

*Cl. (1) : No tax on sales outside the State.*—This clause practically reiterates the provision in the Legislative list that taxes on imports and exports [Entry 83, List I] shall be the exclusive jurisdiction of the Union and the principle that the taxing jurisdiction of a State is limited to *intra*-State transactions [Art. 245 (1)].

The *Explanation* explains the meaning of the expression 'outside the State' in sub-cl. (a). A State shall have the power to tax ■ sale or purchase only if two conditions are satisfied, *viz.*, that—(i) the goods have been actually *delivered* within that State as a direct result of such transaction of sale or purchase ; (ii) such delivery takes place for the purpose of *consumption* of the goods within that State. If these two conditions are satisfied, that State has the power to tax that transaction of sale or purchase even though *title* to the goods has passed in another State under the general law relating to the sale of goods. On the other hand, if the delivery and consumption does not take place within ■ State, it cannot tax ■ sale or purchase on the ground that the property in the goods by such sale or purchase has vested within its territory.

*Cl. (2) : Restriction to impose sales tax ■ inter-State transactions.*—This clause supports the principle of freedom of inter-State trade and commerce, enunciated by Art. 301, *post*.

*Analogous Provision.*—See in this connection, Art. 304, *post*.

*Proviso to Cl. (2).*—This is only a transitional provision which will cease to be operative after 31st March, 1951. At the commencement of the Constitution, some Provinces were, in fact, levying some taxes on sales which would offend against Cl. (2). In order to prevent a dislocation of the finances of those Provinces by an immediate abolition of those taxes, the Proviso gives them time to adjust, till 31st March, 1950, by empowering the President to validate such taxes till that date. The President has accordingly promulgated the Sales Tax Continuance Order, 1950,<sup>1</sup> providing that—

"Any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution of India, shall, until the 31st day of March, 1951, continue to be levied notwithstanding that the imposition of such tax is contrary to the provisions of Cl. (2) of Art. 286 of the said Constitution."

*Cl. (3) : Taxes ■ sales of 'essential' goods.*—This clause embodies the principle that some commodities are essential for the life of the community throughout India and that, accordingly, they should not be subject to sales tax by the States in which they are found, without Union control. So, it provides that if Parliament declares by law that any commodity is so essential [*cf.* Entry 3, List III], no State Bill levying a tax on the sale or purchase of such goods shall become ■ law unless it

(25) There was such interference under the Government of India Act, 1935, in which there was no provision corresponding to the present

Article.

(1) C.O. 7—Gaz. of India, Extraordinary, dated 26th January, 1950.

is reserved for the consideration of the President and has received his assent [See Art. 200, *ante*].

*Analogous Provision.*—See Entry 3, List III.

**287.** Save in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

Exemption from taxes on electricity.

(a) consumed by the Government of India, or sold to the Government of India for consumption by that Government; or

(b) consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway,

and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as aforesaid for consumption in the construction, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 287 of the Constitution reproduces Art. 154-A of the Government of India Act, 1935.

#### INDIA

*Art. 387 : Exemption from State taxes on Electricity consumed by Government of India or a railway.*—Arts. 287-8 constitute partial importations of the doctrine of immunity of instrumentalities in relation to the Union. They ensure immunity of certain functions carried on by the Union, as distinguished from property.

Under Entries 53 and 54 of List II, the State Legislature has the power to impose—

“taxes on the consumption or sale of electricity;” taxes on the sale or purchase “of goods other than newspapers.”

But ‘railways’<sup>2</sup> and ‘inter-State rivers and river-valleys’<sup>3</sup> are Union subjects.

Arts. 287-8, therefore, exempt the consumption or sale of electricity or water by these Union agencies, from any State tax as above. Art. 287 has two parts :

(i) Save in so far as permitted by Union legislation, no State shall tax the consumption or sale of electricity which is consumed by the Government of India itself or in the construction, maintenance or operation of a railway.

(ii) Secondly, when the imposition of such tax is permitted by Parliament, the law imposing or authorising the tax shall secure that the price of such electricity sold to the Government of India for consumption by itself or by a railway maintained by it, shall be less than that charged to other customers, by the amount of that

(2) Entry 22, List I.

(3) Entry 56, List I.



tax ; in other words, the law imposing the tax must provide that the incidence of the tax shall be upon the *producer* of the electricity and not upon the Government of India or the railway,—as *consumer*.

**288.** (1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Exemption from taxation by States in respect of water or electricity in certain cases.

*Explanation.*—The expression “law of ■ State in force” in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent ; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

*Art. 288 : Exemption from State taxation of water or electricity.*—The object of this Article is to exempt, subject to any order of the President to the contrary,—certain objects of inter-State public utility, from existing State taxation. Future taxation of such concerns by the States is also made subject to President's assent to such legislation.

This provision is in respect of water or electricity generated, consumed, distributed or sold by any authority established for regulating or developing any inter-State river or river-valley [*cf.* Entry 56 of List I].

*“Any authority established by any existing law.”*—For instance, Ss. 13-21 of the Damodar Valley Corporation Act (XIV of 1948) empowers the Damodar Valley Corporation to sell water and electricity, under certain conditions.

Exemption of property and income of a State from Union taxation.

**289.** (1) The property and income of ■ State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, ■ Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government.

## OTHER CONSTITUTIONS

U. S. A.—See p. 608, *ante*.

Australia.—S. 114 of the Australian Constitution which enunciates the rule of immunity from *mutual* taxation, has already been reproduced at p. 608, *ante*.

Canada.—See S. 125, quoted at p. 608, *ante*.

Government of India Act, 1935.—S. 155 (1) of that Act provided—

“(1) Subject as hereinafter provided, the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income accruing, arising or received in British India :

Provided that—

(a) where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof ; . . . . .”

## INDIA

Art. 289 : *Immunity of State property from Union Taxation*.—This Article corresponds to S. 155 of the Government of India Act, 1935, but improves upon it in several respects : (a) while S. 155 of the Act exempted only ‘lands and buildings’ so that movable property belonging to the Provinces were subject to customs and excise duties levied by the Centre<sup>4</sup>—the present Article exempts *any* property of the State from Union taxation, including movables, except those coming under Cl. (2).

(b) Cl. (2) of this Article is wider than Proviso (a) to S. 155 of the Act of 1935 in so far as the words “in any part of British India outside that Province” are not reproduced in the present Article. The result is that while under the Act of 1935, business carried on by the units within their own territory was exempt from Federal taxation (*e.g.*, income-tax), there is no such exemption under the Constitution.

(c) Cl. (3), which is new,—enables Parliament to make exceptions to the application of Cl. (2).

CL. (1) : *Exemption of property and income of a State*.—It is to be noted that while in Art. 285 (1), there is specific mention of ‘any authority within the State’ apart from a State, there is no mention of any authority within the State within the present Article. Hence, the property or income of local authorities shall have no immunity from Union taxation whether those are used for commercial or non-commercial purposes.

As to the State, it is to be noted that not only the property but also the ‘income’ of a State is exempted, provided it is not income arising from any trade or business or operations connected therewith.

CL. (2) : *Trade or business not exempted*.—Even the wider doctrine of ‘Immunity of Instrumentalities’ [see p. 527, *ante*], is confined to governmental functions<sup>5</sup>, and does not exempt trading or commercial functions entered into by a Government like a private trader, *e.g.*, the lighting of streets<sup>6</sup>, supply of electricity ; sale of liquor.<sup>7</sup>

As to what are governmental functions, see pp. 216-7, *ante*. Instances are,—administration of justice, maintenance of order, repression of crime<sup>8</sup>, health, education, development of natural resources.

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(4) Following *A.-G. v. Collector of Customs*, (1908) 5 C.L.R. 818.      *Corporation*, (1919) 26 C.L.R. 508.  
 (5) *Thomson v. Union Pac. Ry.*, 9 Wall. 579 ;      (7) *South Carolina v. U. S.*, 199 U.S. 437.  
*Central Pac. Ry. v. California*, 162 U.S. 91.      (8) *Goomber v. Justices of Berks*, (1883) A.C. 61  
 (6) *Federated Municipal Employees v. Melbourne*      (74).

Cl. (3) : *Power of Parliament*.—What is a governmental function and what is a trading or business function is not always easy to determine<sup>9</sup>. Thus, in Australia, activities of the Government have been held to be 'industrial' even though nothing is charged for the services, e.g., municipal road construction<sup>9-a</sup> a harbour dredging, piloting, ferries<sup>10</sup>.

Our Constitution avoids this difficulty by empowering Parliament to declare<sup>c</sup> by law<sup>11</sup> that any trade or business carried on by a State shall not come within the scope of Cl. (2) of this Article, but shall be deemed to be 'incidental to the ordinary functions of Government'. Upon such declaration, no taxation by the Union of such trade or business or of property or income connected therewith will be possible.

From the standpoint of the Courts there is an important difference between Cls. (2) and (3). Though the power of Parliament to declare a trade or business as 'incidental to the ordinary functions of Government' is final [Cl. (3)], the selection by Parliament of a particular function for taxation as a trade or business, under Cl. (2), does not preclude the Court from enquiring whether it is really ■ 'trade or business' so as to be excepted from the scope of the general prohibition in Cl. (1). In short, the determination of Parliament under Cl. (2) is not final.

**290.** Where under the provisions of this Constitution the expenses of any court or commission, or the pension payable to or in respect of a person who has served before the commencement of this Constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State, are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if—

(a) in the case of ■ charge on the Consolidated Fund of India, the Court or Commission serves any of the separate needs of a State, or the person has served wholly or in part in connection with the affairs of a State ; or

(b) in the case of a charge on the Consolidated Fund of a State, the Court or Commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State, there shall be charged on and paid out of the Consolidated Fund of the State or, as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

ART. 290 : ADJUSTMENT OF EXPENSES BETWEEN UNION AND STATES.—This Article provides for adjustment, by agreement or arbitration of certain expenses, pensions, etc., which are liable to be shared between the Union and the States or the States *inter se*.

(9) Cf. *South Australia v. Commonwealth*, (1942) 65 C.L.R. 373 (423).

(9-a) *Municipal and Shire Employees' Case*, (1919) 26 C.L.R. 508.

(10) *Merchant Service v. Commonwealth Steamship Association*, (1920) 28 C.L.R. 436.

(11) "In a fully self-governing country where a Parliament determines legislative policy and an executive government carries it out, any activity may become ■ function of government if Parliament so determines." (*South Australia v. Commonwealth*, (1942) 65 C.L.R. 373 (423)).



**291.** (1) Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India ; and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income.

(2) Where the territories of any such Indian State as aforesaid are comprised within a State specified in Part A or Part B of the First Schedule, there shall be charged on, and paid out of, the Consolidated Fund of that State such contribution, if any, in respect of the payments made by the Government of India under clause (1) and for such period as may, subject to any agreement entered into in that behalf under clause (1) of article 278, be determined by order of the President.

ART. 291 : PRIVY PURSE OF RULERS.—See definition of ‘ Ruler of an Indian State ’ in Art. 366 (22), *post*.

Prior to the integration of the States on the eve of this Constitution, there was no distinction in the Indian States between expenditure on account of the administration and the private or personal expenses of the Rulers. As absolute Sovereigns, they had practically an unrestricted right to draw from the revenues of their respective States.<sup>12</sup> The accession of these States to the Union of India, and the surrender of the Rulers of all their ruling powers, as well as the integration and merger of the States, were all *voluntary* acts.<sup>13</sup> In consideration of such surrender, all the agreements of Merger and the Covenants for formation of the Unions of States<sup>14</sup> fixed a certain sum as the Rulers’ Privy Purse, intended to cover all the expenses of the Ruler and his family<sup>15</sup>. For example, Art. 3 of the Mayurbhanj Merger Agreement<sup>16</sup> provides—

“ The Maharaja shall with effect from the said day be entitled to receive from the revenues of the State annually for his privy purse the sum of Rs. 3,27,400 free of all taxes. This amount is intended to cover all the expenses of the Ruler and his family, including expenses on account of his personal staff, maintenance of his residences, marriages and other ceremonies, etc., and will neither be increased nor reduced for any reason whatsoever.

The Government of India undertakes that the said sum of Rs. 3,27,400 shall be paid to the Maharaja in four equal instalments in advance at the beginning of each quarter from the State treasury or at such other treasury as may be specified by the Government of India.”

The present Article of the Constitution provides the constitutional guarantee for the payment of the sums as Privy Purse fixed by the above agreements and Covenants.

(12) The personal expenditure of the Rulers and their families exceeded about 20 crores of rupees per annum.

(13) Owing to the lapse of paramountcy, under Sec. 7 of the Indian Independence Act, 1947 [see p. 504, *ante*].

(14) See Apps. XII to XLII, LVII-LVIII of the White Paper on Indian States, M.S. 6.

(15) App. LIX of the White Paper contains a complete List of the Privy Purses so fixed. In some of the Agreements [e.g., Proviso to Art. 1 (1) of the Agreement with the Nizam of Hyderabad],

the amount fixed in the Agreement is payable only during the lifetime of the present Ruler who was a party to the Agreement; in such cases there is provision for refixing of the Privy Purse of the successors by the Government of India. As a result, while at the commencement of the Constitution the aggregate amount of Privy Purse is about 58 millions, after the death of the present Rulers, this sum will be much reduced.

(16) App. XII of the White Paper on Indian States, M. S. 6, p. 180.

CL. (1) (a) : *Charged on the Consolidated Fund of India.*—In Art. 112 (3) (g) (see p. 346, *ante*), it is provided that any other expenditure declared by the Constitution to be charged on the Consolidated Fund of India shall also be included in the list given in that clause. Art. 291 (1) (a) is an instance of such expenditure.

In order to guarantee the payment of the Privy Purse, it is provided by the present sub-clause, that such sums shall be charged on the Consolidated Fund of India (*i.e.*, independent of vote of Parliament), and that the payments shall be out of that Fund [subject to contribution by the States, under cl. (2)].

CL. (1) (b) : *Exemption from income-tax.*—This sub-clause guarantees the exemption of the Privy Purse from income-tax (agricultural or non-agricultural), which is already assured by the Agreements and Covenants. It is to be noted that the exemption is only in respect of the 'Privy Purse' and does not include any other income of the Ruler or his family.

CL. (2) : *Contribution by States.*—Since some of the States have merged into the Provinces, some have been taken over by the Centre, and others have been integrated into the Unions in Part B of the First Schedule, there should be a provision for the sharing of the liability between the Union and these Units, though the payment is made out of the Consolidated Fund. The present clause accordingly provides for contribution by the States in Parts A and ■ to the Union on account of such sums. The amount and period of contribution shall be determined by the President by Order, subject to agreements with States in Part B, under Art. 278 (1) (c) (p. 604, *ante*). The amounts of contribution so fixed shall be charged on the Consolidated Funds of the respective States.

## CHAPTER II.—BORROWING

**292.** The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

Borrowing by the Government of India.

### OTHER CONSTITUTIONS

*U. S. A.*—Art. I (2) gives the Congress *unlimited* power—

“to borrow money ■ the credit of the United States.”

The usual modes in which Congress raises loans are—by issuing bonds and treasury notes. But Congress has the exclusive power to select the means or methods of exercising this power<sup>17</sup>, as well as the purposes for which the loan may be raised, provided the purpose is one for which Congress may lawfully spend money. This borrowing power of the federal government cannot be controlled by the States in any way, by taxation or otherwise, without its consent.<sup>18</sup>

*Australia.*—Under section 51 (iv) of the Australian Constitution Act, 1900, the Commonwealth Parliament has the exclusive power of—

“Borrowing money on the public credit of the Commonwealth.”

*Canada.*—Section 91 (4) of the B. N. A. Act gives the Dominion exclusive power in relation to—

“The borrowing of money on the public credit” ;

but Section 92 (3) gives the Province power in relation to—

“The borrowing of money on the sole credit of the Province”.

(17) *McCulloch v. Maryland*, (1819) 4 Wh. 316.

(18) *The Banks v. The Mayor*, 7 Wall. 16.

*Government of India Act, 1935.*—Art. 292 reproduces section 162 of the Government of India Act, 1935, as adapted in 1947.

#### INDIA

*Art. 292 : Borrowing by the Union.*—This Article gives the Government of India exclusive power to borrow upon the security of the Consolidated Fund of India (*i.e.*, of the resources of the Union), subject only to such limitations as Parliament may by law impose, under its legislative power with respect to 'the public debt of the Union' [Entry 35, List I].

**293.** (1) Subject to the provisions of this Article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

*Borrowing by States.*

(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under Article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

#### OTHER CONSTITUTIONS

*U. S. A.*—This Constitution leaves the borrowing by the States on the credit of their own resources, to be governed by the State Constitutions.

*Canada.*—See Section 92 (3) of the British North America Act, quoted at p. 619, *ante*.

*Australia.*—While the Constitution of Australia follows that of the U. S. A. in leaving the public debts of States to be governed by their own Constitutions it also provides for agreements between the Commonwealth and the States in this respect. Secs. 105-105-A of the Commonwealth of Australia Constitution Act are as follows :—

" 105. The Parliament may take over from the States their public debts, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient or, if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

105-A.—(1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including—

- (a) the taking over of such debts by the Commonwealth;
- (b) the management of such debts;



(c) the payment of interest and the provision and management of sinking funds in respect of such debts ;

(d) the consolidation, renewal, conversion and redemption of such debts ;

(e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth ; and

(f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4) Any such agreement may be varied or rescinded by the parties thereto.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section 105 of this Constitution."

*Government of India Act, 1935.*—Under Sec. 163, the Provinces might raise loans outside India on the securities of India,—but not without the consent of the Federation.

As regards borrowing within the territory of India, the consent of the Federation was required if there was still outstanding any part of a loan made to the Province by the Federation or in respect of which a guarantee had been given by the Federation. It was a powerful means of Central control over the general policy of the Provincial administration. The question whether consent was unreasonably withheld in any instance rested with the Governor-General in his discretion.

Cls. (1) and (2) of Art. 293 substantially reproduce sub-sections (1) and (2) of Section 163 of the Act. Cls. (3) and (4) reproduce sub-section (3), with the omission of the words 'borrow outside India.' Sub-section (4) of the section has been altogether omitted. That sub-section was—

"(4) A consent required by the last preceding sub-section shall not be unreasonably withheld, nor shall the Dominion refuse, if sufficient cause is shown, to make a loan to, or to give a guarantee in respect of a loan raised by, a Province, or seek to impose in respect of any of the matters aforesaid any condition which is unreasonable, and, if any dispute arises whether a refusal of consent, or a refusal to make a loan or to give a guarantee, or any condition insisted upon, is or is not justifiable, the matter shall be referred to the Governor-General and the decision of the Governor-General in his discretion shall be final."

#### INDIA

ART. 293 : BORROWING BY STATES.—This Article imposes a number of limitations upon the power of a State to borrow upon its own securities :

(i) It cannot borrow outside India. (Under the Act of 1935, the States had the power to borrow outside India with the consent of the Centre. But this power is totally denied to the States by the Constitution ; the Union shall have the sole right to enter into the international money market in the matter of borrowing).

(ii) The State executive shall have the power to borrow, within the territory of India, upon the security of the Consolidated Fund of the State, subject to the following conditions :

(a) Limitations as may be imposed by the State Legislature.<sup>19</sup> (b) If the Union has guaranteed an outstanding loan of the State,<sup>20</sup> no fresh loan can be raised by the State without consent of the Union Government. (c) The Government of India may itself offer a loan to a State<sup>20</sup> under a law made by Parliament. So long as such a loan or any part thereof remains outstanding, no fresh loan can be raised by the State without consent of the Government of India. The Government of India may impose terms in giving its consent as above. (d) There is no limitation upon the above power of the Government of India to give its consent to State borrowing.

(19) See Entry 43, List II.

(20) Under Art. 293 (2).

### CHAPTER III.—PROPERTY, CONTRACTS, RIGHTS, LIABILITIES, OBLIGATIONS AND SUITS

Succession to property,  
assets, rights, liabilities and  
obligations in certain cases.

**294.** As from the commencement of  
this Constitution—

(a) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

(b) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State, subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

#### OTHER CONSTITUTIONS

*Canada.*—Secs. 107-117 of the British North America Act deal with the subject of property and assets of the Dominion and the Provinces. The more important of these provisions are—

“107. All stocks, cash, banker's balances and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union.

108. The public works and property of each Province, enumerated in the third schedule to this Act, shall be the property of Canada.

110. All assets connected with such portions of the public debt of each Province as are assumed by that Province shall belong to that Province.

111. Canada shall be liable for the debts and liabilities of each Province existing at the Union.

117. The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.”

The general principle of distribution underlying the above provisions was—

“ . . . . . that the Dominion Government should be vested with those powers, property and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of the Provincial Government.”<sup>21</sup>

*Government of India Act, 1935.*—The provisions in this respect were contained in sections 172-3, the relevant portions of which are—

“172.—(1) All lands and buildings which immediately before the commencement of Part III of this Act were vested in His Majesty for the purposes of the Government of India shall as from that date—

(a) in the case of lands and buildings which are situate in a Province, vest in His Majesty for the purposes of the Government of that Province unless they were then used, otherwise than under a tenancy agreement between the Governor-General in Council and the Government of that Province, for purposes which thereafter will be purposes of the Federal Government or of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, or unless they are lands and buildings formerly used for such purposes as aforesaid, or intended or formerly intended to be so used, and are certified by the Governor-General in Council or, as the case may be, His Majesty's Representative, to have been retained for future use for such purposes, or to have been retained temporarily for the purpose of more advantageous disposal by sale or otherwise ;

(21) *Liquidator's case*, (1892) A.C. 437.

(b) in the case of lands and buildings which are situate in a Province but do not by virtue of the preceding paragraph vest in His Majesty for the purposes of the Government of that Province, and in the case of lands and buildings which are situate in India elsewhere than in a Province, vest in His Majesty for the purposes of the Government of the Federation or for the purposes of the exercise of the functions of the Crown in its relations with Indian States, according to the purpose for which they were used immediately before the commencement of Part III of this Act ; . . . . . ”

“ 173. (1) Subject to the provisions of this and the last preceding section, all property vested in His Majesty which by virtue of any delegation from the Secretary of State in Council or otherwise is immediately before the commencement of Part III of this Act in the possession or under the control of, or held on account of, the Governor-General in Council or any Local Government shall, as from the commencement of Part III of this Act, vest in His Majesty—

(a) for the purposes of the Government of the Federation ; or

(b) for the purposes of the exercise of the functions of the Crown in its relations with Indian States ; or

(c) for the purposes of the Government of ■ Province,

according as the purposes for which the property was held immediately before the commencement of Part III of this Act will thereafter be purposes of the Government of the Federation, purposes of His Majesty's Representative for the exercise of the said functions of the Crown or purposes of the Government of a Province :

Provided that—

(i) all moneys which immediately before the commencement of Part III of this Act were in the public account of which the Governor-General in Council was custodian shall be vested in His Majesty for the purposes of the Government of the Federation ;

(ii) all credits and debits of the Local Government of any Governor's Province (other than Burma) in account with the Governor-General in Council shall be deemed to be credits and debits of the corresponding Province under this Act in account with the Federation.

(2) Subject as aforesaid, all other property vested in His Majesty and under the control of the Secretary of State in Council immediately before the commencement of Part III of this Act shall as from the commencement of Part III of this Act vest in His Majesty for the purposes of the Government of the Federation, for the purposes of the exercise of the functions of the Crown in its relations with Indian States or for the purposes of the Government of ■ Province, according ■ the Secretary of State may determine having regard to the circumstances of the case, and the Secretary of State shall have power to and shall deal with the property accordingly.

(3) In this section ‘ property ’ includes money, securities, bank balances and movable property of any description . . . . . ”

Prior to the Government of India Act, 1935, the scheme of Government was unitary, and so there was nothing such as the property of the Government of India or property of the Provinces. All property of the Crown in India was held by that single Corporation which was called the Secretary of State-in-Council which was also liable to be sued and had a right to sue. The Act of 1935 divided the assets and liabilities held by the Secretary of State into two parts,—those set apart for the Government of India and those set apart for the Provinces, in technical language,—‘ held by His Majesty for the purposes of the Government of the Federation’, and ‘ held by His Majesty for the purposes of the Government of a Province ’.

While section 172 of the Act of 1935 dealt with ‘ lands and buildings ’, section 173 dealt with all other property as defined in sub-section (3) of that section.

The general scheme underlying the above division of property under Sec. 172 was that all property in ■ Province vested in that Province (more accurately, ‘ vested in the Crown for the purposes of that Province’), except such as were necessary for the performance of the functions of the Government of India under the Act<sup>22</sup>, and the general test applied was the ‘ future use ’ of the property :

“ The destination of the property, the future ownership of property, shall be decided in accordance with the purposes for which the property *will be used* under the new regime, that is to say, if it is to be used for Provincial purposes it will belong to the Provincial Government or if under the new Constitution for central purposes, it will belong ■ the Federal Government.”<sup>23</sup>

To the above general rule, there were certain *exceptions* :

“ (i) Property actually being used on 1st April, 1937, for purposes which would under this Act be Central ■ distinguished from Provincial purposes.

(22) Cf. *Liquidator's case*, (1892) A.C. 437, at p. 622, *ante*.

(23) *Parliamentary Debates*, Vol. 302, Col. 529.



(Provided that where the Government of India are in occupation of Provincial property as tenants, such property is not divested from the Province.)

(ii) Property which was at any time before 1st April, 1937, used or intended to be used for a purpose which would under this Act be Central (even though it was not being used for a Central purpose on the 1st April, 1937), provided that the Governor-General or the Crown Representative certifies that such property is retained for such future use or retained for the purpose of more advantageous sale, etc. . . . ."<sup>24</sup>

So, in cases coming within the above exceptions, the vesting of the property was governed by past use, i.e., use prior to 1st April, 1937. As to 'other property', i.e., property other than lands and buildings<sup>24-a</sup>, coming under Section 173, the division was determined by *past use*, that is to say, the property vested in the Government of India if it was used for the purposes of that Government prior to 1st April, 1937, or in the Government of a Province if it was so used for the purposes of that Government. An exception to this was contained in the Proviso to sub-section (1), viz., that all existing cash resources vested in the Centre, though the credits and debits of Local Governments were transferred to the corresponding Province and to the extent of the corresponding resources, the Government of India acted as the banker for the Provinces.<sup>25</sup>

### INDIA

*Art. 294: Property, Assets, etc., of Union and States by succession.*—This Article, in short, means that all property, assets, rights and liabilities that belonged to the Dominion of India or a Governor's Province at the commencement of the Constitution shall be transferred, by succession to the Union or the corresponding State under the Constitution. In other words, though the Government of India Act, 1935, is repealed by the Constitution, the assets and liabilities of the different units and the Central Government will continue as before,—the Union and the States in Part A being the successors of the Government of India and of the corresponding Province under the Act of 1935.

"*Shall vest.*"—Not only the beneficial interest but the title to the property shall vest in the Union or the State, as the case may be.

*Legislative Power.*—As under the Constitution of Canada<sup>1</sup> and the Government of India Act, 1935,—proprietary rights and legislative powers are not co-extensive under the Constitution. Thus, the Union has legislative power over property of the Union as determined as by the present Chapter, but—

"as regards property situated in ■ State specified in Part A or Part B of the First Schedule subject to legislation by the State, save in so far as Parliament by law otherwise provides" (Entry 32, List I, 7th Schedule).

'*Subject to adjustment made by reason of the creation of . . . . . Pakistan*'.—Sec. 9 (1) (b) of the Indian Independence Act, 1947, empowered the Governor-General to make provisions by an order, for dividing rights, property and liabilities as between the two Dominions of India and Pakistan and the partitioned Provinces. In pursuance of this provision, the Indian Independence (Rights, Property and Liabilities) Order, 1947<sup>2</sup> and the Indian Independence (Liabilities) Order, 1947, were made. The present Article of the Constitution provides that in determining the question of succession to the property, assets, rights, liabilities and obligations of the Government of the Dominion of India and the Provinces under the Act of 1935, the provisions of the above Orders, as well as

(24) Aiyangar's Government of India Act, 1935, p. 204.

(24-a) The Federal Court, however, opined (*Ref. under Section 213 of the Government of India Act, (1943)*, 47 C.W.N.(F.R.), 34 that 'lands and building's situate in a Chief Commissioner's Province which, immediately before the commencement of Part III of the Act of 1935, were vested in His Majesty for the purposes of the Government of India but were used wholly for purposes which thereafter became purposes of

the Government of ■ Governor's Province,—were not included in Section 172 (1) (b) of the Act, but came either under sub-sections (1) or (2) of Section 173, and therefore vested in His Majesty for the purposes of that Province.

(25) *Parliamentary Debates*, Vol. 302, Col. 529.

(1) *A.-G. of Canada v. A.-G. for Ontario*, (1898) A.C. 700.

(2) See *Indian Law Review* (Transitional Constitutions, Supp., p. 125, *et seq.*).

under the Indian Independence (Partition Councils) Order, and the Arbitral Tribunal Order, 1947, should be referred to.

*The Indian Independence (Rights, Property and Liabilities) Order, 1947.*—This Order first deals with property, including land (Ss. 4-5); goods, coins, bank notes and currency notes (S. 6); and then deals with contractual rights and liabilities and other properties (Ss. 7-8, 10); it next deals with loans, guarantees and other financial obligations (S. 9); actionable wrongs (S. 10); pensions (S. 11); and finally, legal proceedings (S. 12).

This order is only concerned with the actual division of the physical assets and specific liabilities and have no reference to the division of *sovereign* rights arising out of the very creation of two independent Dominions, *e.g.*, the right of ■ Government to tax its own subjects.<sup>3</sup>

'*Land*'.—This word, in S. 5 of the Order, means land belonging to the Government as such or used for Governmental purposes, and not the territories of India or a State.<sup>3</sup>

'*Contractual Liability*'.—If the purposes for which the contract was made were after the appointed day the exclusive purposes of the new Province of West Bengal, then the Province of West Bengal would be liable even though the contract was made with undivided Bengal. Thus, an obligation to pay rent in respect of a house, let out for a hospital which did not serve any area now falling within East Bengal, is an obligation of West Bengal.<sup>4</sup>

'*Loans, guarantees and other financial obligations*'.—These words in S. 9 of the Order must be given a technical interpretation so as to refer to liabilities with matters connected with *revenue* and not to any kind of *pecuniary* liability,<sup>5</sup> or purely contractual obligations, such as an obligation to pay rent.<sup>6</sup>

'*Proceeding with respect to that property*'.—This expression, in S. 12 of the Order, must be given ■ wide interpretation. Hence the liability for compensation for acquisition of land shall be that of the successor Government which has obtained that property on partition.<sup>5</sup>

Succession to property,  
assets, rights, liabilities and  
obligations in other cases.

**295.** (1) As from the commencement  
of this Constitution—

(a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to ■ State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List;

(3) *Prov. of East Bengal v. Tripura*, (1948) 53 C.W.N. 368.

(4) *Prov. of West Bengal v. Midnapur Zamindary*, (1949) 54 C.W.N. 677.

(5) *Madan Gopal v. Prov. of West Bengal*, (1950) 54 C.W.N. 807.

(6) *Prov. of West Bengal v. Midnapur Zamindary*, (1949) 54 C.W.N. 677.

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

*Art. 295 : Succession to Property, Assets and Liabilities of Indian States.*—While Art. 294 deals with the succession to the property and assets of the Government of India and of the Governor's Provinces under the Act of 1935, Art. 295 deals with succession to the 'property and assets' which were held by those Indian States which correspond to the States included in Part B of the 7th Schedule of the Constitution.

What distinguishes the provisions of Art. 295 from those of Art. 294 is,—that the constitutional provisions are subject to agreement between the Government of India and the Government of such a State. Subject to such agreement, the property, etc., will vest in the Union if the purposes for which the property, etc., were used before the commencement of the Constitution relate to any matter enumerated in List I ; otherwise the property, etc., will vest in the corresponding State in Part B.

**296.** Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union :

Property accruing by escheat or lapse or as *bona vacantia*.

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

*Explanation.*—In this article, the expressions "Ruler" and "Indian State" have the same meanings as in article 363.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 296 of the Constitution reproduces Sec. 174 of the Act of 1935, with verbal alterations only.

#### INDIA

*Art. 296 : Property accruing by escheat, lapse or bona vacantia.*—This Article (following the principle underlying S. 174 of the Act of 1935), lays down that property accruing by lapse, escheat or *bona vacantia* will vest in a State (in Part A or B<sup>7</sup>) if the property is situate in that State ; and in the Union if it is situate in territory outside States in Part A or B. But though situation is the primary criterion,—if the property was in fact being used for the purposes of the Union or of a State, then the vesting will be determined by such user.

(7) See Art. 264 (c), ante.



It is now to be seen what property accrued to the Crown by escheat, lapse or *bona vacantia* for want of a rightful owner.

*Escheat*.—Escheat *per defectum sanguinis* takes place when a man dies intestate, without heirs, leaving property. In England, the personal property of dissolved corporations<sup>8</sup> and friendly societies<sup>9</sup>, also goes to the Crown.

*Lapse*.—Under the Government financial rules, certain funds lapse to the Government if the rightful owners do not claim them within a certain period of time, e.g., Court deposits.

*Bona vacantia*.—This expression means that there is no apparent rightful claimant to the property,—in which case the property accrues to the Crown. In England, this happens in several cases :

(a) *Wrecks*, i.e., goods and cargo of wrecked ship which are not claimed within a year<sup>10</sup>.

(b) *Treasure trove*, i.e., “ anything of any value hidden in the soil, or in anything affixed thereto ”<sup>11</sup> which is subsequently discovered without trace of the owner.

(c) *Estrays*, i.e., wandering animals where the owner cannot be found.

(d) *Waifs*, i.e., stolen goods thrown away by a thief in flight.

Things of value lying within territorial waters to vest in the Union.

**297.** All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest in the Union and be held for the purposes of the Union.

*Art. 297 : Things of value underlying territorial waters*.—As to “ territorial water ”, see p. 33, ante.

This article lays down that though territorial waters are adjuncts of the coastal States whose territory they adjoin, things of value “ underlying ” such waters will belong to the Union, irrespective of ownership of the surface. “ Underlying ” the waters means the area lying between the surface line and the soil line of the territorial waters.

“ Other things of value ” do not include “ fisheries ” within the territorial waters which is expressly given to the States [Entry 21 of List II, read with Entry 57 of List I].

**298.** (1) The executive power of the Union and of each State shall extend, subject to any law made by the appropriate Legislature, to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts.

(2) All property acquired for the purposes of the Union or of a State shall vest in the Union or in such State, as the case may be.

#### OTHER CONSTITUTIONS

*U. S. A.*—Art. IV, Sec. 3 (2) says—

“ The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

(8) *In re Wells*, (1932) 101 L.J. Ch. 346.

(9) *Braithwaite v. A.-G.*, (1909) 25 T.L.R. 333.

(10) See Indian Merchant Shipping Act [XXI of 1923].

(11) Sec. 3 of the Indian Treasure Trove Act (VI of 1878). This Act provides the procedure under which a thing is acquired by Government as a treasure trove.

*Australia.*—See Sec. 51 (xxxi) of the Australian Constitution Act, at p. 152, *ante*.

*Government of India Act, 1935.*—Art. 298 of our Constitution corresponds to sub-Secs. (1) and (2) of Sec. 175 of the Government of India Act, 1935 [excluding the Proviso to sub-Sec. (1) of that section], which, again, was taken from Sec. 28 of the Act of 1919.

#### INDIA

*Cl. (1) : Power relating to property and contracts.*—This clause amplifies the executive power of the Union [Art. 73] and of the State [Art. 162] as regards property and contracts.

The executive power of the Union shall include power of sale, disposition or mortgage of any property held for the purposes of the Union and of purchase or acquisition of any property for the same purposes. The State Executive shall have similar powers for the purposes of the State.

This executive power shall, of course, be subject to legislation by the appropriate Legislature (*i.e.*, of the Union or State, as the case may be), relating to transfer of property [Entries 6 of List III, 18 of List II].

“*For the purposes of the Union or of the State*”.—The above expression also occurs in Entries 33 of List I and 36 of List II.

Though, generally speaking “purposes of the Union” and “purposes of the State” are co-terminous with their legislative powers, the expressions may be interpreted in a wider sense, to include whatever is *incidental* to their existence and to the exercise of their functions of a national or State Government, as the case may be<sup>12</sup>.

*Analogous Provisions.*—Under Entry 33 of List I, the Union has exclusive power for acquisition of property for purposes of the Union and Entry 36 of List II gives corresponding power to the State, Art. 31 provides the constitutional limitations subject to which compulsory acquisition may be made and Entry 42 of List III provides the legislative power relating to compensation.

The power of making contracts is subject to Art. 299.

*Cl. (2) : Vesting of the property so acquired.*—Ownership of the property *acquired* under Cl. (1) shall vest in the Union or the State case may be. The word “vest” is used in the same sense as in Arts. 294-297. Property which is merely “requisitioned” [see p. 610, *ante*] does not vest in the Union or the State.<sup>13</sup>

*Legislative power.*—As to the legislative power of the Union and the State over such property, see Entries 32 of List I and 35 of List II.

**299.** (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor or the Rajpramukh of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor or the Rajpramukh by such persons and in such manner as he may direct or authorise.

(2) Neither the President nor the Governor nor the Rajpramukh shall be personally liable in respect of any contract or assurance

(12) Cf. *A.-G. for Victoria v. Commonwealth*, (1946) 71 C.L.R. 237 (269-272).

(13) *Corporation of Calcutta v. St. Thomas School*, A.I.R. 1949 Cal. 312.

made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Cl. (1) of this article follows Sec. 175 (3) of the Government of India Act, 1935 [which again followed Sec. 30 (4) of the Act of 1915].

Cl. (2) reproduces sub-Sec. (4) of Sec. 175 of the Act of 1935, with verbal changes.

#### INDIA

Cl. (1) : *How contracts by the Union and the State shall be made and executed.*—Art. 298 (1) has already provided that the executive power of the Union and each State shall include the power of making of contracts, subject to laws made by the appropriate Legislature (Entry 7, List III). The present clause provides how such contracts are to be made and executed. “Assurances of property” generally includes all kinds of transfer.

*Formality for contracts on behalf of Government.*—When a statute provides a particular method by which a contract should be made, there must be a strict compliance with the provisions of the statute<sup>14-15</sup>. This rule would apply with all the more strictness under the Constitution.

Hence, the provisions of this article must be held to be mandatory and a contract, in order to be binding upon the Government, must be in strict conformity with this article.<sup>16</sup>

“*Expressed to be made by the President*”.—These words occurred in the Government of India Act, 1935, but not in the Act of 1919<sup>17</sup>. It seems that these words exclude the possibility of a contract by mere correspondence.<sup>18</sup> The word ‘execute’ also suggests a formal (written) contract. At any rate, where a contract is made by correspondence and it is later accepted by the Government by a resolution, it is not a contract expressed to be made by the President (or the Governor), and the other party is not bound by it.<sup>19</sup>

The contract must also be executed by a person who is authorised in that behalf, by the President, Governor or Rajpramukh, as the case may be<sup>20</sup>.

(14) *Young and Co. v. Mayor of Lemington Spa*, (1883) A.C. 517.

(15) *Kessoram v. Secretary of State for India*, (1926) 54 Cal. 969.

(16) *Deviprasad v. Secretary of State*, (1941) All. 741 (758).

(17) Under Sec. 30 (2) of the Government of India Act, 1919, there was a sharp difference of opinion as to whether the word ‘execute’ required a formal deed or merely required a writing and a contract by correspondence was valid. (i) The strict view requiring a formal deed was taken in *Municipal Corporation v. Secretary of State*, (1932) 58 Bom. 660; *Secretary of State v. Dharamgir*, (1935) 60 Bom. 42; *Krishnaji v. Secretary of State*, A.I.R. 1937 Bom. 449; *Sankara v. Secretary of State*, A.I.R. 1938 Mad. 749; *Secretary of State v. Cheltiyar*, (1926) 4 Rang. 291; *Secretary of State v. Sarin and Co.*, (1929) 11 Lah. 375.

(ii) On the other hand, correspondence and informal documents were held sufficient in *Secretary of State v. Bhagwan*, A.I.R. 1938 Bom. 168; *Deviprasad v. Secretary of State*, (1941) All. 741, provided the correspondence was carried on on behalf of the Secretary of State and that the final correspondence, constituting the contract, was executed by a person authorised by resolution in that behalf.

(18) Vide *Province of Bengal v. Puri*, (1945) 51 C.W.N. 753. (The doubt expressed in *Secretary of State v. Bhagwan* in A.I.R. 1938 Bom. 168 would not arise under the above phraseology).

(19) Cf. *G. K. Gas Plant v. Emperor*, A.I.R. 1947 F.C. 38.

(20) *Perumal v. Province of Madras*, A.I.R. 1950 Mad. 195; *Sankara v. Secretary of State*, A.I.R. 1938 Mad. 749.



*Illustrations.*

1. A contract on a printed form headed 'Government of Bengal' in the form of a letter addressed to a seller, confirming a purchase of grams on behalf of the Government, was signed by the Food Grains Purchasing Officer, Bengal. *Held*, the document did not purport to be a contract expressed to be made by the Governor of Bengal as required by Sec. 175 (3) of the Government of India Act, 1935, and was, accordingly, not binding on the Provincial Government.<sup>21</sup>

2. The Superintendent of a Government oil factory wrote to a merchant asking him to quote the lowest rate for supplying groundnut oil, which the merchant did. The Superintendent then accepted the offer and directed the merchant to supply the oil within a certain time. On default of the merchant, Government sued him in damages. *Held*, that though the Superintendent might have taken permission of the Director of Industries who alone was authorised to enter into a contract on behalf of the Government, it cannot be said that this contract was entered into by the Director of Industries. Nor did the correspondence embodying the contract show that it was entered into by the Government or on its behalf.<sup>22</sup>

— *Cl. (2) : Personal Immunity of Officers for Government contracts.*—Excepting the present clause, there is no provision in our Constitution to exempt officials<sup>23</sup> from personal liability for acts done or purported to be done in the exercise of their official duties. The present clause, following English law (*see* under Art. 300, *post*), exempts officials as well as the Executive heads from personal liability for contracts made or executed 'for the purposes of this Constitution,' or under any of the Government of India Acts. The words 'purporting to be' which occur in Cls. (1) and (4) of Art. 361, *post*, are absent from Art. 299 (2). In the result, in cases of excess of jurisdiction, where it is proved that the purpose for which the contract was made is not within the 'purposes of this Constitution,' the officer will be personally liable, notwithstanding the *bona fides* of his intention.

**300.** (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution—

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

## OTHER CONSTITUTIONS

*England.*—Under the Common law of England, "the King can do no wrong," and accordingly, no action lay against the Crown for *tortious* acts of its servants,—

(21) *Province of Bengal v. Puri*, (1945) 51 C.W.N. 753, Clough, J.

(22) *Perumal v. Province of Madras*, A.I.R. 1950 Mad. 195.

(23) Of course, there is immunity of the Executive heads of the Union and the States, under Art. 361, *post*.

the public officials. Nor are the public officials or their departments liable in their *public capacity* for wrongs committed by the officials, for the wrongs of a servant, at common law, are the wrongs of his master and so the immunity of the Crown prevents any action also against the public officials in their official capacity or the Departments,<sup>21</sup> but the official himself would be *personally* liable for torts committed in the discharge of his official duties on the principle that "the civil irresponsibility of the supreme power to tortious acts could not be maintained with any show of justice if its agents were not personally responsible for them." So, under the Common law, a subject who was injured by some wrongful act committed by a public servant or some Department of the State, had to be contented with whatever relief he could get in an action brought against the particular official or officials who were directly responsible for that wrongful act. The State had no liability at all for any negligence or default committed by the Government and its members against the subject.

The above immunity of the Crown (*i.e.*, non-suability of the State) for the *torts* of its servants has been abolished by the Crown Proceedings Act, 1947 [10 and 11 Geo. VI, c. 44], which makes the Crown liable for the torts of its officers in the same way as a private employer. Of course, this liability is of the Crown as the head of the State and not personally. The passing of this Act practically introduces in England the Continental theory of State liability for wrongs committed to the subject by the officers of the State. It is also to be noted that the remedy available under this Act is not by a petition of right but by a regular action as in the case of a private wrong-doer, and in the ordinary Courts.

In *contracts*, the immunity of the Sovereign does not incapacitate the sovereign from entering into contracts. But in the absence of statutory liability, no regular action can still be brought either against the Crown or against the official<sup>25</sup> through whose agency the contract is made. Remedy lies only by a *petition of right* to the Crown.<sup>1-9</sup>

*Australia.*—Sec. 78 of the Constitution lays down :

"The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power."

(a) An action lies against the Commonwealth in contract or tort, in the ordinary manner, by a subject or a State<sup>10</sup>. Thus, the Commonwealth is responsible for the tortious acts of its servants, when the person doing it is performing a *ministerial* duty<sup>10</sup>. Money realised without authority, may be recovered by action.<sup>11</sup> But the Commonwealth would not be liable for wrongful arrest by a constable, because this is not a ministerial duty<sup>12</sup>, nor for a nuisance in connection with the location of a Commonwealth building<sup>13</sup>, nor action would lie where the officer has done the wrong in the performance of a quasi-judicial duty, *e.g.*, the refusal of a Collector of customs to pass certain entries, even if the refusal be *mala fide*<sup>14</sup>.

(b) Similarly a State may be sued in contract or in tort without its consent.<sup>15</sup>

[As to laws made by Parliament under this section, see Part IX of the Judiciary Act, 1903].

The maxim "King can do no wrong" has not been applied in Australia<sup>16</sup>, by reason of Secs. 56-64 and 75-78 of the Constitution Act.

(24) *Bainbridge v. Postmaster-General*, (1906) 1 K.B. 178.

(25) *Macbeath v. Haldimand*, (1786) 1 Term. Rep. 172.

(1-9) *Fletcher v. The Queen*, (1865) 6 B. & S. 257.

(10) Wynes, *Legislative and Executive Powers*, p. 325.

(11) *Sargood Bros. v. Commonwealth*, (1910)

18 C.L.R. 258.

(12) *Enver v. The King*, 3 C.L.R. 969.

(13) *Davidson v. Walker*, 1 S.R. (N.S.W.) 196.

(14) *Baume v. Commonwealth*, (1906) 4 C.L.R. 98.

(15) *Commonwealth v. New S. Wales*, (1923) 32 C.L.R. 200.

(16) *Shaw Savill, Ltd. v. Commonwealth*, (1940) 66 C.L.R. 344 (352).

*Government of India Act, 1935.*—Sec. 176 (as adapted in 1947) of the Act was as follows :—

“(1) The Dominion may sue or be sued by the name of the Dominion of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Dominion Legislature or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.”<sup>17</sup>

#### INDIA

*Art. 300 : Suits and Proceedings against the Government.*—This article provides that the Union of India and the Governments of States shall be juristic personalities for purposes of suits or proceedings, just as the Secretary of State in Council was, prior to the Government of India Act, 1935.

Though the word “sue” is used, the article is not confined to “suits” or proceedings initiated by plaint, but to all proceedings before a Court of law by which a civil right may be established.<sup>18</sup>

Though the Union and the Government of a State are empowered to sue or be sued by this article, the Constitution itself does not lay down the circumstances in which such actions lie. The power to provide them is left to the Legislatures of the Union and the respective States, and, subject to such legislation, the existing law relating to this matter will continue, as “if this Constitution had not been enacted.”

Under Art. 131 (pp. 390-5, *ante*) we have already discussed the principles relating to suability of the Union and the States *inter se*. In the following pages, we shall discuss the suability of the Union and the States at the instance of individuals.

“*Had not this Constitution been enacted.*”—In order to appreciate the significance of these words, we must trace the history of the Indian administration from the time of the East India Company.

In 1765, the East India Company acquired the Dewani from the Moghul Emperor, and from that time up to 1858, the Company had a dual character, *viz.*, that of a trader as well as of a sovereign inasmuch as it obtained the right of fiscal and general administration of the country from the grant of the Dewani. By the Charter Act of 1833, the Company came to hold the Government of India in trust for the British Crown. In 1858, the Crown assumed sovereignty over India and took over the Government of India from the hands of the East India Company. Sec. 65 of the Government of India Act, 1858, declared the Secretary of State in Council to be a “body corporate” for the purposes of suing and to be sued and provided—

“Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Government of India Act, 1858, had not been passed.”

The above provision was reproduced in Sec. 32 of the Government of India Act, 1915.

Sec. 176 (1) of the Government of India Act, 1935, also reproduced the same provision with two points of difference—(a) Instead of the Secretary of State in Council, the Federation of India<sup>19</sup>, and the Provincial Governments themselves were made liable to be sued in like cases where the Secretary of State might be sued under the previous Acts. (b) The liability of the Governments was ‘subject to any provisions’ of any Act that might be passed by the Federal Legislature or the Provincial Legislature, as the case might be.

(17) Sub-sec. (2) was omitted by the India (Provisional Constitution) Order, 1947.

(18) Cf. *Rao v. Khusaldas*, A.I.R. 1949 Bom. 277 (289, 301).

(19) Substituted by the expression of “Dominion of India” by India (Provisional Constitution) Order, 1947.



So, whether under the law existing prior to the Constitution or under the Constitution, in order to make the Government liable in a suit brought by a citizen, the question that has got to be answered is—

“Would such a suit lie against the East India Company, had the case arisen prior to 1858?”

*Contract.*—In India, direct suit has been allowed against the East India Company, the Secretary of State or the existing Governments in matters of contract, instead of a petition of right.<sup>20</sup> The Government of India Acts (section 30 of the Act of 1919 and Sec. 175 of the Act of 1935) expressly empowered the Government to enter into contracts with private individuals and the corresponding provision in the Constitution is Art. 298 (1). And in all these Constitution Acts, it is provided that the person making the contract on behalf of the Government shall not be personally liable in respect thereof [*vide* Sec. 175 (4) of the Act of 1935, and Art. 299 (2) of the Constitution].

Subject to statutory conditions or limits, thus, the contractual liability of the State, under our Constitution, is the same as that of an individual under the ordinary law of contract.

*Torts.*—The liability of the State under the existing law, for actionable wrongs committed by its servants, cannot be so simply stated as in the case of contracts. As will appear from below, the state of the law is unnecessarily complicated by reason of its being founded on the position of the British Crown under the Common Law and of the East India Company upon its supposed representation of the Sovereignty of the Crown, both of which have become archaic, owing to changes in history and in law.

We have already seen that under the *Common law of England*, “the King can do no wrong”, and accordingly, no action lies against the Crown for tortious acts of its servants,—the public officials. So, under the Common law, a subject who was injured by some wrongful act committed by a public servant or some Department of the State, had to be contented with whatever relief he could get in an action brought against the particular official or officials who were directly responsible for that wrongful act.

The above doctrine of immunity of the Sovereign was extended to the *East India Company* in respect of its “sovereign acts.” It has been pointed out at the outset that since 1765 the East India Company had a dual character, *viz.*, that of a trader and that of a Sovereign. Hence, the East India Company was held to be not liable for acts done by the Company or its servants, in the exercise of its ‘sovereign powers,’ and, consequently, the Company’s successor, the Secretary of State in Council was also not liable in like cases. The liability lay only for acts which could be done by the Company in its trading capacity, *i.e.*, in the course of transactions in which any private person (not being a Sovereign) could engage. This was laid down in the leading case of *The P. and O. Steam Navigation Co. v. Secretary of State*<sup>21</sup>, and the existing law is built up of a body of subsequent cases decided on the authority of this leading case.

It should be pointed out at the beginning that the law stated below relates to the liability of the State towards its citizen, and has nothing to do with the transactions between the Government of India and other independent States which have been given immunity from the municipal law, under the doctrine of “Act of State.”<sup>22</sup>

But whether in England or in India, there is no such thing as an ‘Act of State’ between the State and its subjects.”<sup>23</sup>

(20) Cf. *Rangachari v. Secretary of State*, (1937) 64 I.A. 40; *Venkata v. Secretary of State*, (1937) 64 I.A. 55.

(21) (1861) 5 Bom.H.C.R. App. A.

(22) *Secretary of State v. Kamachee*, (1859) 13

Moo.P.C. 22; *Madhava v. Secretary of State*, (1904) 31 I.A. 239.

(23) *Entick v. Carrington*, (1765) 19 S.T. 1066; *Eshugbai v. Government of Nigeria*, (1931) A.C. 662 (671).

Nevertheless, there is in India immunity of the Government for 'acts done in the exercise of its *sovereign functions*,' under the historical immunity of the East India Company for such acts. As I have stated at the outset, in order to make the Government of India or a Provincial Government liable, the person aggrieved has to satisfy the Court that the suit would lie against the East India Company, had the case arisen before 1858.

Thus, it has been held—

(A) No action lies against the Government for injury done to an individual in the course of exercise of the *sovereign functions* of the Government, such as the following :

(i) Commandeering goods during war<sup>24</sup> ; (ii) making or repairing a military road<sup>25</sup> ; (iii) administration of justice<sup>1</sup> ; (iv) improper arrest, negligence or trespass by Police officers<sup>2</sup> ; (v) wrongful refusal by officers of a Revenue Department to issue licence to the plaintiff, causing him damage<sup>3</sup> ; (vi) negligence of officers of the Court of Wards in the administration of an estate under its charge<sup>4</sup> ; (vii) wrongs committed by officers in the performance of duties imposed upon them by the Legislature<sup>5</sup>, unless, of course, the statute itself prescribes the limits or conditions under which the executive acts are to be performed<sup>6</sup> ; (viii) loss of moveables from Government custody owing to negligence of officers<sup>7</sup>.

(B) On the other hand, a suit lies against the Government for wrongs done by public servants in the course of transactions which a trading company or a private person could engage in<sup>8</sup>, such as the following :

(i) Injury due to the negligence of servants of the Government employed in a dockyard<sup>9</sup> ; (ii) trespass upon or damage done to private property in the course of a dispute as to a right to land between Government and the private owner, even though committed in the course of a colourable exercise of statutory powers<sup>9</sup> ; (iii) Whenever the State has benefited by the wrongful act of its servants whether done under statutory powers or not, the State is liable to be sued for *restitution* of the profits unlawfully made, just as a private owner<sup>10</sup>, e.g., where Government retains property or moneys unlawfully seized by its officers, a suit lies against the Government for its recovery<sup>11</sup>, with interest<sup>12</sup> ; (iv) defamation contained in a resolution issued by Government<sup>13</sup>.

A little reflection would show that the above state of the law is not clear and certain. As Seshagiri Ayyar, J., observed in *Secretary of State v. Cockraft*<sup>14,15</sup>, there is no authoritative definition of what are 'sovereign functions'. No doubt, the constitution and control of various departments of the State are instances of the exercise of Sovereign powers. But as to other functions, it is difficult to determine in individual instances, whether it is done in the exercise of sovereign functions or not, as even Sir Barnes Peacock recognised in *P. and O. Steam Navigation Co.'s case*<sup>8</sup>. "Sovereign

(24) *Kesoram v. Secretary of State*, (1926) 54 Cal. 969.

(25) *Secretary of State v. Cockraft*, 1914) 39 Mad. 351.

(1) *Mata Prasad v. Secretary of State*, (1929) 5 Luck. 157.

(2) *Kader Zillany v. Secretary of State*, (1931) 9 Rang. 375; *Shivabhanjan v. Secretary of State*, (1904) 28 Bom. 314; *Ross v. Secretary of State*, (1913) 37 Mad. 55.

(3) *Nobin v. Secretary of State*, (1875) 1 Cal. 11.

(4) *Secretary of State v. Sreegoonda*, (1932) 36 C.W.N. 606.

(5) *Secretary of State v. Ram*, (1933) 37 C.W.N. 957; *Ross v. Secretary of State*, (1913) 37 Mad. 55; *Shivabhanjan v. Secretary of State*, (1904) 28 Bom. 314 (325).

(6) *Secretary of State v. Hari*, (1882) 5 Mad. 273.

(7) *Ram Ghulom v. U. P. Government* A.I.R. 1950 All. 206.

(8) *P. & O. Steam Navigation Co. v. Secretary of State*, (1861) 5 Bom.H.C.R. App. A.

(9) *Secy. of State v. Moment*, (1912) 40 I.A. 48.

(10) *Bank of Bengal v. United Co.*, (1831) Bingnell 87; *Municipal Corporation of Bombay v. Secy. of State*, (1932) 36 Bom.L.R. 568 (604).

(11) *Kailas v. Secretary of State*, (1912) 40 Cal. 452; *Shivabhanjan v. Secretary of State*, (1904) 28 Bom. 314.

(12) *Wasappa v. Secretary of State*, (1915) 40 Bom. 200.

(13) *Jehangir v. Secretary of State*, 6 Bom.L.R. 131.

(14,15) (1914) 39 Mad. 351 (359).

powers" according to his Lordship "are powers which *cannot be lawfully exercised except by a Sovereign power.*" But this is a negative definition and itself begs the question "what are the powers which can be exercised by a Sovereign or by a private individual."

In fact, it is highly artificial to hold that the State would not be liable for wrongs done in course of construction or repair of a military road<sup>16</sup>, but would be liable for similar acts done in course of construction or repair of non-military roads, made for the use of the public. Nor is the principle quite clear when the local authorities are held liable for acts done in connection with municipal or other local roads on the ground that "Municipalities do not exercise purely sovereign functions".<sup>17</sup> Seshagiri, J., "sought to draw the line with reference to *profit* when his Lordship observed that the mere fact that a function or duty is undertaken by the State for interests of the public will not make it a sovereign act, particularly if some profit is derived by the State from the undertaking, as in the case of a Railway.<sup>18</sup> But even that test, it is submitted, is not a fully satisfactory test, for, there are many acts which may be undertaken by the State simply for the public benefit, without any idea of profit, e.g., the construction of civil roads, tanks and wells and other amenities for the citizens, which can as well be provided by private individuals, so that it cannot be said that "these acts could not be done except by a private individual."

The reference to a commercial undertaking being unsatisfactory, we are bound to come to the conclusion that the State is liable *for all acts other than those* done by it in the exercise of its Sovereign functions. This seems to have been suggested by the decision of the Judicial Committee in *Secretary of State v. Moment*<sup>19</sup>, but it has nowhere been so clearly stated, as yet. The difficulty was realised by Turner, C.J., and Ayyar, J., in *Secretary of State v. Hari*<sup>20</sup>, and their Lordships asserted that the Secretary of State should be held liable for all acts of its servants, excepting those that are technically referred to as "Acts of State". But the other High Courts have not been able to agree. Thus in *McInerny v. Secretary of State*<sup>21</sup>, Fletcher, J., held that an individual had no remedy against the Government for injury suffered by him in colliding with a post negligently put up at the edge of the Calcutta maidan, while he was lawfully walking by the adjoining road. The reason given was that in putting up the post, the Government were not carrying a commercial or trading operation. Very few people in free India would be able to accept this conclusion. In *Venkata v. Secretary of States*<sup>22</sup>, the Privy Council, indeed, showed their readiness to correct the observations made in the Peninsular case<sup>23</sup>, when they said—

"... It would not be too much to assume that if the Peninsular case<sup>23</sup> laid down that the right of the subject to sue Government was limited to any consideration as to whether the East India Company could or could not have been sued *as a trading corporation*, that was not the correct statement of the law."<sup>24</sup>

As to Sec. 32 of the Government of India Act, 1915, their Lordships observed<sup>25</sup> that it merely dealt with parties and procedure, and that if an action lay against the Government, Sec. 32 did not take away that right simply because an identical right of action did not exist against the East India Company. Following these observations, the Bombay High Court has held<sup>26</sup> that Sec. 176 of the Government of India Act, 1935, is merely *procedural* and that the Government cannot claim immunity from illegal acts under the above section, e.g., an illegal requisition under the Bombay Land Requisition Ordinance<sup>27</sup>.

(16) *Secretary of State v. Cockraft*, (1914) 39 Mad. 351.

(17) *Vizagapatam Municipal Council v. Foster*, (1917) 41 Mad. 538.

(18) (1912) 24 M.L.J. 459: 40 I.A. 48: 40 Cal. 391 (P.C.).

(19) (1882) 5 Mad. 273.

(20) (1911) 38 Cal. 797.

(21) A.I.R. 1937 P.C. 31.

(22) *P. & O. Navigation Co. v. Secretary of State*, (1861) 5 Bom.H.C.R. App. A, p. 1.

(23) *Rao v. Khusalchand*, A.I.R. 1949 Bom. 277.



So, Art. 300 of the Constitution is also merely procedural<sup>24.5</sup>; and, if the above liberal interpretation is adopted by the Courts under the Constitution, the Government would be liable for all unlawful acts which are not strictly "sovereign", and an action would not be liable to be thrown away simply on the ground that an identical right of action did not exist against the East India Co.

"*Government of India*" and "*Union of India*".—The Union of India is the legal entity that is created by Art. 1 of this Constitution, and the property and assets vested in the Crown for the purposes of the Government of the Dominion of India as well as property acquired shall vest, under other provisions of this Chapter in the Union [Art. 294 (a)]. This expression "*Government of India*" is not defined in the Constitution. Probably it occurs for the first time in the Constitution, in Art. 12. Obviously it refers to the Executive organ of the Union<sup>24.5</sup>. Art. 294 (b) says that the rights, liabilities and obligations of the Government of the Dominion of India shall be those of the Government of India, under the Constitution. Hence, the right to sue and the obligation to be sued belongs to the "*Government of India*", as the opening words of Art. 300 (1) says. But the party in the suit will be named the "*Union of India*"<sup>1</sup>.

"*Corresponding Province*", "*Corresponding Indian State*".—See Art. 366 (7), *post*.

## PART XIII

### TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA

Freedom of trade, commerce and intercourse.

**301.** Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

#### OTHER CONSTITUTIONS

*U. S. A.*—In the Constitution of the United States there is no express provision guaranteeing freedom of inter-State trade and commerce but Congress is empowered to "regulate commerce" among the several States [Art. 1, Sec. 8 (3)], and it has been judicially interpreted that the above power of Congress to regulate inter-State commerce is plenary and exclusive<sup>2</sup>, so that the silence of Congress on any particular respect upon this matter is an implication that in such respect, the matter is to be free from regulation or restraint by the States<sup>3</sup>.

*Australia*.—Sec. 92 of the Commonwealth of Australia Act says :

"On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

*Canada*.—Sec. 121 of the British North America Act provides :

"All articles of the growth, produce or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

*South Africa*.—Sec. 136 of the South African Constitution Act says :

"There shall be free trade throughout the Union . . . ."

*Burma*.—Art. 18 of the Constitution of Burma, 1948, says :

"Subject to regulation by the law of the Union trade, commerce and intercourse among the units shall be free :

Provided that any unit may by law impose reasonable restrictions in the interests of public order, morality, health or safety."

<sup>24-5</sup>) Cf. Constituent Assembly Debates VIII, p. 902.

(1) See the 2nd Proviso to Art. 361 where we again find "proceedings against the Govern-

ment of India."

(2) *Brown v. Maryland*, (1827) 12 Wheat. 419.

(3) *Marshall v. Ogden*, 9 Wheat. 1; *Welton*

*v. Missouri*, 91 U.S. 275 (282).

*Need for Freedom of Inter-State Trade, Commerce and Intercourse.*—The great problem of any federal structure is to prevent the growth of sectional and local interests which are inimical to the interests of the nation as a whole. The strength of the Union may be achieved only by minimising inter-State barriers as much as possible, so that the people may feel that they are the members of one nation, though they may, for the time being, be residents of particular geographical divisions of the country. One of the means to achieve this object is to guarantee to every citizen the freedom of movement throughout the territory of the Union, and also to reside and settle in any part thereof, which we have already noticed.<sup>4</sup>

No less important is the allied freedom of every citizen to trade with any part of the country. Explaining the need of this freedom, the Privy Council observed in *James v. Commonwealth of Australia*<sup>5</sup>.

“The idea starts with the admitted fact that Federation in Australia was intended (*inter alia*) to abolish the frontiers between different states and create one Australia. That conception involved freedom from customs duties, imposts, border prohibitions and restrictions of every kind; the people of Australia were to be free to trade with each other, and to pass to and fro among the States, without any burden, hindrance or restriction based merely on the fact that they were not members of the same State.”

*The meaning of ‘trade,’ ‘commerce,’ and ‘intercourse.’*—The term ‘intercourse’ is not used in the *United States Constitution*. In *Australia*, it has been interpreted to mean *non-commercial* intercourse<sup>6</sup>, e.g., travelling between one State and another by tourists, in short, to include all migration or movement of persons from one State to another.<sup>7</sup> Freedom of inter-State intercourse thus includes the ‘individual freedom of movement’ of every citizen of India ‘from State to State,’<sup>7</sup> which is already guaranteed by Art. 19 (1) (d).<sup>8</sup>

In a popular or narrower sense, ‘commerce’ is sometimes used to refer to external trade or dealings with other countries, while ‘trade’ refers to internal trade, i.e., mutual traffic and dealings amongst citizens of the same States<sup>9</sup>. But that distinction would not be of help in the present context of inter-State trade and commerce, where both the terms are used to refer to internal dealings.

Broadly speaking, it may be said that ‘trade’ is narrower than ‘commerce’ and technically means ‘buying and selling.’<sup>10</sup> ‘Commerce’ is thus wider than trade or business in which persons bought, sold, bargained and contracted.<sup>11</sup> What is essential for commerce is *transmission* and not the realisation of profit or intention to gain<sup>12</sup>. Thus, importation of a commodity for personal consumption is also commerce.<sup>13</sup>

Thus, in the *United States*, ‘commerce’ has been interpreted to include all forms of *transportation*, by land, air or water, over the telegraph, telephone, or wireless<sup>14</sup>, and every negotiation, contract, trade and dealing between citizens, which causes such transportation.<sup>14</sup> The commodity transported may be either tangible or intangible, such as a telephonic message<sup>14</sup>; or gas<sup>15</sup>, or tuition (by post)<sup>16</sup>. Nor is commerce confined to mere exchange of *goods*; it includes the transportation of men<sup>17</sup> or animals,<sup>18</sup> by common carriers<sup>19</sup>, or by private conveyance<sup>20</sup> or on foot<sup>18</sup>.

So interpreted, commerce comes nearly to be identified with ‘intercourse.’

(4) See p. 94, ante. *Gopalan v. Secy. of State* (1950) S.C.J. 174 (293).

(5) (1936) A.C. 578 (630).

(6) *R. v. Smithers*, (1912) 16 C.L.R. 99 (113).

(7) *Duncan v. Queensland*, (1916) 22 C.L.R. 556 (636).

(8) *Gopalan v. State of Madras*, (1950) S.C.J. 174 (180-1, 268, 292-3).

(9) Tomlin's Law Dictionary.

(10) *San Pauls Ry. v. Carter*, (1896) A.C. 38.

(11) *U.S. v. S.E. Underwriters' Association*, (1944) 322 U.S. 533.

(12) *U. S. v. Hill*, (1919) 248 U.S. 420.

(13) *U. S. v. Simpson*, (1919) 252 U.S. 465.

(14) *Pensacola Tel. Co. v. W. U. Tel. Co.*, (1877) 96 U.S. 1.

(15) *Pennsylvania Gas Co. v. Public Service Comm.*, (1919) 252 U.S. 23.

(16) *International Text-Book Co. v. Pigg*, (1910) 217 U.S. 91.

(17) *Hoke v. U.S.*, (1913) 227 U.S. 308.

(18) *Kelly v. Rhodas*, 188 U.S. 1.

(19) *Second Employers' Liability cases*, (1912) 223 U.S. 1.

(20) *U. S. v. Simpson*, (1919) 252 U.S. 465.

"Commerce is undoubtedly traffic, but it is something more; it is intercourse."<sup>21</sup>

"Commerce among the States consists of *intercourse* and traffic between their citizens, and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."<sup>22</sup>

"There may be a movement of persons as well as of property; that is, a person may move or be moved in inter-State commerce."<sup>23</sup>

The result of decisions is beautifully summed up in a recent case, thus<sup>24</sup>;

"Not only, then, may transactions be commerce though *non-commercial*,<sup>25</sup> they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the *flow* of anything more tangible than electrons or information".

The above wide interpretation of the words 'trade and commerce' has been followed in *Australia*, as to include—

"the mutual communings, the negotiations verbal or by correspondence, the bargain, the transportation and the delivery are all parts of that class of relations between mankind which the world calls 'trade and commerce'."<sup>1</sup>

Thus, the expression is not confined to mere act of transportation of merchandise or the mere operation or occupation of buying and selling, but includes, 'intercourse' for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities<sup>2</sup>; in short, all commercial *traffic* and *intercourse* and the *persons* who conduct it as well as the *means* and *instruments* used<sup>3</sup>. So, it was held that under the power relating to 'trade and commerce' the Commonwealth Parliament is competent to regulate the engagement, service and discharge of transport workers and to provide for their licensing and protection, and to prohibit employment of unlicensed workers<sup>4</sup>. Even the business of banking has been held to come under this expression<sup>5</sup>.

It is to be noted that even in *England*, the word '*trade*' has been used to mean something more than the occupation of mere buying and selling<sup>6</sup>.

It is, therefore, to be expected that the words 'trade and commerce' will be understood to have been used in *our Constitution* in the sense it has been used in the American and Australian Constitutions as explained above, for, as the Australian High Court observed, the import of these words is essentially the same to an American, English or Australian merchant or lawyer<sup>1</sup>.

*What freedom of Inter-State Trade and Commerce means.*—The freedom of inter-State trade and commerce means that no State shall, either directly or indirectly, impose a *prior restraint* upon trade, and commerce as between itself and another. The restraint is equally bad, whether it attacks inter-State trade alone or in company with the State's own domestic trade. Again, *subsequent* punishment, in so far as it operates, as a prior restraint and is likely to deter the trade by fear of punishment, is also an infringement of the freedom.<sup>1</sup> It includes the freedom not only of the *instruments* by which inter-State trade is carried on, but also of the *persons* engaged in it, with respect to the act of trade and commerce.<sup>7</sup> In short, it means that—

"Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law."<sup>8</sup>

Thus, in the *United States*, it has been held that a State cannot impose a tax upon its citizens on the occupation of importing goods from other States, *as such*<sup>9</sup>.

(21) *Gibbons v. Ogden*, (1824) 9 Wh. 1.

(22) *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 196 (203).

(23) *Hoke v. U. S.*, (1913) 227 U.S. 303 (320).

(24) *U. S. v. S. E. Underwriters' Assn.*, (1944) 322 U. S. 533 (550).

(25) As to non-commercial intercourse held to be commerce, see also *Covington Bridge Co. v. Kentucky*, (1894) 154 U.S. 201; *International Text Book Co. v. Pigg*, (1910) 217 U.S. 91.

(1) *McArthur v. Queensland*, (1920) 28 C.L.R. 530 (547).

(2) *James v. Cowan*, (1932) 43 C.L.R. 386 (418) (P.C.).

(3) *Roughley v. N. S. W.*, (1928) 42 C.L.R. 179.

(4) *Victorian Stevedoring Co. v. Dignan*, (1931) 48 C.L.R. 73.

(5) *Australia v. Bank of N.S.W.* (1949) 2 A.E.R. 755 (767) P.C.

(6) *Bank of India v. Wilson*, (1877) 3 Ex. D. 108 (113); *Commissioners of Taxation v. Kirk*, (1907) A.C. 589 (592).

(7) *Sherlock v. Ailing*, 93 U.S. 99.

(8) *New South Wales v. Commonwealth*, (1915) 20 C.L.R. 54.

(9) *Brown v. Maryland*, (1827) 12 Wheat. 419-



Nor can it tax the citizens of other States for a license or privilege to carry on commerce with itself<sup>10</sup>.

Any State act which may even *indirectly* discourage inter-State commerce would be held unconstitutional in the *United States*. Thus, an Act of West Virginia was declared invalid on the ground that it gave preference to its own citizens in the use of natural gas produced in that State<sup>11</sup>. On the same principle, it has been held in *Australia* that if a State acquires the whole of a commodity with the real object of preventing it being sent to other States, the acquisition is invalid.<sup>12</sup>

But the prohibition is against restraint of inter-State trade and commerce, *as such*. It does not prevent or curtail the power of a State to impose general taxes, under its taxing powers. Thus, when a resident citizen engages in *general* business, subject to a particular tax, the fact that for the time being the business chances to consist in negotiating sales of goods made in another State, does not make such tax an imposition on inter-State commerce<sup>13</sup>. Again, though a State cannot demand a licence fee from citizens of other States selling goods *by sample* within its limits<sup>14</sup>, it can tax or impose a licence fee if the article offered for sale is in the *possession* of the seller (even if it be the product of another State), provided that tax is a general tax on all sales within the State<sup>14-a</sup>.

But freedom of trade or intercourse does not include the freedom of *choice of means*, *i.e.*, the right to transport goods or to travel to a place in whatever vehicle or by whatever route or at whatever time or at whatever speed he may choose. A non-discriminatory limitation as to choice of means<sup>15</sup> is not necessarily inconsistent with the freedom guaranteed by Art. 301. This is made clear by Arts. 302-3<sup>16</sup>.

*Analogous Provisions.*—In this connection we should note that under *our* Constitution, while the States have the power to impose taxes on sale or purchase of goods (Entry 54, List I, Schedule VII), the State Legislature is absolutely prohibited from imposing this tax where such sale or purchase takes place “outside the State” and the delivery of the goods has also taken place outside the State seeking to impose the tax [Art. 286 (1)]. On the other hand, the State Legislature has no power without the authority of a Union law, to impose a sales tax on sale or purchase of goods in the course of inter-State commerce, under Art. 286 (2). [See p. 612, *ante*].

“*Throughout the territory of India.*”—This expression is wider than the Australian phrase—“among the States” [see p. 636, *ante*]. It refers to the “territory of India” as defined in Art. 1 (3) [p. 27, *ante*] and lays down that there shall be no interference with the freedom of trade, commerce and intercourse between *any* part of India and another<sup>17</sup> (not merely between one State and another), as is not authorised by any provision of Part XIII. So, restrictions upon the freedom ■ between different parts of the same State are also bad.

*Analogous Provision.*—The same expression occurs in Art. 19 (1) (d) [see p. 67, *ante*].

*Restrictions upon the freedom.*—We have seen [p. 68, *ante*] that there is no freedom which is absolute in the sense of being supreme over the public interest. So, the freedom of inter-State trade and commerce and intercourse must also be subject to restrictions in the public interest, made by the national Legislature as well ■ by the State Legislatures, within certain limits, *i.e.*, without affecting the freedom of trade, commerce and intercourse *as such*. The opening words of Art. 301—

(10) *Moran v. New Orleans*, 112 U.S. 69.

(11) *Pennsylvania v. W. Virginia*, (1923) 262 U.S. 553.

(12) *James v. Cowan*, (1932) A.C. 542; *Peenut Board v. Rockhampton Board*, (1933) 48 C.L.R. 266.

(13) *Ficklen v. Shelby Taxing District*, 145 U.S. ■.

(14) *Robbins v. Shelby County*, (1887) ■ U.S.

489.

(14-a) *Emert v. Missouri*, 156 U.S. 296.

(15) *Gilpin v. Commissioner*, (1935) 52 C.L.R. 189 (213).

(16) *Duncan v. Vizzard*, (1935) 53 C.L.R. 493 (508).

(17) Cf. *Gopalan v. State of Madras*, (1950) S.C.J. 174 (268).

“subject to the other provisions of this Part” make this clear. The limitations imposed upon inter-State freedom of trade, commerce and intercourse, by the other provisions of Part XIII are—

(a) It is subject to non-discriminatory restrictions imposed by Parliament, in the public interest [Art. 302].

(b) Even discriminatory or preferential provisions may be made by Parliament, for the purpose of dealing with a scarcity of goods arising in any part of India [Art. 303 (2)].

(c) Reasonable restrictions may be imposed by a State “in the public interest” [Art. 304 (b)].

(d) Non-discriminatory taxes may be imposed by States on imported goods similarly as on intra-State goods [Art. 304 (a)].

(e) Restrictions imposed by “existing laws” except in so far as provided otherwise by order of the President [Art. 305].

(f) Existing restrictions imposed by States in Part B, to continue for a period of 10 years from commencement of Constitution, if an agreement to that effect is made between the Governments of India and such States [Art. 306].

**302.** Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

Power of Parliament to impose restrictions on trade, commerce and intercourse.

#### OTHER CONSTITUTIONS

*U. S. A.*—We have already noticed that there is no constitutional guarantee of freedom of trade, etc. and that Congress has plenary powers to ‘regulate’ inter-state commerce. The only limitations upon that power of Congress are provided in Art. 1, S. 9 (5)-(6), [see p. 642, *post*].

*Australia.*—It has been finally held by the Privy Council that the freedom of inter-State trade, commerce and intercourse, as guaranteed by section 92 of the Australian Constitution Act, is binding also on the Commonwealth Parliament<sup>20</sup>.

Hence, it would not be possible for the Commonwealth Parliament to make laws—(a) Prohibiting the entry of ex-criminals from one State into another<sup>18</sup>.  
(b) Providing a compulsory marketing scheme for inter-State producers<sup>19</sup>.

The Privy Council, however, limited their decision<sup>20</sup>, by saying that the Commonwealth Parliament was prohibited only from interfering with the freedom ‘in passing across the State borders’, and that they reserved decision upon the question whether the above prohibition would be overridden by the maxim “*salus populi est suprema lex*”, and whether it would be competent for Parliament to make regulations in the interest of public health, sanitation, famine and the like. As a matter of fact, in subsequent cases, exceptions have been engrafted upon the above ruling of the Privy Council, by laying down that—

(a) The Commonwealth Parliament is entitled to forbid ‘objectionable trade practices irrespective of any State boundary’, e.g., the practice of exchanging ‘gifts’ for coupons<sup>21</sup>, sale of shares in lotteries conducted in other States<sup>22</sup>, or gambling.<sup>23</sup>

(18) *Fox v. Robbins*, (1912) 16 C.L.R. 99.  
(19) *Peanut v. Rockhampton Harbour*, (1933) 48 C.L.R. 266.  
(20) *James v. Commonwealth*, (1936) 55 C.L.R. 1.  
(54) P.C., *Commonwealth v. Bank of N.S.W.*

(1949) 2 A.E.R. 755 P.C.  
(21) *Home Benefits, Ltd. v. Crafter*, (1938) 61 C.L.R. 701.  
(22) *Ex parte Wawn*, (1938) 61 C.L.R. 596.  
(23) *Ex parte Wawn*, (1939) 62 C.L.R. 457.

(b) Section 92 does not bar the exercise of any independent power of the Parliament conferred by some other provision of the Constitution, *e.g.*, the 'defence power' [section 51 (VI)], and so Parliament may control or regulate<sup>24</sup> transport in the interest of national security<sup>25</sup>, because an exercise of the 'defence power' cannot be open to attack because "*incidentally* inter-State trade was affected"<sup>1</sup>. It has, however, been held that the 'defence power' would not enable the Commonwealth Parliament to override the right granted by section 92 altogether; hence, it would not validate a *direct restriction or prohibition* of inter-state intercourse, where the restriction is only remotely connected with the purposes of defence<sup>2</sup>. In other words, under its 'defence power' read with section 51 (i), Parliament can only 'regulate' but cannot restrict or prohibit inter-State intercourse<sup>3</sup>. Thus, it cannot prohibit travel from one State to another except under a permit issued by some administrative authority<sup>2</sup>.

## INDIA]

*Art. 302 : Restrictions by Parliament in the public interest.*—It is to be noted that though the power of Parliament under Cl. (2) of Art. 303, is not subject to the prohibition against preference and discrimination, the power under Art. 302 is so subject (*vide* the opening words of Art. 303). Hence, Art. 302 empowers Parliament to impose any restrictions on the freedom of trade, etc., provided they are—(i) required in the public interest and (ii) non-discriminatory.

The absence of the word 'absolutely' from Art. 301 (*Cf.* S. 92 of the Australian Constitution Act) and the engrafting of Art. 302, relieves our Courts from any difficulty<sup>2</sup> in determining how far the other powers of Parliament, *e.g.*, as to defence, foreign affairs or the like, enable Parliament to impose restrictions upon the freedom of inter-State trade and commerce guaranteed by Art. 301. Any restriction by Parliament would be valid, provided only it was imposed 'in the public interest', *e.g.*, military necessity.<sup>25</sup>

'*Between one State and another or within any part of the territory of India*'.—The second part of this expression is required as there are 'territories' in India [Part D of the 1st Sch.], which are outside the 'States' in Parts A-C. It also means that though the ordinary legislative power of Parliament is confined to inter-State trade, it may also impose restrictions upon *intra* State trade, etc., if public interest so requires. The present article thus enlarges the normal legislative power of Parliament [*Cf.* Art. 249, *ante*].

'*Restrictions*'.—Restriction would include the power of total prohibition or exclusion if the commerce in question spreads an evil which is irresistible in nature<sup>4-6</sup> or where the traffic or commerce is unlawful, *e.g.*, carrying liquor in a public carriage for the use of passengers.<sup>7</sup>

'*Restrictions in the public interest*'.—As to 'public interest', see pp. 97-100, *ante*. This expression in the present Article would include the power—

(i) To 'forbid and punish' the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of the States from the State of origin<sup>8</sup>, *e.g.*, the kidnapping of persons of one State to another<sup>9</sup>; transmission of stolen cars<sup>8</sup>; transportation of women for immoral purposes<sup>10</sup>.

(24) *R. v. Vizzard*, (1933) 50 C.L.R. 301.  
*Riverina v. Victoria*, (1937) 57 C.L.R. 327.

(25) *Farey v. Burvet*, (1916) 21 C.L.R. 433 (454).

(1) *James v. Cowan*, (1939) A.C. 542 (558-9).

(2) *Gratwick v. Johnson*, (1945) 70 C.L.R. 1.

(3) *Milk Board v. Metropolitan Cream, Ltd.*,

(1939) 62 C.L.R. 116.

(4-6) *Reid v. Colorado*, 117 U.S. 137.

(7) *U. S. v. Hill*, (1919) 248 U.S. 420.

(8) *Brooks v. U. S.*, (1925) 267 U.S. 432.

(9) *Gooch v. U. S.*, (1936) 297 U.S. 124.

(10) *Hoke v. U. S.*, (1913) 227 U.S. 308.



(ii) To 'exclude' from inter-State trade or commerce, harmful substances, *e.g.*, impure food<sup>11</sup>; lottery tickets<sup>12</sup>, carrying of liquor in a public carriage, for the use of the passengers<sup>13</sup>; animals or persons having contagious diseases<sup>14—15</sup>.

(iii) To prohibit entry into particular areas, on military grounds<sup>15</sup>.

**303.** (1) Notwithstanding anything in Article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

#### OTHER CONSTITUTIONS

*U. S. A.*—The power of Congress to regulate inter-State commerce is subject to the following limitations :

- (a) No tax or duty may be imposed on articles *exported* from any State [Article 1, section 9 (5)].
- (b) No preference may be given to the ports of one State over those of another [Article 1, section 9(6) ].
- (c) Vessels bound to or from one State may not be obliged to clear, enter, or pay duties in another State [Article 1, Section 9 (6)].

As to the 'preference' clause, it has been held that what is forbidden is not discrimination between individual ports within the same or different States, but discrimination *between States*<sup>16</sup>. It is a mistake to suppose that Congress is forbidden to give any preference to a port in one State over a port in another. Such preference is given in every instance where it makes a port in one State a port of entry, and refuses that advantage to another port in another State. Similarly, the improvement of rivers and harbours, the erection of lighthouses, and other facilities of commerce, which operate to the advantage of particular ports are not necessarily discriminations against the States which are not so directly benefitted<sup>16</sup>, or are indirectly injured thereby<sup>17</sup>.

*Australia.*—S. 99 of the Constitution Act says—

"The Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof."

(11) *Hippolite Egg Co. v. U. S.*, (1911) 220 U.S. 45.

(12) *Champion v. Ames*, (1903) 188 U.S. 321.

(13) *U. S. v. Hill*, (1919) 248 U.S. 420.

(14) *Reid v. Colorado*, (1902) 187 U.S. 137.

(15) *Gopalan v. State of Madras*, (1915) S.C.J. 173 (268, 293).

(16) *Pennsylvania v. Wheeling Co.*, 18 How. 421.

(17) *South Carolina v. Georgia*, 93 U.S. 4.

It has been held that the prohibition against preference imposed by the above section applies only to laws and regulations of trade and commerce passed under S. 51 (i) and not under any other provision, *e.g.*, under the *defence power* of the Commonwealth<sup>18, 19</sup>.

*Government of India Act, 1935.*—S. 297 (b) of the Government of India Act, 1935, contained a similar provision against discrimination but the prohibition therein was only against Provincial Legislatures and Governments. There was no restraint upon the Federal Legislature or Government.

S. 297 of that Act was—

“(1) No Provincial Legislature or Government shall—

(a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from the province of goods of any class or description : or

(b) by virtue of anything in this Act have power to impose any tax, cess, toll or due which, between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.”

The present Article is wider inasmuch as it is a limitation upon the legislative powers of both the Federal and State Legislatures.”

#### INDIA

*Art. 303 : Limitations upon power of Parliament under Art. 302.*—This Article provides that excepting a law required to meet a situation arising from scarcity of goods, any law made by Parliament under Art. 302, and by virtue of an Entry relating to trade and commerce in any of the Legislative Lists, must be subject to one limitation, *viz.*, that it must not give any preference or make any discrimination as between one State and another.

#### CLAUSE (1).

‘*By virtue of any entry relating to trade and commerce*’.—The legislative entries relating to trade and commerce power of Parliament are—Entry 41 of List I (Trade and commerce with foreign countries . . . . .) ; Entry 42 of List I (Inter-State Trade and commerce) ; Entry 33 of List I (Trade and commerce in the products of industries where the control of such industries by the Union is . . . . . expedient in the public interest).

The words ‘by virtue of any entry relating to trade . . . . .’ make it clear that the prohibition upon Parliament to make any discrimination or to give any preference relates only to the power of Parliament relating to ‘trade and commerce’ and not upon the exercise of any other power of Parliament, not connected with trade and commerce, *e.g.*, ‘defence’. What has required a judicial decision in *Australia*<sup>19</sup> is thus expressly provided by our Constitution.

In *Australia*, it has been observed<sup>19</sup> :

“It would, indeed, be a remarkable thing for a Constitution to provide that laws for the defence of a country, at a time possibly of the most critical threat to national existence, should be limited by a requirement that they should not have the effect of giving some commercial preference to parts of the country over other parts”.

So, the prohibition against preference and discrimination in Art. 303 (1) would not apply to laws passed by Parliament under any Entry other than those mentioned above,—such as defence, currency, foreign exchange, public debt and the like. For the same reason, the prohibition does not affect the power of Parliament to make grants-in-aid (Art. 275).

Similarly, the prohibition against discrimination attaches also to the exclusive power of the State to regulate inter-State trade, *i.e.*, trade and commerce within the State (Entry 26 of List II). So, even in regulating *intra*-State trade and commerce, the States shall have no power to make such regulations as may be discriminatory in effect against the goods of other States.

#### 'PREFERENCE' AND 'DISCRIMINATION.'

(a) *Preference* means something which provides a *tangible* advantage in the court of trade or some *material* or *substantial* benefit of a *commercial* or *trading* character<sup>20</sup>. The Court is concerned not with the *purpose* of an enactment but whether it does in fact constitute a preference between one State and another in its effect<sup>21</sup>.

The preference that is prohibited is the preference of one State over another, *i.e.*,

"the preference of one locality *merely* because it is locality, and because it is a part of particular State."<sup>22</sup>

Of course, the word "State" in this context does not mean the geographical unit or the government of a State but the residents of one State, in relation to trade and commerce. Thus, if some impediment or burden is imposed upon the traders in some State or States which is not imposed on traders in other States, it is a preference.<sup>22</sup> Again, the fixing of varying prices for different States constitutes preference, whatever be the economic consequences thereof<sup>20</sup>.

But a preference that is given not merely on the ground of *locality* is not prohibited by Art. 303 (1). As the Australian High Court observed, "preference"—

"does not include a differentiation based on *other* considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities. . ."<sup>23</sup>

(b) *Discrimination*, on the other hand, means "singling out a government and specifically legislating about it"<sup>23, 24</sup>. In the words of the Australian High Court<sup>25</sup>—

"Discrimination between localities in the widest sense means that, because one man or his property is in one locality, then regardless of any other circumstances, he or it is to be treated differently from the man or property in another locality".

A statute which lays down a *general* rule applicable to all States alike, but which operates or *may* operate *unequally* and with different *results* in the several States, does not offend against the provision prohibiting discrimination<sup>1-2</sup>.

#### Illustrations

1. Certain Commonwealth Income-tax Regulations provided for ascertaining values of live-stock, according to different standards for the same class of stock in different States, *e.g.*, horses were to be valued in one State at £8, while in another State they would be valued at £15, though belonging to the same class or quality. *Held*, the Regulation was void, being discriminatory, since the sole test in determining the amount of the tax was the *situation* of the property. It was observed—"Stock are, by reason solely of their State situation, treated 'differently', by the mere fact that different standards are applied to them respectively. It does not matter whether those legal standards are arbitrary or measured, whether dictated by a desire to benefit or to injure,—the simple fact is that they are 'different', and these different legal standards being applied simply because the subject of taxation finds itself in one State or the other, there arises the discrimination by law between States, which is forbidden by the Constitution."<sup>22</sup>

2. The Commonwealth Dried Fruits Act, 1928, provided for the issue of licences for the carriage of dried fruits by authorities prescribed by regulations to be made under the Act. The Regulations, however, prescribed no such authority for two States,—Queensland and Tasmania, with the result that the owners of dried fruits in these two States could not obtain licences in the same way as other States could have, under the Act. *Held*, that though the Act itself was not discriminatory

(20) *Crowe v. Commonwealth*, (1935) 54 C.L.R. 69 (83, 86).

(21) *Commissioner of Taxation v. Moran*, (1939) 61 C.L.R. 735 (760), affirmed by *Moran v. Commr. of Taxation*, (1940) 63 C.L.R. 338 (P.C.).

(22) *Cameron v. Commissioner of Taxation*, (1923) 32 C.L.R. 68 (73).

(23-24) *New York v. United States*, (1946) 326 U.S. 572; *Melbourne Corporation v. Commonwealth*, (1947) 74 C.L.R. 31 (61).

(25) *R. v. Barger*, (1908) 6 C.L.R. 41 (110).

(1-2) *Colonial Sugar Refining Co. v. Irving*, (1906) A.C. 360.



because its provisions were general and applied equally to all States, the Regulations were *discriminatory* as against the above two States. It was nothing to say that these two States did not actually produce dried fruits. "We cannot take judicial notice of such a fact; nor can we assume a limit to the possibilities of a State trade or commerce under the changing conditions of science and inventions."<sup>3</sup>

3. The Commonwealth Excise Tariff, 1902, which allowed an exemption in the case of goods on which customs and excise duties had been paid under State legislation prior to 1901, was not a discrimination by Parliament, within the meaning of section 51 (ii) of the Australian Constitution Act inasmuch as the Commonwealth Act in question imposed a general duty, and the inequality in its operation amongst the States was not due to anything done by Parliament, but owing to duty previously imposed by the States<sup>4</sup>.

Discrimination takes place when any special burden is imposed by a State on some goods simply *because they have come from another State*<sup>5</sup>.

#### CLAUSE (2)

*Legislation for meeting scarcity of goods.*—This clause provides that the limitation imposed by clause (1) of this Article will not apply to any law made by Parliament in which it is expressly declared that the preference or discrimination (*e.g.*, fixation of different prices for different States) provided therein is necessary "for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India." Of course, without such express declaration, the discriminatory law will be invalid, being in contravention of Cl. (1).

*Analogous Provisions.*—See in this connection Entries 33-4 of List III.

Restrictions on trade, commerce and intercourse among States.

**304.** Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

#### OTHER CONSTITUTIONS

*U. S. A.*—The power of the States to impose restrictions on inter-State trade is derived from the judicial doctrine of "police power". Though the power of direct regulation of inter-State commerce is an exclusive federal subject, [p. 637, *ante*], that does not prevent a State to exercise its essential "police power" within its house, even though such exercise may *incidentally affect* inter-State commerce.

It may also be said that goods which are impure, diseased or tainted with fraud, are outside the range of "commerce" or are *extra commercium*, and are hence subject to regulation by the State under its "police power", by way of an exception to the exclusive commerce power of Congress<sup>6</sup>.

In short, though a State is prohibited from raising barriers against the free circulation of trade between itself and another, it is free to impose reasonable restric-

(3) *James v. Commonwealth*, (1936) A.C. 578, reversing (1935) 52 C.L.R. 570.

(4) *Colonial Sugar Refining Co. v. Irving*, (1906) A. C. 360.

(5) *James v. Commonwealth*, (1936) A.C. 578 (630).

(6) *Wynes*, Legislative and Executive Powers, p. 268.

tions as may be required in the public interests, *e.g.*, in the interests of health, morality, safety and the like. But the exercise of the above police power by the State is, according to judicial decisions, subject to the paramount right of the national government to regulate inter-State commerce, and is, therefore, subject to the following conditions ;

(i) that the restriction imposed is reasonable, that is to say, does not go beyond what is necessary to give effect to the legitimate purpose comprised by the expression 'police power' ;

(ii) that there is no attempt on the part of the State to discriminate against inter-State commerce as such ;

(iii) that the national government has not already legislated with respect to that matter,—in which case the federal legislation will prevail ;

(iv) that the matter is not of such a nature, that whether Congress has legislated or not relating to it, it admits only of federal action so that the silence of Congress would lead, by implication, to forbid State action relating to that matter. In other words, while a State may enact legislation which has predominantly only a *local* influence in the course of the inter-State commerce, it cannot interpose local regulation where *uniformity* is essential to the functioning of the commerce, whether or not Congress has already legislated upon that matter<sup>7</sup>.

"Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."<sup>8</sup>

Thus, to protect the health and safety of its own citizens, a State may, in the absence of federal legislation, provide for examination of railway personnel<sup>9</sup> or require protective devices<sup>9</sup> ; but, a State has no right to regulate freight rates of railways even in the absence of federal legislation<sup>10</sup>, on the ground that uniformity in inter-State transportation rates is essential to national authority.

(i) "Police power" is a comprehensive term which includes prevention of fraud and deception, public safety and morals, protection of the lives, health, comfort and convenience of the citizens.

In the absence of Congressional legislation, a State is entitled to protect its citizens from *injuries* arising from inter-State commerce.<sup>11</sup> Thus,

(a) On the ground of prevention of *fraud* a State may make regulations providing : Inspection and labelling of goods so as to prevent fraud as to quality and weight<sup>12</sup>. Licensing of agents or brokers engaged in inter-State trade to secure honest dealing and financial responsibility<sup>13</sup> or to secure their responsibility to State Courts on claims arising locally<sup>14</sup>, heavy taxation or prohibition of import of coloured oleomargarine as may resemble butter<sup>15</sup>, compulsory delivery on trial to an intending purchaser of complicated and costly farm machinery for some time before purchase, so that the dealer may not defraud the purchaser<sup>16</sup>.

(b) On the ground of *public safety*, a State may require all locomotives operating within the State, to be equipped with head lights of a particular candle-power<sup>17</sup> ; require training or physical examination of engineers and conductors of inter-State trains, to secure their competency<sup>18, 19</sup> ; provide for pilotage and police control of harbours<sup>18, 19</sup> ; require a reasonable bond of one who wishes to engage in inter-State trade of a kind which is dangerous to well-recognised local interests<sup>14</sup>.

(7) *Morgan v. Commonwealth of Virginia*, (1945) 328 U. S. 373, 377-81.

(8) *Cooley v. Philadelphia Port*, (1851) 12 How. 299.

(9) *Smith v. Alabama*, (1888) 124 U.S. 465.

(10) *Wabash R. R. v. Illinois*, (1886) 118 U.S. 557.

(11) *California v. Thompson*, 313 U.S. 109.

(12) *Armor & Co. v. N. Dakota*, (1916) 240 U.S. 510.

(13) *Hartford Accident Co. v. Illinois*, 298 U.S. 155.

(14) *Union Brokerage v. Jensen*, 322 U.S. 202.

(15) *Plumley v. Massachusetts*, (1894) 155 U.S. 461.

(16) *Advance-Rumley Thresher Co. v. Jackson*, (1932) 287 U.S. 283.

(17) *Smith v. Alabama*, (1888) 124 U.S. 465 ;

*Vandalia R. R. v. Indiana*, (1916) 242 U.S. 255.

(18-19) *Cooley v. Wardens*, 12 How. 299.

(c) For the protection of the *health and morals* of its citizens, from the injuries of inter-State trade, a State may :

make quarantine laws and regulations<sup>20</sup> ; provide for sanitary control of inter-State trains<sup>21</sup>.

(d) For the protection of the *property* of its citizens, a State may, exclude the importation of dangerous property, such as animals having a contagious disease<sup>22</sup>, or make the carriers importing such cattle liable in damages<sup>23</sup>.

But the restrictions imposed by the State must be *reasonable*, that is to say, the regulations imposed must be reasonably designed to safeguard the local public interests and must not constitute an "undue burden" on inter-State commerce. The Supreme Court explained the limits of regulation of inter-State commerce by a State under its "police power" in these words :—

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders . . . it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is *absolutely necessary* for its *self-protection*. It may not, under the cover of exerting its police powers, substantially prohibit or burden . . . inter-State commerce."<sup>24</sup>

'Burdens' upon commerce, in short, are those actions of a State which directly impair the usefulness of its facilities for such traffic.<sup>25</sup>

Thus, the Supreme Court has nullified the following State laws on the ground of their being undue burdens on inter-State commerce :

1. A Statute of Missouri totally prohibiting the conveying of cattle from other States into itself during certain seasons of the year,<sup>26</sup> even though it had the right to exclude diseased cattle.

2. A statute forbidding the sale of meat more than 100 miles away from the place of slaughter, unless the animal is inspected at the place of sale (on the ground that it needlessly prevents the introduction of sound meat killed in other States<sup>1-2</sup> ; or a statute requiring inspection of meat sold within the State 24 hours before slaughter (on the ground that it was unreasonable to suppose that other States exporting meat had no inspection arrangements and that such an extreme precaution by the importing State was not necessary to ensure a healthful meat supply)<sup>3</sup>.

3. A statute prohibiting any deaf, dumb, or crippled person to land unless the master of the vessel gave a bond of indemnity to every city in the State from loss from such landing (on the ground that the restriction was needless and most extraordinary)<sup>4</sup>.

(ii) Even where the exercise of 'police power' by a State in restriction of inter-State trade is legitimate, it cannot impose such restrictions as are *discriminatory* against the goods of other States.

Article 1, section 10 (2) says—

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

Thus, a State may not impose a tax on imported goods or on those engaged in carrying on business in selling those goods, without imposing a corresponding tax on domestic goods or traders thereof<sup>5</sup>. Again, though a State may levy a tax on *all* sales of oil or coal or on the production or the mining thereof<sup>6</sup> it may not impose a tax only on the use of oil or coal which is purchased or delivered outside its borders or used within the State to operate a boat or engine engaged in inter-State commerce.<sup>7</sup>

The only exception to imposing import duties or duties on the act of importation<sup>8</sup> without previous consent of Congress is such duties "as may be absolutely necessary for executing the inspection laws" of the State [Art. 1, S. 10 (3)]. The object of *inspection laws* is to 'improve the quality of the articles'. They act upon

(20) *Licence Cases*, (1847) 5 How. 504.

(21) *Smith v. Albana*, (1888) 124 U.S. 465.

(22) *Railroad Co. v. Husen*, (1877) 11 Pet. 102.

(23) *Missouri Ry. v. Haber*, 169 U.S. 613.

(24) *Railroad Co. v. Husen* (1877) 95 U.S. 465 (472).

(25) *Illinois C. R. Co. v. Illinois*, 163 U.S. 142.

(1-2) *Brimmer v. Reban*, 138 U.S. 78.

(3) *Minnesota v. Barber*, (1890) 136 U.S. 313.

(4) *Chy Lung v. Freeman*, 92 U.S. 275 (a case on "foreign" commerce).

(5) *Welton v. Missouri*, 91 U.S. 275.

(6) *Askren v. Continental Oil Co.*, (1920) 252 U.S. 444.

(7) *Helson v. Kentucky*, 279 U.S. 245.

(8) *Brown v. Maryland*, 12 Wh. 419.



the Article before it becomes an Article of foreign or inter-State commerce<sup>9</sup>. Whether the charges are made on goods inspected as they pass into and out of the State or on goods inspected in any other part of the State, they are not 'taxes' but merely *compensation* for services rendered<sup>10</sup>. Such charges are not in any sense regulation of external or inter-State trade though they may have some remote influence on them<sup>11</sup>. Inspection laws, in fact, are regarded as a part of the internal laws of a State, such as its health laws or laws regulating its internal commerce.<sup>12</sup> But they should not operate so as to substantially discriminate against the goods of other States<sup>12</sup>, or be made a pretext for interference with the freedom of inter-State trade<sup>13</sup>.

*Australia*.—It has been held that the freedom guaranteed by S. 92 is a freedom not of the 'goods' or 'persons' but of—"the *acts* which constitute 'trade, commerce and intercourse'."<sup>14</sup>

Hence, though the Constitution guarantees freedom of inter-State trade and intercourse, the person is not *himself* protected from the ordinary law of the State, *e.g.*, as to public order, and if he commits a crime he may be apprehended by his State, even though he may thereby be prevented from crossing the limits of the State, and thereby his freedom of inter-State intercourse may be curtailed<sup>15</sup>. In short,

"the constitutional freedom begins and ends with respect to the *act* of trade, commerce and intercourse."<sup>14</sup>

S. 112 of the Constitution Act authorises the States to impose inspection charge<sup>16</sup> on imports or exports, as under Art. 1, S. 10 (3) of the Constitution of the U.S.A.

*Canada*.—Similarly, in *Canada*, it has been held that though the Dominion Parliament has wide power 'to regulate trade and commerce' [section 91 (2), British North America Act], the Provincial Legislature has power to make police or municipal or sanitary regulations of a merely local character, *e.g.*,—

(a) For the good government of taverns licensed for the sale of liquor in retail;<sup>16</sup>

(b) For regulating the importation, manufacture, sale, purchase and use of intoxicating liquors, even though such regulation may interfere with manufacturers duly licensed by the Dominion Government or they may *indirectly* affect business operations beyond the limits of the Province;<sup>17</sup>

(c) For granting on certain persons an exclusive right to establish a system of electric lighting for a certain term of years in a city.<sup>18</sup>

#### INDIA.

**Art. 304 : State regulation of inter-State trade, commerce and intercourse.**—Notwithstanding the imperative need that inter-State trade and commerce should be free from restrictions imposed by the States, it has been acknowledged in all countries that some local control is also necessary in order to safeguard the particular interests of each State, without, of course, unduly burdening the freedom of inter-State commerce or discriminating against other States. The present Article empowers the State Legislature :

(a) to impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to

(9) *Gibbons v. Ogden*, 9 Wh. 168 (203).

(10) *Duncan v. State of Queensland*, (1916) 22 C.L.R. 556.

(11) *Turner v. Maryland*, 107 U.S. 38 (51).

(12) *Minnesota v. Barber*, 136 U.S. 313; *Fox v. Robbins*, (1909) 8 C.L.R. 115.

(13) *Tasmania v. Victoria*, (1934) 52 C.L.R. 157.

(14) *McArthur v. Queensland*, (1920) 28 C.L.R.

530 (550).

(15) Wynes, *Legislative and Executive Powers*, p. 274.

(16) *Hodge v. Queen*, (1883) 9 A.C. 117.

(17) *A. G. of Manitoba v. Manitoba License-Holders*, (1902) A.C. 73.

(18) *Hull v. Ottawa Electric Co.*, (1902) A.C. 237.

discriminate between goods so imported and goods so manufactured or produced ; and

(b) to impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest.

#### CLAUSE (a).

CL. (a) : *Non-discriminating import duty*.—This clause follows American decisions<sup>19</sup>, viz., that a State may tax goods imported from other States only if it taxes like domestic goods, and no discrimination is made against the imported goods by such tax.

Freedom of inter-State trade implies that there should be no import barriers as between the States and that there should be no *special levy* upon the act of importation or upon imported goods as such.

"The Constitution does not permit a State by such discriminating charges to place at a disadvantage the goods of other States passing into it for sale."<sup>20</sup>

This does not, however imply that imported goods shall have any special privileges or shall have exemption from the duties which are imposed by a State upon its own goods.

If, however, the tax is *discriminating*, it will be invalid, to the extent of such discrimination, by whatever name it may be called.<sup>20</sup> Freedom of inter-State trade—

"would be illusory if a State could impose *disabilities* upon the sale of the products of other States which are not imposed upon the sale of home products."

Under our Constitution, even if it is not tax but any other discriminating disability imposed upon the trade and commerce power, it will be hit by Art. 303 (1).

#### Illustration.

The law of a State requiring a *licence* for sale of wine, required a greater fee for authorizing the sale of wine manufactured from fruit grown in any other State than that for the sale of wine manufactured from fruit grown within its own State. *Held*, that the law was invalid to the extent of the above difference between the fees.<sup>20</sup>

'Goods'.—Goods includes all materials, commodities, and articles [see Art. 366 (12), *post*].

#### CLAUSE (b).

CL. (b) : *Reasonable restrictions in the public interest*.—Cl. (b) is practically a codification of the American doctrine of the 'Police power' of the States, and so the principles enunciated in the American cases, as explained at [pp. 646-7, *ante*] will broadly apply under the present clause of our Constitution. The principle is that the freedom declared in Art. 301 does not prevent the States to take measures to prevent the intrusion from outside a State of such persons and goods as may become dangerous to its domestic peace, order, health or morals. This clause is very wide in its scope, for it even exempts the State Legislatures from the prohibition against preference or discrimination contained in Art. 303. The only condition upon the exercise of the power under this clause is that the restriction must be "required in the public interests". But preference or discrimination may be checked by use of the Proviso.

'Reasonable restrictions'.—This gives the power to the Court to determine [see pp. 71-2] what restrictions imposed by the State shall be upheld as valid. It is to be noted that the word 'reasonable' is absent from Art. 302, *ante*.<sup>21, 22</sup> So, the Courts shall have no power to test the reasonableness of restrictions imposed in the public interest by Parliament under Art. 302<sup>23</sup> but they will be competent to scrutinise State legislation in the same way as in the U.S.A.

(19) See p. 647, *ante*.

(20) *Fox v. Robbins*, (1909) 8 C.L.R. 115 (126).

(21-22) But the word '~~reasonable~~' occurs in clauses (5) and (6) of Art. 19 [cf. *Gopalan v.*

*State of Madras*, (1950) S.C.J. 174 (269)].

(23) This is *contra* the position in *Australia*: [Cf. *Ex parte Benson*, (1912) 16 C.L.R. 99].

'Reasonable' means commensurate with the purpose for which the restriction is laid down.<sup>24</sup> The word 'reasonable' enables the Court to interfere where the State, under the pretence of preventing injury to the welfare of the citizens, intends to prevent legitimate articles of inter-State commerce, or to impose needlessly burdensome conditions so as 'to substantially obstruct the commerce.'<sup>25</sup> [See page 647, *ante*.]

*Illustration.*

An Act of New South Wales prohibited any person from entering New South Wales, until after the lapse of three years from the date of his release from prison on conviction by another State. *Held*, the law was invalid being an unreasonable interference with the freedom guaranteed by section 92.<sup>1</sup>

'Public interest'.—This is a very wide expression. (See pp. 97-8, 100, *ante*, as to the meaning of an analogous expression).

Such restrictions, in the true perspective, are really 'aids to,'<sup>2</sup> and not restrictions upon, the freedom of inter-State commerce, *e.g.*, preventing entry of infested cattle<sup>2</sup>; restriction of competition of privately owned motor vehicles with publicly owned railways with a view to preventing superabundance of transport at one and deficiency at another (without discriminating between inter-State and intra-State traffic)<sup>3</sup>; regulation of sale of lottery tickets for the suppression of gambling<sup>4</sup>; regulations affecting the lighting and speed of vehicles, provisions for safe carriage; prohibition of fraudulent description of goods<sup>5</sup>.

It is to be noted in this connection that 'inter-State migration and inter-State quarantine' are exclusive Union subjects under *our Constitution* (Entry 81, List I, Schedule VII).

'Or within that State.'—These words elucidate the words 'throughout the territory of India' in Art. 301, meaning that the freedom of trade, etc., declared in Art. 301 is the freedom not only between one State and another, but also between different parts of the same State. But under clause (b) of Art. 304, the State may impose in the public interest reasonable restrictions upon trade and intercourse not only inter-State but also intra-State.

*The Proviso.*—While the two clauses empower the State Legislature to impose restrictions on the freedom of trade, commerce and intercourse, the Proviso provides a safeguard for protecting national interests, by requiring the President's previous sanction for any such legislation.

**305.** Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise provide.

Effect of articles 301 and 303 on existing laws.

**306.** Notwithstanding anything in the foregoing provisions of this Part or in any other provisions of this Constitution, any State specified in Part B of the First Schedule which before the commencement of this Constitution was levying any tax or duty on the import of goods into the State from other States or on the export

Power of certain States in Part B of the First Schedule to impose restrictions on trade and commerce.

(24) *Gopalan v. State of Madras*, (1950) S.C.J. 173 (269).  
 (25) *California v. Thompson*, 313 U.S. 114.  
 (1) *Ex parte Benson*, (1912) 16 C.L.R. 99.  
 (2) *Ex parte Nelson*, (1928) 42 C.L.R. 209 (219).  
 (3) *R. v. Vizard*, (1933) 50 C.L.R. 30; *Riverina Transport v. Victoria*, (1937) 57 C.L.R. 327.  
 (4) *R. v. Connare*, (1939) 61 C.L.R. 596; *R. v. Martin*, (1939) 62 C.L.R. 457.  
 (5) *Gilpin v. Commissioner*, (1935) 52 C.L.R. 189 (206).



of goods from the State to other States may, if an agreement in that behalf has been entered into between the Government of India and the Government of that State, continue to levy and collect such tax or duty subject to the terms of such agreement and for such period not exceeding ten years from the commencement of this Constitution as may be specified in the agreement :

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if, after consideration of the report of the Finance Commission constituted under article 280, he thinks it necessary to do so.

*Art. 306 : Agreement with States in Part B.*—It has already been pointed out that prior to this Constitution, some of the Indian States<sup>6</sup> used to levy internal customs duties. The present article provides for the continuance of such duties for a period not exceeding 10 years, by agreement between the Government of India and of that State, subject to modification at the end of 5 years according to report of the Finance Commission.

**307.** Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.

Appointment of authority for carrying out the purposes of articles 301 to 304.

*Art. 307 : Authority for carrying out purposes of Arts. 301-304.*—This Article authorises Parliament to establish an authority similar to the Inter-State Commerce Commission of the U.S.A.<sup>6-a</sup> (p. 576, ante).

## PART XIV

### SERVICES UNDER THE UNION AND THE STATES

#### CHAPTER I.—SERVICES

**308.** In this Part, unless the context otherwise requires, the expression “State” means a State specified in Part A or Part B of the First Schedule.

Interpretation.

*Art. 308 : Interpretation.*—This Article is analogous to Art. 264 (b). The provision relating to the services of the States in Part XIV will not, generally, apply to States in Part C, obviously because the States in Part C shall be administered by the Union [Art. 239, ante] and through the Union Services.

(6) At the commencement of the Constitution, these States were—Hyderabad, Rajasthan, Madhya Bharat, Saurashtra and Vindhya Pradesh [White Paper ■ Indian States, M.S., 6, p. 93].

(6-a) The main functions of the Inter-State Commerce Commission of the United States ■ to control the charges etc. of inter-State carriers to prevent preference or discrimination ■ between

persons or localities, to prevent any device which aims at ■ unlawful interference with inter-State commerce, and to hear and investigate complaints. Its decisions are quasi-judicial (*Louisville v. Brewing Co.*, (1912) 223 U.S. 70 (84); *Inter-State C.C. v. Union Pac. R. Co.*, (1912) 222 U.S. 541 (547); *Baer v. Denver R. Co.* (1914) 233 U.S. 479 (486)).

**309.** Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State :

Recruitment and conditions of service of persons serving the Union or a State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor or Rajpramukh of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—The Legislature had no voice in these matters under the Act of 1935. Everything was done by the Executive. Thus, sub-Secs. (1)-(2) of Sec. 241 provided—

(1) “ Except as expressly provided by this Act, appointments to the civil services of, and civil posts under, the Crown in India, shall, after the commencement of Part III of this Act, be made—

(a) in the case of services of the Federation, and posts in connection with the affairs of the Federation, by the Governor-General or such person as he may direct ;

(b) in the case of services of a Province, and posts in connection with the affairs of a Province, by the Governor or such person as he may direct.

(2) Except as expressly provided by this Act, the conditions of service of persons serving His Majesty in a civil capacity in India shall, subject to the provisions of this section, be such as may be prescribed—

(a) in the case of persons serving in connection with the affairs of the Federation, by rules made by the Governor-General or by some person or persons authorised by the Governor-General to make rules for the purpose ;

(b) in the case of persons serving in connection with the affairs of a Province, by rules made by the Governor of the Province or by some person or persons authorised by the Governor to make rules for the purpose ; ”

#### INDIA

*Art. 309 : Recruitment and conditions of service to be regulated by legislation.*—Besides laying down certain general provisions, the Constitution does not aim at providing detailed rules for recruitment or conditions of the services of the Union or of the States. That power is left to the respective Legislatures [Entry 70 of List I, and 41 of List II]. The power of appointment belonging to the Executive will thus be subject to legislative control [p. 218, *ante*].

The Proviso is a transitional provision empowering the Executive to make rules having the force of law, relating to the above matters, until the appropriate Legislature legislates on the subjects.

‘ *Public services and posts in connection with the affairs of the Union and of the States.*— Besides the regular services of the Union and the States, there may be persons holding posts in connection with the affairs of the Union or a State who do not belong to these regular services, *e.g.*, temporary employees [see *also* under Art. 311 (1) *post*]. The Legislature concerned shall have power to regulate recruitment, etc., of persons appointed to these ‘ posts ’ as well. The present article thus amplifies the Legislative entries (70 of List I and 41 of List II, which refer only to the ‘ Services ’).

The Services under the legislative control of the Union will comprise several classes : (i) All-India Services, referred to in Art. 312, *post*. (ii) Civil services of the Union, *i.e.*, including members of the civil services of the Union other than the "all-India Services". (iii) Defence Services, *i.e.*, members of the Army, Navy and Air Services.

"Subject to the provisions of the Constitution".—The Constitution itself provides the mode of appointment and conditions of service of certain officers in connection with the affairs of the Union and the States, *e.g.*, the Attorney-General<sup>7</sup>. The present Part has no application to those offices.

**310.** (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor or Rajpramukh of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor or the Rajpramukh, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

#### OTHER CONSTITUTIONS

*England.*—"Military,<sup>8</sup> naval and civil<sup>9</sup> officers of the Crown are dismissible at will, and no petition of right can be brought by them to recover pay, pension or other sums to which they claim to be entitled for their services, or damages in respect of their dismissal, even if contrary to the terms of an express contract of service. Neither have they any right of action for breach of an implied warranty of authority against the officer who engaged them<sup>10</sup>." If, however, the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause", it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded<sup>9</sup>.

*Government of India Act, 1935.*—Sec. 240 (1) of that Act provided—

"(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure"

Cl. (2) of Art. 310 of the Constitution corresponds to sub-Sec. (2) of Sec. 240 of the Act.

(7) See list ■ pp. 217-8.

(8) *Leaman v. Rex*, (1920) ■ K.B. 663 ;  
*Denning v. Secretary of State*, (1920) 37 T.L.R.

138 ; *Kynaston v. A.-G.*, (1933) 49 T.L.R. 300.

(9) *Reilly v. King*, (1934) A.C. 176.

(10) Halsbury, Hailsham Ed., Vol. IX, p. 692.



## INDIA

*Art. 310 : Office during pleasure of the Crown.*—This provision corresponds to the English rule that all service<sup>11-12</sup> under the Crown is held at the pleasure of the Crown. In our constitution, however, the above general rule is qualified by the words 'except as expressly provided by the Constitution.' Thus, in cases of services under *contract*, the power of dismissal is to be exercised subject to the provisions of Cl. (2) of Art. 310. Again, dismissal of *civil* servants must comply with the *procedure* laid down in Art. 311. Then, again, Art. 314 lays down certain provisions for the benefit of existing officers of the Indian Civil Service or any other Service who were appointed by the Secretary of State or Secretary of State in Council. The remedies for wrongful dismissal under the Constitution, are discussed under Art. 311, *below*. Special provisions are also made by the Constitution as to the tenure of particular officers such as the Comptroller and Auditor-General, Judges of the Supreme Court, High Courts, etc. (see pp. 217-8, *ante*).

**311.** (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :

Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge ;

(b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause ; or

(c) where the President or Governor or Rajpramukh, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give to that person such an opportunity.

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 311 reproduces sub-Secs. (2) and (3) of Sec. 240 of the Act of 1935, with the addition of Proviso (c) to Cl. (2), which is new.

(11-12) Including the Defence Services, Thus, Sec. 18 of the Air Force Act, 1950, says.

"Every person subject to this Act shall hold office during pleasure of the President."

## INDIA

*Art. 311 : Dismissal, Removal, etc., of persons in Civil Employments.*—While Art. 310 lays down that all service under the Union or the States shall be at the pleasure of the President, the present Article lays down certain conditions under which that pleasure may be exercised and disciplinary action taken, as against one class of public officers, viz., those who hold any *civil* office under the Union or the States.

## CLAUSE (1).

*Cl. (1) : 'No dismissal by an authority subordinate to the appointing authority.'*—Cl. (1) makes it imperative that the order of dismissal of a civil servant should be made by the authority which appointed that civil servant. A dismissal by an officer *subordinate* to the appointing authority is null and void.<sup>13</sup> But dismissal by an authority *superior*<sup>14</sup> to the appointing authority is not invalidated by the Constitution.

*Analogous Provision.*—See in this connection, Sec. 16 of the General Clauses Act (X of 1897), which provides, generally, that the power to appoint includes the power to suspend or dismiss, unless a contrary intention appears in the Act by which the power to appoint was conferred.

*'No person who holds a civil post'.*—The provisions of Art. 311 include all persons holding a *civil* post under the Union or a State, including members of the all-India Services. Members of the defence services<sup>15</sup> are thus excluded from the scope of this Article, but not Police-officers. Under the *Government of India Act, 1935*, Police-officers were excluded from the operation of Sec. 240 of that Act by Sec. 243. But there is no provision in the Constitution, corresponding to Sec. 243 of the Act of 1935. Hence, under the Constitution, the dismissal by a Deputy Inspector-General of a Police officer who was appointed by the Inspector-General, will be void.<sup>16</sup>

The expression 'civil post' means an appointment or office on the civil side of the administration ■ distinguished from the military side.<sup>14</sup> It includes all the personnel, whether permanent or temporary, employed in the civil administration of the Union or a State, who have not been incorporated into a 'service' of the Union or the State concerned.<sup>14</sup> The question whether the Civil Service Rules are applicable to the employee in question is wholly irrelevant to determine whether he holds a civil post within the scope of the present Article of the Constitution.<sup>14</sup>

*'An all-India service.'*—This Article applies to members of the all-India Services, referred to in Art. 312, but not to the members of the I.C.S. and other existing services appointed by the Secretary of State (Art. 314, *post*).

## CLAUSE (2).

*Cl. (2) : 'Reasonable opportunity of showing cause'.*—The observations of the Privy Council in *High Commissioners v. Lall*<sup>17, 18</sup>, a case under the corresponding provision of the Government of India Act, 1935, lead to the view that the person charged has the right to reasonable opportunity of showing cause *twice*, before the order of dismissal, etc., is passed. There are two stages in a proceeding under the present article : the first being when the charges are enquired into and at this

(13) *N.-W. Frontier Prov. v. Suraj Narain*, A.I.R. 1949 P.C. 112.

(14) *Yusuf v. Prov. of the Punjab*, A.I.R. 1950 Lah. 59.

(15) Dismissal, removal, etc., of members of the Defence Services ■ governed by the provisions of the Army, Navy and Air Force Acts (e.g., Ss. 19-24, Air Force Act, 1950) and ■ subject to the procedural limitations

laid down in Art. 311 of the Constitution.

(16) The Constitution, thus, supersedes the decision in *N.W. Frontier Province v. Suraj Narain*, A.I.R. 1949 P.C. 112. [Rules of the Police Regulations, to the contrary, if not amended already, will become void under the Constitution.]

(17-18) A.I.R. 1948 P.C. 121, affirming A.I.R. 1945 F.C. 47.

stage, the person required to meet the charges should be given a reasonable opportunity to enter into his defence ; and the second stage is when after the enquiring authority has come to its conclusions on the charges and there arises the question of the proper punishment to be awarded. A notice has then again to be given to show cause against the punishment proposed<sup>19</sup>. This conclusion follows from the words ' action proposed to be taken ' :

" No action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow has been provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which the present sub-section makes provision. Their Lordships . . . see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry . . . , it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry."<sup>20</sup>

In short, this clause requires that the civil servant in question is entitled to have an opportunity to show cause at *two stages* : (a) once after he is found guilty and punishment is provisionally proposed and (b) then, against the punishment so proposed upon the above finding.

' *Reasonable opportunity* '.—What this clause requires is not only a notification of the action proposed but of the *grounds* on which the authority is proposing that the action should be taken and that the person concerned must then be given a reasonable *time* to make his representations against the proposed action and the grounds on which it is proposed to be taken. In some cases it may be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved,—dismissal or reduction in rank will follow. But each case will have to turn on its own facts, and the substance of the provision is that the person to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment shall not be imposed<sup>20</sup>.

Subject to the Proviso to Cl. (2), the Courts have jurisdiction to determine whether reasonable opportunity has been given in any case.<sup>21</sup>

' *No such person as aforesaid* '.—These words refer to the persons specified in Cl. (1) of Art. 311, and not to those mentioned in Cl. (1) of Art. 310. Hence, members of the Defence services or persons holding defence posts are excluded from the protection of the present clause.

' *Reduced in rank* '.—The Nagpur High Court has held<sup>22, 25</sup> that an order of *suspension* is ' reduction in rank ' within the meaning of this clause inasmuch as the officer ceases to discharge his duties and to receive his pay. Hence, Government is not entitled to place an officer under indefinite suspension without affording him reasonable opportunity of showing cause. Further when an order of dismissal is declared to be void and operative, the Government servant is entitled to draw his pay for the period of suspension.

' *Dismissal and removal* '.—These are synonymous terms<sup>20</sup>, meaning termination of service against the will of the civil servant.

(19) *Gulzar v. U.P. Government*, A.I.R. 1950 All. 212 ; *Tusuf v. Prov. of the Punjab*, A.I.R. 1950 Lah. 59.

(20) *High Commissioners v. Lall*, A.I.R. 1948 P.C. 121, approving *Secretary of State v. Lall*,

(1945) 49 C.W.N. (F.R.) 63.

(21) *Secretary of State v. Lall*, A.I.R. 1945 F.C. 47 (57).

(22-25) *Central Provinces v. Shamsul*, A.I.R. 1949 Nag. 118.



*Remedies for wrongful dismissal.*—Both Cls. (1) and (2) of Art. 311 are mandatory. They constitute express provisions of the Constitution which qualify Cl. (1) of Art. 310. Hence, dismissal by an authority lower than the appointing authority, and dismissal without giving reasonable opportunity of showing cause, are equally void and inoperative, and therefore, actionable<sup>1</sup>.

In both cases of wrongful dismissal [in contravention of Cl. (1) or (2)], the remedy is the same, *viz.*, a declaration that the order of dismissal was void and inoperative and that the plaintiff remained a member of the service at the date of institution of the suit<sup>2</sup>.

Under the *Government of India Act, 1935*, it had been held that neither damages nor arrears of pay may be recovered against the Crown, for wrongful dismissal.<sup>1</sup>

#### Proviso.

*Proviso (a) : 'Conviction on a criminal charge'*—This clause makes an officer who has been convicted on a criminal charge, liable to dismissal without any further proceeding or hearing. No distinction is made between crimes involving moral turpitude and other crimes. The word 'charge' in this clause contemplates some accusation and not merely a charge in the technical sense of the Code of Criminal Procedure. Hence, conviction for contempt of court, consisting in making defamatory accusations against the presiding officer of a Court is a conviction within the purview of the present clause, even though a contempt of this nature may not be an 'offence' under the Indian Penal Code.<sup>3</sup>

*Proviso (c) : 'Interest of security of the State.'*—There might be cases where the mere disclosure of the charge might affect the security of the State. In such cases the President or Governor or Rajpramukh might exempt the giving of notice to show cause. This Proviso is new; there was nothing corresponding to it in the *Government of India Act, 1935*.

'Security of the State'.—See pp. 79-80, *ante*.

#### CLAUSE (3):

*Cl. (3) : Finality of decision under Proviso (b).*—In cases coming under Cl. (2), Proviso (b), the decision of the authority concerned as to the impracticability of giving notice will be final. No Court shall be entitled to call in question such

(1) Apart from departmental appeal by way of a memorial to the Government, upon which the Public Service Commission shall be consulted [Art. 320 (3) (c)].

(2) *High Commissioners v. Lall*, A.I.R. 1948 P.C. 121, reversing *Secretary of State v. Lall*, (1945) 49 C.W.N. (F.R.) 63, and superseding *Punjab Province v. Tarachand*, A.I.R. 1947 F.C. 23. [It is submitted that the Federal Court decision should be followed under the Constitution in preference to the Privy Council decision (as regards arrears of pay), for the following reasons: The Privy Council decision was founded on the immunity of the Crown from an action in tort, and followed the observation in *Mulvanna v. The Admiralty*, (1926) S.C. 842, that remuneration for public service was a bounty of the Crown. It is to be observed that under S. 240 of the *Government of India Act*, office was held during the pleasure of the Crown. But the Crown of England has no place under the Constitution. Art. 310 (1) says that office is held during the pleasure of the President. Hence the immunity of the Crown is not material under the Constitution. Though the President is personally immune from action, nothing debars action against

the Government itself [Art. 361 (1)] provided only that such action was maintainable against the East India Co. (see p. 633, *ante*). The Federal Court (*ibid.*) pointed out that the Civil Procedure Code allowed attachment of the salary of a servant of the Crown, and that there were decisions in India, where a claim for arrears of pay had been decreed against the Government [*Vakil v. Secretary of State*, (1944) 19 Luck. 163; *Hifzul Quadeer v. Government of C.P. and Berar*, A.I.R. 1945 Nag. 190]. In short, if the Federal Court decision is revived under the Constitution, a civil servant who has been wrongfully dismissed and gets a declaration from the Court to that effect, would also be entitled to recover arrears of pay that would have become due to him had not the illegal order of dismissal been made, subject, of course, to the law of limitation.

Damages, too, had been decreed by the Federal Court in *Secretary of State v. Lall*, A.I.R. 1945 F.C. 47 (58). Hence, if the principle of immunity of the Crown in an action for tort goes, damages may also be available for wrongful dismissal, under the Constitution.

(3) *Venkatarama v. Province of Madras*, A.I.R. 1946 Mad. 375.

decision. The object of the provision would have been defeated if the aggrieved person had a right to go to a Court of law and question the propriety of the action of his superior authority.

*Analogous Provision.*—In all cases under Art. 311, whether there is a right of action in Court or not a memorial shall lie to the Government which shall consult the Public Service Commission, under Art. 320 (3) (c), *post*.

**312.** (1) Notwithstanding anything in Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative-Service and the Indian Police Service shall be deemed to be services created by Parliament under this Article.

*Art. 312 : All-India Services.*—It was pointed out early (p. 30) that like other federal polities, the Union and the States under our Constitution shall have their separate public services to administer their respective affairs, though there will be no clear-cut bifurcation as regards the administration of the laws of the Union and the States. The present Article introduces an extraordinary feature of the Indian Constitution (which may be said to be a legacy of the Government of India Acts), *viz.*, that notwithstanding separate services for the Union and the States, there shall be certain services common to the Union and the States. Cl. (2) adopts the existing two services for this purpose, *viz.*, the Indian Administrative and Police Services, and Cl. (1) empowers Parliament (under certain conditions) to create more of such all-India services whenever it is expedient in the national interest to create them. These all-India Services will give a greater cohesion to the federal structure than in the United States, and it will also conduce to greater efficiency in the administration of the Union as well as the States. Explaining the reasons behind the creation of such all-India Services, Dr. Ambedkar observed—

“The dual polity which is inherent in a federal system is followed in all federations by a dual service. In all Federations, there is a Federal Civil Service and a State Civil Service. The Indian Federation, though a dual polity, will have a dual service, but with one exception. It is recognised that in every country there are certain posts in its administrative set-up which might be called strategic from the point of view of maintaining the standard of administration. . . . There can be no doubt that the standard of administration depends upon the calibre of the civil servants who are appointed to these strategic posts . . . . The Constitution provides that without depriving the States of their right to form their own civil services<sup>4</sup> there shall be an all-India Service<sup>5</sup> recruited on an all-India basis with common qualifications, with uniform scale of pay and members of which alone could be appointed to these strategic posts throughout the Union.”

**313.** Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post

(4) *Vide* Entry 41, List II.

(5) Entry 70, List I.

under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

**314.** Except as otherwise expressly provided by this Constitution, every person who having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India continues on and after the commencement of this Constitution to serve under the Government of India or of a State shall be entitled to receive from the Government of India and the Government of the State, which he is from time to time serving, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or rights as similar thereto as changed circumstances may permit as that person was entitled to immediately before such commencement.

Provision for protection of existing officers of certain services.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Ss. 247-9 of the Act of 1935 provided the special provisions relating to the conditions of service, etc., of persons recruited by the Secretary of State. Thus, if such officer was affected by any order relating to his conditions of service, he had a right of *complaint* to the Governor-General or the Governor (as the case may be), and the latter was to deal with it 'exercising individual judgment' [S. 248 (1)].

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*Art. 314: Saving of existing provisions relating to persons recruited by the Secretary of State.*—This Article maintains the above privileges of these officers, 'so far as changed circumstances may permit.'

#### CHAPTER II.—PUBLIC SERVICE COMMISSIONS

**315.** (1) Subject to the provisions of this Article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.

Public Service Commissions for the Union and for the States.

(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a Joint State Public Service Commission (referred to in this Chapter as Joint Commission) to serve the needs of those States.

(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.

(4) The Public Service Commission for the Union, if requested to do by the Governor or Rajpramukh of a State, may, with the



approval of the President, agree to serve all or any of the needs of the State.

(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Art. 315 of the Constitution reproduces S. 264 of the Act of 1935, with the only change that the agreement referred to in Cl. (2) shall require sanction of the State Legislatures concerned, followed by an Act of Parliament.

**316.** (1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor or Rajpramukh of the State :

Appointment and term of office of members.

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission, or a Joint Commission, the age of sixty years, whichever is earlier :

Provided that—

(a) a member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor or Rajpramukh of the State, resign his office ;

(b) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of Article 317.

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.—See S. 265 of that Act.*

**317.** (1) Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under Article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

Removal and suspension of a member of a Public Service Commission.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor or Rajpramukh, in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in clause (1), the President may by order remove from office of the Chairman or any other member of ■ Public Service Commission if the Chairman or such other member, as the case may be,—

(a) is adjudged an insolvent ; or

(b) engages during his term of office in any paid employment outside the duties of his office ; or

(c) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehaviour.

*Art. 317 : Removal and suspension of members of Public Service Commissions.—*There was no such provision in the Government of India Act, 1935. Under that Act [S. 265 (2) (a)], these matters were governed by rules framed by the Governor-General and the Governors, acting in their discretion.

The present Article lays down that the President may remove the Chairman of any Public Service Commission (of the Union or of ■ State), *without any formality*, in cases coming under Cl. (3), *i.e.*, when—(a) he is adjudged ■■ insolvent ; (b) he engages in any other paid employment ; (c) he is unfit ■ to continue in office owing to infirmity of mind or body [Cl. (3)].

In cases other than those coming under Cl. (3), he may be *removed* by the President only (a) ■■ the ground of 'misbehaviour' [Cl. (4) provides an instance

of misbehaviour] ; and (b) on the report of the Supreme Court, on a reference by the President [Cl. (1)]. Pending enquiry or report of the Supreme Court upon such reference, the President has the power to *suspend* in the case of the Union or a Joint Commission, and a similar power belongs to the Governor or Rajpramukh in the case of a State Commission [Cl. (2)].

*Procedure prescribed under Art. 145 (1) (j).*—The Supreme Court has made the following rules<sup>6</sup>, laying down the procedure for hearing a reference under Art. 317 (1)—

“ 1. On receipt by the Registrar of the order of the President referring to the Court a case for inquiry under Article 317 (1) of the Constitution, the Registrar shall give notice to the Chairman or member of the Public Service Commission concerned and to the Attorney-General for India or the Advocate-General of the particular State to appear before the Court on a day specified in the notice to take the directions of the Court in the matter of the inquiry. A copy of the charges preferred against him shall be furnished to the respondent along with the notice.

2. The Court may summon such witnesses as it considers necessary.

3. After the hearing of the Reference, the Registrar shall transmit to the President the Report of the Court.

4. No court-fees or process fees shall be payable in connection with any reference dealt with by the Court under this Order.”

*Analogous Provision.*—See Art. 145 (1) (j) [p. 426, ante].

Power to make regulations as to conditions of service of members and staff of the Commission.

**318.** In the case of the Union Commission or a Joint Commission, the President and, in the case of a State Commission, the Governor or Rajpramukh of the State may by regulations—

(a) determine the number of members of the Commission and their conditions of service ; and

(b) make provision with respect to the number of members of the staff of the Commission and their conditions of service :

Provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment.

Prohibition as to the holding of offices by members of Commission on ceasing to be such members.

**319.** On ceasing to hold office—

(a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State ;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State ;

6) Order XXXVII of the Supreme Court Rules, 1950 [(1950) S.C.J. Supplement, p. 21].



(c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State ;

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.—See S. 265 (3) of that Act.*

**320.** (1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

Functions of Public Service Commissions.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts ;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers ;

(c) on all disciplinary matters affecting ■ person serving under the Government of India or the Government of ■ State in a civil capacity, including memorials or petitions relating to such matters ;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of ■ State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State ;

(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor or Rajpramukh of the State, may refer to them :

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor or Rajpramukh, as the case may be, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335.

(5) All regulations made under the proviso to clause (3) by the President or the Governor or Rajpramukh of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Cls. (1)-(3) of this Article correspond to sub-Ss. (1)-(3) of S. 266 of the Act of 1935. Cl. (5) of the Article is new. Cl. (4) differs in some respects from sub-sec. (4) of S. 266, which was as follows—

“(4) Nothing in this section shall require a Public Service Commission to be consulted as respects the manner in which appointments and posts are to be allocated as between the various communities in the Federation or a Province or, in the case of the subordinate ranks of the various police forces in India, as respects any of the matters mentioned in paragraphs (a), (b), and (c) of sub-section (3) of this section.”

#### INDIA

Cl. (3): “*Shall be consulted*”.—As under the Act of 1935, the status of the Public Service Commissions shall be *advisory*. The reason why mandatory powers could not be given to the Public Service Commissions is that in that case, it would not be possible for the Executive to carry on the administration with responsibility :

“The danger is that if you give them mandatory powers, you set up two Governments in a Province and two Governments at Centre, and there is everything to be said against a procedure of that kind.”

So, the Public Service Commission shall merely give its opinion to the President or the Governor of Rajpramukh (as the case may be), and it will not be obligatory upon the latter to accept that opinion or recommendation. But there is a provision in Art. 323, which was not to be found in the Act of 1935, *viz.*, that annually, the President or the Governor or Rajpramukh, shall have to explain to the Legislature the reasons why in particular cases the advice of the Commission could not be accepted. This is a safeguard against arbitrary action by the Executive in disregard of the Commissions advice.

*Cl. (4) : Backward classes, Scheduled Castes and Tribes.*—This clause withdraws from the purview of the Commission the matters referred to in Arts. 16 (4) and 335, as regards these classes.

*Cl. (5) : Regulations under the Proviso to Cl. (3).*—This introduces another improvement upon the Government of India Act, 1935. Though the President or the Governor or Rajpramukh is empowered to make regulations withdrawing particular matters or classes of cases from the purview of the Public Service Commission, such regulations must be laid before the Legislature and shall be subject to legislative control and modification.

**321.** An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

Power to extend functions  
of Public Service Commissions.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—See S. 267 of that Act.

#### INDIA

*Art. 321 : Power to extend Functions.*—The innovation made in this Article upon the corresponding provision in the Government of India Act is that the appropriate Legislature shall be entitled to extend the functions of the Commission concerned not only in respect of Government services, but also in respect of services under local authorities, corporations or any public institution.

**322.** The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, as the case may be, the Consolidated Fund of the State.

Expenses of Public Service  
Commissions.

**323.** (1) It shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of Parliament.

Reports of Public Service  
Commissions.



(2) It shall be the duty of a State Commission to present annually to the Governor or Rajpramukh of the State a report as to the work done by the Commission, and it shall be the duty of a Joint Commission to present annually to the Governor or Rajpramukh of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor or Rajpramukh, as the case may be, shall, on receipt of such report, cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature of the State.

*Art. 323 : Reports of Public Service Commissions.—See under Art. 320 (3), p. 665, ante.*

## PART XV

### ELECTIONS

**324.** (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission).

Superintendence, direction and control of elections to be vested in an Election Commission.

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine :

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment :

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor or Rajpramukh of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

#### OTHER CONSTITUTIONS

*England.*—A defeated candidate may petition the House of Commons to have the election of his rival invalidated either on the ground that he is not qualified to be a member of the House or on the ground of corrupt or illegal practice at election. If the dispute relates to the *qualifications* of the elected candidate, the House itself hears the petition<sup>8</sup>. But if it relates to the *manner of election, irregularity or illegality*, the House refers the dispute to the King's Bench Division of the High Court, which then hears the evidence and certifies its decision to the Speaker of the House. The House then either confirms the election or orders a new writ to be issued.<sup>9</sup>

*U. S. A.*—Art. II, S. 4 (1) of the Constitution says—

“The time, places and manner of holding elections of Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places for choosing Senators”.

As a result, the State Legislatures are competent to make regulations relating to Congressional elections; but if Congress choose to legislate, the State regulations shall be superseded to that extent. Thus, Congress has passed the Federal Corrupt Practices Act, in 1925. In 1873, it provided for holding Congressional elections on the same day throughout the country. In 1939-40, Congress has passed the Hatch Acts, prohibiting political activity on the part of the administrative employees of the federal Government, and setting a limit to the annual expenditure of any political committee.

Though the power of prescribing the times, places and manner of elections for membership to Congress is a concurrent power for the State Legislatures and Congress, each House of Congress is given the exclusive right to judge—

“(the validity) of the elections, returns and qualifications of its own members” [Art. 1, S. 5 (1)].

In the House of Representatives, election disputes are heard by the Committee on House Administration [Legislative Re-organization Act, 1946].

*Australia.*—These matters are governed by the Commonwealth Electoral Act, 1902-1940, passed under Sec. 47 of the Constitution Act.

*Burma.*—Sec. 77 of the Burmese Constitution, 1948, provides—

“Subject to the provisions of this Constitution, all matters relating to elections for either Chamber of Parliament including the delimitation of constituencies, the filling of casual vacancies, and the decision of doubts and disputes arising out of or in connection with such elections shall be regulated in accordance with law.

(8) *Mitchell's Case*, (1875) 130 Com. Journ. 235; *Michael Davitt's Case*, (1882) 1 Com. Journ. 565.

(9) Parliamentary Elections Act, 1868 (31 and 32 Vict. c. 125).

*Government of India Act, 1935.*—Sec. 291 of the Act provided—

“In so far as provision with respect to the matters hereinafter mentioned is not made by this Act, His Majesty in Council may from time to time make provision with respect to those matters or any of them, that is to say—

- (a) the delimitation of territorial constituencies for the purpose of elections under this Act ;
- (b) the qualifications entitling persons to vote in territorial or other constituencies at such elections and the preparation of electoral rolls ;
- (c) the qualifications for being elected at such elections as a member of a legislative body ;
- (d) the filling of casual vacancies in any such body ;
- (e) the conduct of elections under this Act and the methods of voting thereat ;
- (f) the expenses of candidates at such elections ;
- (g) corrupt practices and other offences at or in connection with such elections ;
- (h) the decision of doubts and disputes arising out of, or in connection with, such elections ;
- (i) matters ancillary to any such matter as aforesaid.”

Under the Government of India (Provincial Elections) Corrupt Practices and Election Petitions) Order, 1936, the Governor, exercising his individual judgment, might summarily dismiss an election petition, or refer it for trial to a Commission appointed by him, consisting of person eligible to be appointed as High Court Judges. The orders of the Governor in accordance with the report of the Commission were final.

#### INDIA

*Art. 324 : Election Commission.*—This Article provides for the creation of an independent body named the Election Commission, which shall have the following *exclusive* powers:

(a) Superintendence, direction and control of the preparation of the electoral rolls for all elections to Parliament and the Legislature of every State ; and of elections to the offices of President and Vice-President ;

(b) Conduct of all the above elections ;

(c) Appointment of election tribunals for the decisions of doubts and disputes arising out of or in connection with election to Parliament and to the Legislature.<sup>10</sup>

The entire electoral machinery of the Union as well as of the States is thus placed at the hands of a centralised body,—the Election Commission which alone would be entitled to issue directives to returning officers, polling officers and others engaged in the preparation and revision of electoral rolls so that no injustice may be done to any citizen of India by any local Government<sup>11</sup>. The Commission will, of course, be assisted by Regional Commissioners, but they will not be working under the control of the State Governments but under the control of the Election Commission and they will not be liable to be removed except on the recommendation of the Chief Election Commissioner.

The Election Commission shall also have an advisory function. It will give its opinion to the President [Art. 103 (2), p. 315, *ante*], and to the Governor (Art. 192 (2), p. 464, *ante*), upon any question relating to disqualification of any member of either House of Parliament or a State Legislature (as the case may be).

The Election Commission shall be independent of executive control inasmuch as members of the Election Commission (and Regional Commissioners) shall not be removed by the President except on the recommendation of the Chief Election Commissioner, and the Chief Election Commissioner shall not be removed except in the manner provided in Art. 124 (4), p. 387, *ante*, relating to the removal of a Judge of the Supreme Court.

(10) Enquiry and decision of all doubts and disputes relating to election of President or Vice-President is vested in the Supreme Court

(Art. 71 (1), p. 240, *ante*.)  
(11) Constituent Assembly Debates, Vol. VIII, p. 906.



'*Decision of doubts and disputes.*'—Read with Arts. 103 and 192, it would appear that while the decision of doubts and disputes as to *qualifications* of members of the Legislatures shall be decided by the President or the Governor (as the case may be) according to the opinion of the Election Commission, the decision of doubts and disputes relating to *elections*<sup>12</sup> (whether to Parliament or to the State Legislatures)<sup>13</sup> shall be made by Election Tribunals appointed by the Election Commission.

**325.** There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of ■ State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

*Art. 325 : No discrimination as to franchise on ground of religion, etc.*—This Article is complementary to Art. 15 (1), (pp. 60-1, *ante*), and guarantees the same equality in the matter of *political* right, *viz.*, franchise. There shall be no special treatment nor exclusion on the ground *only* of religion, race, caste, sex or any of them. The word 'only' permits the imposition of such conditions as of residence<sup>14</sup>.

**326.** The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage ; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.

#### OTHER CONSTITUTIONS

*U. S. A.*—In the United States, notwithstanding gradual extension of the suffrage and the inclusion of women, it cannot be said that universal adult suffrage has been established. All the States still retain some or other of certain qualifications which operate to exclude the Negroes, *e.g.*, real property, tax payment, education and literacy requirements.

Nevertheless, the idea remains that ■ citizen has no natural or constitutional right to vote ; it is only ■ *privilege* offered by the State<sup>15</sup>.

*Eire.*—Cl. (1) 2°-3° of Art. 16 of the Constitution of Eire, 1937, provides—

" 2° Every citizen without distinction of sex who has reached the age of 21 years, who is not disqualified by law and complies with the provisions of the law relating to the election of members of Dail Eireann, shall have the right to vote at an election for members of Dail Eireann.

(12) That is, imputing corrupt practices, such as bribery, undue influence, publication of false statements and the like.

(13) *Prima facie*, an election tribunal would be 'tribunal' within the scope of Art. 136,

p. 415, *ante*.

(14) Cf. S. 19 of the Representation of the People Act, 1950. The qualification of residence is also reserved by Art. 326.

(15) *U.S. v. Reese*, (1876) 92 U.S. 214.

3°. No law shall be enacted placing any citizen under disability or incapacity for membership of Dail Eireann on the ground of sex or disqualifying any citizen from voting at an election for members of Dail Eireann on that ground."

*Burma.*—Sub-secs. (2)-(4) of S. 76 of the Burmese Constitution, 1948, says—

"(2) Every citizen, who has completed the age of eighteen years and who is not disqualified by law and complies with the provisions of the law regulating elections to the Parliament, shall have the right to vote at any election to the Parliament.

(3) There shall be no property qualification for membership of the Parliament or for the right to vote at elections to the Parliament.

(4) No law shall be enacted or continued placing any citizen under disability or incapacity for membership of the Parliament on the ground of sex, race or religion or disqualifying any citizen from voting at elections to the Parliament on any such ground :

Provided that notwithstanding anything contained in section 21 (3), members of any religious order may by law be debarred from voting at any such elections or from being a member of either Chamber of Parliament."

## INDIA

*Art. 326 : Adult suffrage.*—This Article provides that election to the House of the People [Art. 81 (1), p. 283, *ante*] and to the Legislative Assembly of a State [Art. 170 (1), p. 450, *ante*] shall be on the basis of unqualified *adult* suffrage ; that is to say, every citizen of India, male or female, who is not less than 21 years of age and is not otherwise disqualified under this Constitution or by any law of the appropriate Legislature on the grounds specified in this Article shall be entitled to be registered as a voter at such elections.

The adoption of universal adult suffrage *without any qualification* either of *literacy, property, taxation or the like*, is a 'bold experiment' in India, having regard to the vast extent of the country and its population. It has been estimated that at the first election of the House of the People there will be about 170 m. voters.

The suffrage in India is thus wider than that in the United States [*see* p. 669, *ante*].

'*Residence*'.—Ss. 19-21 of the Representation of the People Act (XLIII of 1950) provide for this qualification as follows :

"19. *Conditions of registration.*—Subject to the foregoing provisions of this Part, every person who—

(a) has been ordinarily resident in a constituency for not less than 180 days during the qualifying period, and

(b) was not less than 21 years of age on the qualifying date, shall be entitled to be registered in the electoral roll for that constituency.

20. *Meaning of "ordinarily resident."*—(1) Save as hereinafter provided, a person shall be deemed to be ordinarily resident in a constituency if he ordinarily resides in that constituency, or owns, or is in possession, of, a dwelling house therein.

(2) A person who is a patient in any establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness, or who is detained in prison or other legal custody at any place, shall not by reason thereof be deemed to be ordinarily resident therein.

(3) A member of the Armed Forces of the Union while living in any barrack, building or place belonging to, or provided by, the Government shall not be deemed to be ordinarily resident in the constituency within which such barrack, buildings or place is situate, but shall be deemed to be ordinarily resident during any period or on any date in the constituency in which, but for his service in the Armed Forces, he would have been ordinarily resident during that period or on that date.

(4) Any person holding any office in India declared by the President in consultation with the Election Commission to be an office to which the provisions of this sub-section apply, or any person who is employed under the Government of India in post outside India, shall be deemed to be ordinarily resident during any period or on any date in the constituency in which, but for the holding of any such office or employment, he would have been ordinarily resident during that period or on that date.

(5) The statement of any such person as is referred to in sub-section (3) or sub-section (4) made in the prescribed form and verified in the prescribed manner, that but for his service in the Armed Forces or but for his holding any such office or being employed in any such post ■ is referred to in sub-section (4) he would have been ordinarily resident in a specified place during any period or on any date, shall, in the absence of evidence to the contrary, be conclusive evidence of that fact.

(6) The wife of any such person as is referred to in sub-section (3) or sub-section (4) shall, if she be ordinarily residing with such person during any period, be deemed to be ordinarily resident during that period in the constituency specified by such person under sub-section (5).

(7) For the purpose of the electoral rolls first prepared under this Act, a person who is a citizen of India and has migrated from the territory of Pakistan into the territory of India before the 25th day of July, 1949, on account of disturbances or fear of disturbances in his former place of residence shall be deemed to have been ordinarily resident during any period or on any date in the constituency in which he was resident on the said day or, if any other constituency is specified by him in this behalf in the prescribed form and manner, in that other constituency.

21. *Meaning of "qualifying date" and "qualifying period".*—For the purpose of this Part, the qualifying period,—

(a) in the case of electoral rolls first prepared under this Act shall be the 1st day of March, 1950, and the period beginning in the 1st day of April, 1947, and ending on the 31st day of December, 1949, respectively; and

(b) in the case of every electoral roll subsequently prepared under this Act, shall be the 1st day of March of the year in which it is prepared, and the year immediately preceding that year, respectively."

**327.** Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

Power of Parliament to make provision with respect to elections to Legislatures.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—See S. 291, quoted at p. 668, *ante*, under which the power belonged to the Crown in Council.

#### INDIA

*Art. 327 : Power of Parliament to make laws with respect to elections.*—This Article explains the legislative power under Entry 72 of List I.—

"Elections to Parliament, to the Legislatures of States . . . . ."

The generality of the above power is supplemented by mentioning some specified matters included in the power, *viz.*, (i) preparation of electoral rolls, (ii) delimitation of constituencies, (iii) all other matters necessary for securing the due constitution of the Houses of Parliament or State Legislatures.

*Legislation by Parliament.*—Parliament has already enacted, in pursuance of the above power, the Representation of the People Act (XLIII of 1950), which is—

"an Act to provide for the allocation of seats in, and the delimitation of constituencies for the purpose of elections to, the House of the People and the Legislatures of the States, the qualifications of voters at such elections, the preparation of electoral rolls, and matters connected therewith."

**328.** Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses.

Power of Legislature of a State to make provision with respect to elections to such Legislature.



*Art. 328 : Power of State Legislature Relating to elections.*—This Article is to be read with Art. 327 and Entry 37 of List II. Entry 37 gives the State Legislature power with respect to—

“ Elections to the Legislature of the State subject to the provisions of any law made by Parliament.”

So, the State Legislature shall have power in relation to elections to itself only in so far as provision in that behalf is not made by Parliament under Art. 327 and Entry 72 of List I.

Bar to interference by courts  
in electoral matters.

### 329. Notwithstanding anything in this Constitution—

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328 shall not be called in question in any Court ;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

*Art. 329 : Bar to interference by Courts in electoral matters.*—This article takes away the jurisdiction of the Courts in certain matters relating to elections, which are governed by Part XV of the Constitution.

*Cl. (a) : Validity of law made under Arts. 327-8, not to be questioned by Court.*—This clause provides that the Courts shall have no jurisdiction to question the validity of any law made under Arts. 327-8. Hence, the validity of any provision in such law, itself ousting the jurisdiction of the Courts, is also not questionable by the Courts. Thus, S. 30 of the Representation of the People Act (XLIII of 1950) provides—

“ No civil court shall have jurisdiction—

(a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in the electoral roll for a constituency ; or (b) to question the legality of any action taken by or under the authority of an Electoral Registration Officer, or of any decision given by any authority appointed under this Act for the revision of any such roll.”

*Cl. (b) : Election disputes.*—This clause excludes the jurisdiction of the Civil Courts<sup>17</sup> to entertain any matter relating to election disputes. An election to the Union or State Legislatures may be questioned only by an election petition, to be presented to such authority and in such manner, as may be prescribed by the appropriate Legislature. These petitions will be eventually tried by the election tribunals, referred to in Art. 324 (1), p. 669, *ante*.

## PART XVI

### SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES

Reservation of seats for  
Scheduled Castes and Schedul-  
ed Tribes in the House of the  
People.

### 330. (1) Seats shall be reserved in the House of the People for—

(a) the Scheduled Castes ;

(17) Cf. S. 9 of the Code of Civil Procedure, 1908. [Without such an express bar, the doctrine of bar by implication would have to be

resorted to ; see, for example, *Nauval Kishore v. Municipal Board*, A.I.R. 1937 All. 365 ; *Tara-chand v. Abdul Kasem*, A.I.R. 1938 Cal. 359].

(b) the Scheduled Tribes except the Scheduled Tribes in the tribal areas of Assam ; and

(c) the Scheduled Tribes in the autonomous districts of Assam.

(2) The number of seats reserved in any State for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State in the House of the People as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

**331.** Notwithstanding anything in article 81, the President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People.

Representation of the Anglo-Indian community in the House of the People.

See foot-note (20-b), at p. 285, *ante*.

**332.** (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in the Legislative Assembly of every State specified in Part A or Part B of the First Schedule.

Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district except in the case of the constituency comprising the cantonment and municipality of Shillong.

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district except from the constituency comprising the cantonment and municipality of Shillong.

**333.** Notwithstanding anything in article 170, the Governor or Rajpramukh of a State may, if he is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate such number of members of the community to the Assembly as he considers appropriate.

Representation of the Anglo-Indian community in the Legislative Assemblies of the States.

Reservation of seats and special representation to cease after ten years.

**334.** Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to—

(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States ; and

(b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination, shall cease to have effect on the expiration of a period of ten years from the commencement of this Constitution :

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

*Arts. 330-4 : Reservation of Seats in the House of the People for the Scheduled Castes and Tribes and Anglo-Indians.*—One of the greatest achievements of the framers of this Constitution is the abolition of communal representation and separate electorates which were imposed on India in 1909 and which, logically, led to the lamentable partition of India. In the Constitution, there is no separate electorate. All the voters shall vote under one general electoral roll [Art. 325, *ante*], and there shall be no reservation of seats on the ground of religion or community.

But Arts. 330-4 provide for reservation of seats, for a limited period of 10 years, for the Scheduled Castes and Tribes<sup>18</sup> and the Anglo-Indians<sup>19</sup>, in view of their backwardness.

The President is empowered to draw up the list of Scheduled Castes and Tribes in consultation with the Governor or Rajpramukh of each State, subject to revision by Parliament [Arts. 341-2]. [See Appendices].

Seats shall be reserved in the House of the People for—(a) The Scheduled Castes ; (b) The Scheduled Tribes except the Scheduled Tribes in the tribal areas of Assam ; and (c) The Scheduled Tribes in the autonomous districts of Assam [Art. 330].

Seats shall also be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in the Legislative Assembly of every State specified in Part A or Part B of the First Schedule [Art. 332].

In the Legislative Assembly of Assam, seats shall be reserved for the 'Autonomous districts' [see paragraph 1 of the 6th Sch., *post*].

Such reservation will cease on the expiration of 10 years from the commencement of the Constitution, *i.e.*, in 1960 [Art. 334].



The number of seats reserved for the Scheduled Castes and Tribes is not fixed by the Constitution but the ratio is indicated in Arts. 330 (2) and 335 (3). Secs. 6 (d) and 9 (d) of the Representation of the People Act, 1950, empowers the President to determine the number by an Order.

**335.** The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

Claims of Scheduled Castes and Scheduled Tribes to services and posts.

**336.** (1) During the first two years after the commencement of this Constitution, appointments of members of the Anglo-Indian community to posts in the railway, customs, postal and telegraph services of the Union shall be made on the same basis as immediately before the fifteenth day of August, 1947.

Special provision for Anglo-Indian community in certain services.

During every succeeding period of two years, the number of posts reserved for the members of the said community in the said services shall, as nearly as possible, be less by ten per cent. than the numbers so reserved during the immediately preceding period of two years :

Provided that at the end of ten years from the commencement of this Constitution all such reservations shall cease.

(2) Nothing in clause (1) shall bar the appointment of members of the Anglo-Indian community to posts other than, or in addition to, those reserved for the community under that clause if such members are found qualified for appointment on merit as compared with the members of other communities.

*Arts. 335-6 : Special claims of Scheduled Castes and Tribes and Anglo-Indians.—* These Articles constitute exceptions to the right to equality of opportunity for employment guaranteed by Art. 16 (1). A similar exception is engrafted in Cl. (4) of that Article itself. See p. 65, *ante*, where the distinction between Cl. (4) of Art. 16 and Art. 335 has been discussed. While the provision in Art. 336 regarding Anglo-Indians is a temporary one, the provision in Art. 335 is a permanent one.

**337.** During the first three financial years after the commencement of this Constitution, the same grants, if any, shall be made by the Union and by each State specified in Part A or Part B of the First Schedule for the benefit of the Anglo-Indian community in respect of education ■ were made in the financial year ending on the thirty-first day of March, 1948.

Special provision with respect to educational grants for the benefit of Anglo-Indian community.

During every succeeding period of three years the grants may be less by ten per cent. than those for the immediately preceding period of three years :

Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community, shall cease :

Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent. of the annual admissions therein are made available to members of communities other than the Anglo-Indian community.

**338.** (1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

Special Officer for Scheduled Castes, Scheduled Tribes, etc.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

(3) In this article, references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also to the Anglo-Indian community.

**339.** (1) The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States specified in Part A and Part B of the First Schedule.

Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes.

The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable.

(2) The executive power of the Union shall extend to the giving of directions to any such State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

**340.** (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and

Appointment of a Commission to investigate the conditions of backward classes.

the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

**341.** (1) The President may, after consultation with the Governor or Rajpramukh of a State, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

**342.** (1) The President may, after consultation with the Governor or Rajpramukh of a State, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

## PART XVII

### OFFICIAL LANGUAGE

#### CHAPTER I.—LANGUAGE OF THE UNION

Official language of the Union.

**343.** (1) The official language of the Union shall be Hindi in Devanagari script.

The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English



language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement :

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of—

- (a) the English language, or
- (b) the Devanagari form of numerals,

for such purposes as may be specified in the law.

**344.** (1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint and the order shall define the procedure to be followed by the Commission.

Commission and Committee  
of Parliament on official  
language.

(2) It shall be the duty of the Commission to make recommendations to the President as to—

(a) the progressive use of the Hindi language for the official purposes of the Union ;

(b) restrictions on the use of the English language for all or any of the official purposes of the Union ;

(c) the language to be used for all or any of the purposes mentioned in article 348 ;

(d) the form of numerals to be used for any one or more specified purposes of the Union ;

(e) any other matter referred to the Commission by the President as regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

## CHAPTER II.—REGIONAL LANGUAGES

**345.** Subject to the provisions of articles 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State :

Official language or languages of a State.

Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

**346.** The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union :

Official language for communication between one State and another or between a State and the Union.

Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication.

**347.** On a demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

Special provision relating to language spoken by a section of the population of a State.

## CHAPTER III.—LANGUAGE OF THE SUPREME COURT, HIGH COURTS, ETC.

Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.

**348.** (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

(a) all proceedings in the Supreme Court and in every High Court,

(b) the authoritative texts—

(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,

(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor or Rajpramukh of a State, and

(iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language.

(2) Notwithstanding anything in sub-clause (a) of clause (1), the Governor or Rajpramukh of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State :

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor or Rajpramukh of the State or in any order, rule, regulation or by-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor or Rajpramukh of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.

**349.** During the period of fifteen years from the commencement of this Constitution, no Bill or amendment making provision for the language to be used for any of the purposes mentioned in clause (1) of article 348 shall be introduced or moved in either House of Parliament without the previous sanction of the President, and the President shall not give his sanction to the introduction of any such Bill or the moving of any such amendment except after he has taken into consideration the recommendations of the Commission constituted under clause (1) of article 344 and the report of the Committee constituted under clause (4) of that article.

Special procedure for enactment of certain laws relating to language.

#### CHAPTER IV.—SPECIAL DIRECTIVES

**350.** Every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

Language to be used in representations for redress of grievances.



**351.** It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.

Directive for development of the Hindi language.

## PART XVIII

### EMERGENCY PROVISIONS

#### *General*

THE DIFFERENT KINDS OF EMERGENCY PROVIDED FOR IN PART XVIII.—The foregoing Parts of the Constitution lay down the normal machinery of Government. But there are abnormal situations which would call for a departure from this normal structure and operation. Part XVIII deals with these abnormal situations or emergencies, which are of three different kinds :—(i) An emergency due to external or internal aggression. (ii) Failure of constitutional machinery in the States. (iii) Financial emergency.

(i) A 'Proclamation of Emergency' may be made by the President at any time he is satisfied that the security of India or any part thereof has been threatened by war, external aggression or internal disturbance [Art. 352].

(ii) Proclamation of failure of constitutional machinery in the States. The President is empowered to make a Proclamation, when he is satisfied that the Government of a State cannot be carried on in accordance with the provisions of the Constitution, either on the report of the Governor or Rajpramukh of the State or otherwise [Art. 356].

(iii) Proclamation of Financial emergency. The President is empowered to make a declaration of '*financial emergency*' whenever he is satisfied that the financial stability or credit of India or any part thereof is threatened [Art. 360].

PROCLAMATION OF 'EMERGENCY' DISTINGUISHED FROM A PROCLAMATION OF FAILURE OF CONSTITUTIONAL MACHINERY IN A STATE.—The two types of Proclamation differ not only as to the grounds leading to the Proclamation but also to the effects. The right to move the Courts for the enforcement of Fundamental Rights would not be affected in case of a Proclamation of failure of constitutional machinery, but is liable to be suspended in case of a Proclamation of Emergency [Article 359]. On the other hand, while the object of a Proclamation of Emergency is to confer greater powers of *control* upon the Union authorities, the State authorities would not cease to function. In case of a Proclamation of failure of constitutional machinery, on the other hand, the Government of the State concerned, or some part of it, would be *superseded* by the Union [Art. 356 (1)]. In other words, the provisions of the Constitution ■ regards the Government of the State would be suspended by a Proclamation of the second type, to the extent declared by it.

In short, while Arts. 352-3 merely give the Union concurrent powers of legislation and administration ■ regards State affairs, while the State authorities continue to function, Art. 356 enables the Union to suspend the State Legislature altogether and the State Executive in whole ■ in part.

**352.** (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

- (2) A Proclamation issued under clause (1)—
- (a) may be revoked by a subsequent Proclamation ;
  - (b) shall be laid before each House of Parliament ;
  - (c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Cls. (1) and (2) of this Article are taken from sub-Secs. (1) and (3) of S. 102 of the Act of 1935, which were as follows :—

“(1) Notwithstanding anything in the preceding sections of this Chapter, the Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a ‘Proclamation of Emergency’) that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof, with respect to any of the matters enumerated in the Provincial Legislative List . . .

(3) A Proclamation of Emergency—

- (a) may be revoked by a subsequent Proclamation ;
- (b) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament ; and
- (c) shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.”

#### INDIA

*Art. 352 : Proclamation of Emergency.*—The provisions of this Article may be compared with those of S. 102 of the Act of 1935, as follows—

(i) Both the Act of 1935 and the Constitution vest the power to make the proclamation, in the head of the Executive,—subject to ultimate Parliamentary sanction. But while under the Act of 1935, the Governor-General's Proclamation might remain valid without Parliamentary sanction for a period of 6 months, the Constitution reduces this period to *two* months, and makes special provision for the case where the Proclamation is made during a dissolution of the House of the People.

(ii) The Proclamation can be made under the Constitution, as under the Act of 1935, only in case the security of India is threatened. But the language of the Constitution is an improvement on that of the Act on two points—firstly, the Constitution provides that the Proclamation may be made also where only a *part* of the territory of India is threatened. Secondly, the words 'external aggression' have been added, with the result that under the Constitution, the power may be used by the President not only in case of war, but also in cases of external aggression, short of war. The internal disturbance which justifies a Proclamation may or may not be attended with violence. For example, it may be a general strike (*cf.* the English Emergency Powers Act, 1920), which 'disturbs' the normal life of the people, and yet fall short of an armed rebellion or the like.

(iii) As under the Act of 1935, the Courts shall have no power to question the validity of any Proclamation made by the President on the ground that it is not justified by the existence of any of the grounds mentioned by the Constitution as constituting 'grave emergency'<sup>20</sup>. In the Constitution, this position is secured (a) by the use of the word 'satisfied' in clause (1) and, further, (b) by providing in clause (3) that the *actual* occurrence of war or internal or external aggression is not necessary to justify the Proclamation.<sup>21</sup> The President may make the Proclamation on being satisfied "that there is *imminent danger* thereof."

But though the Courts shall have no say in the matter, the President under the Constitution shall have to exercise the power under ministerial advice, while the power under the Act of 1935 was exercised by the Governor-General 'in his discretion.' Hence, 'satisfaction,' whether in Article 352 or 356 or 360 of the Constitution must be a satisfaction of the President on Ministerial advice.

'Security of India.'—See under Entry 9 of List I, 7th Sch., *post*.

Effect of Proclamation of  
Emergency.

**353.** While a Proclamation of Emergency is in operation, then—

(a) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised ;

(b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union ■ respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

(20) *Cf. Emperor v. Benoari Lal*, (1945) 1 M.L.J. 76 : 1945 F.L.J. 1 : 49 C.W.N. 178 (P.C.).

(21) Cl. (3) has been introduced to remove the doubt raised in *Emperor v. Benoari*, A.I.R. 1943 Cal. 285 (S.B.).



**354.** (1) The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions of Articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation.

(2) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

*Arts. 353-4 : Effects of a Proclamation of Emergency.*—The effects of a Proclamation of Emergency may be discussed under four heads—(i) Executive ; (ii) Legislative ; (iii) Financial ; (iv) As to Fundamental Rights.

(i) *Executive* : When a Proclamation of Emergency has been made, the executive power of the Union shall, during the operation of the Proclamation, extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised [Article 353 (a)].

In normal times, the Union Executive has the power to give directions to a State which includes only the matters specified in Arts. 256-7 ; p. 568, *ante*.

But under a Proclamation of Emergency, the Government of India shall acquire the power to give directions to a State on 'any' matter, so that though the State Government will not be suspended, it will be under the complete control of the Union Executive, and the administration of the country, in so far as the Proclamation goes, will function as under a Unitary system, with local sub-divisions.

(ii) *Legislative* : (a) While a Proclamation of Emergency is in operation, the President may extend the normal life of the House of People (5 years), for a period not exceeding one year at a time and not extending in any case beyond a period of 6 months after the Proclamation has ceased to operate [Proviso to Art. 83 (2), p. 290, *ante*.]

(b) As soon as a Proclamation of Emergency is made, the legislative competence of the Union Parliament shall be automatically widened and the limitation imposed upon as regards List II, by Article 246 (3), shall be removed. In other words, during the operation of the Proclamation of Emergency, Parliament shall have the power to legislate as regards List II (State List) as well [Article 250 (1) ; p. 557, *ante*. Though the Proclamation *shall not suspend* the State Legislature, it will suspend the distribution of legislative powers between the Union and the State, so far as the Union is concerned,—so that the Union Parliament may meet the emergency by legislation over any subject as may be necessary, as if the Constitution were unitary.

(c) In order to carry out the laws made by the Union Parliament under its extended jurisdiction as outlined above, Parliament shall also have the power to make laws conferring upon the Union Executive powers, and imposing upon it duties, as may be necessary, for the purpose [Art. 353 (b)].

(iii) *Financial* : During the operation of the Proclamation of Emergency, the President shall have the constitutional power to modify the provisions of the Constitution as lay down the allocation of financial relations between the Union and the States, by his own Order. But no such Order shall have effect beyond the financial year in which the Proclamation itself ceases to operate, and, further, such Order of the President shall be subject to approval by Parliament [Art. 354].

(iv) *As regards Fundamental Rights* : See under Arts. 358-9, *post*.

**355.** It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.

Duty of the Union to protect States against external aggression and internal disturbance.

#### OTHER CONSTITUTIONS

U. S. A.—Art. 4 (4) of the United States Constitution says—

“The United States shall guarantee to every State in the Union a republican form of Government, and shall protect each of them against invasion, and, on application of the Legislature, or of the Executive (*when the Legislature cannot be convened*), against domestic violence.”

(a) *Guarantee of republican form of Government.*—From the above duty of the Federal Government to guarantee the republican form in the States it might seem that the national Government may prohibit or suspend such State Governments as do not in its judgment conform to its requirement. But in practice we do not get any instance to the effect that the Government of the United States has suspended or interfered with a State Government on the ground that the latter has failed to perform its constitutional obligations.<sup>22</sup>

The above clause has come to the Court on the occasion of—(a) a political rebellion in Rhode island<sup>23</sup>; (b) the adoption of initiative and referendum in a local Governmental machinery<sup>24</sup>, and (c) the commission plan for cities<sup>25</sup>. In all these cases, it has been held that the maintenance of *representative* institutions is sufficient to maintain a ‘republican’ form of Government.

It has, however, been laid down by the Supreme Court that the question whether a State has a republican form of government or not, is a *political* question and that the determination by Congress cannot be questioned by the Courts<sup>23</sup>.

(b) *Protection against invasion.*—The guarantee of protection against invasion or external aggression is not of much significance, for an invasion of a State must *ipso facto* be an invasion of the Union and must, therefore, be resisted by the national forces. It would mean, however, that the Union cannot give up any State to a foreign aggressor without resistance.

(c) *Protection against domestic violence.*—If the working of the State Government becomes impossible owing to domestic violence, the Union Government may come to the aid of the State authorities, with its military forces if required,—but only on the application for such aid by the State Legislature or the State Executive.

If, however, the disturbance interferes with the operation of the *national* Government itself, the processes of the Federal Courts, or the movement of the interstate commerce,—or federal property is in danger, the Union may send its forces on its own initiative, without waiting for the application of the State authorities, as President Cleveland did in the case of the Chicago strike in 1894. But the Union authority, in such a case is founded, not on the failure of the State authorities to maintain peace, but on the right of the Union to execute the federal laws and to maintain its authority on every foot of the national territory. Thus, In re *Debs*<sup>1-2</sup>, the Supreme Court upheld the President's action in Chicago railway strike case, with these observations :

“The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails.”

(22) Garner, Political Science and Government, p. 352.

(23) *Luther v. Borden*, (1848) 7 How. 1.

(24) *Pacific States Tel. Co. v. Oregon*, (1912)

223 U.S. 118.

(25) *Eckerson v. Des Moines*, (1908) 137 Iowa 452.

(1-2) In re *Debs*, (1895) 158 U.S. 564.

*Australia.*—S. 119 of the Constitution Act says—

“The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.”

*German Reich, 1919.*—See under Art. 356, p. 688, *post*.

#### INDIA

*Art. 355 : Duty of Union to protect States.*—In a federal Constitution, as in the U.S.A., it is the duty of the Union to protect the State against external aggression and domestic violence, and also to ensure that the State administration is carried on in accordance with the Constitution. The Indian Constitution adopts this principle, and empowers the President to achieve the above object by a twofold power. (a) The President is given the power to make a Proclamation of Emergency on the ground of war, external aggression or internal disturbance, conferring wider powers to the Union Executive and Legislature to control affairs in a State [Arts. 352-4]. (b) The President is empowered to make a Proclamation in case the constitutional machinery in any State breaks down or any State refuses to discharge its constitutional obligations,—to suspend the State Executive and Legislature and withdraw their powers to the Centre. [Arts. 356-7].

**356.** (1) If the President, on receipt of a report from the Governor or Rajpramukh of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

Provisions in case of failure of constitutional machinery in States.

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or Rajpramukh, as the case may be, or any body or authority in the State other than the Legislature of the State ;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament ;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State :

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this Article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :



Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the people is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3) :

Provided that if and so often as a resolution approving the continuance in force of each Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years :

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

#### OTHER CONSTITUTIONS

*U. S. A.*—It has already been shown (p. 685, *ante*), that we do not get any precedent in the United States for supersession of the State Constitution by the Union Government, on the ground of the "failure of the constitutional machinery" in the State, say, owing to some political deadlock, without interference with federal authority.

But if there is ■ resistance to the execution of the federal laws<sup>3</sup> or to the authority of the federal Government by ■ State Government, the national government may visit it with forces, to maintain 'the indissoluble union.'<sup>4</sup>

(3) *In re Debs*, (1895) 158 U.S. 564.

*v. Anderson*, 9 Wall. 56.

(4) *The Protector*, 12 Wall. 700; *United States*

It is in pursuance of this right that President Lincoln justified his course in sending the national militia into the Southern States, during the 'civil war' of 1861,—treating it as a war against the Union.

*German Reich, 1919.*—Arts. 17 and 48 of that Constitution provided—

“ 17. Every State must have a republican Constitution.

48. In the event of a State not fulfilling the duties imposed on it by the Constitution or the laws of the Reich, the President of the Reich may make use of the armed forces to compel it to do so.

Where public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take the measures necessary for their restoration . . . . .”

The reference to the use of the armed forces makes it clear that in the German Constitution also, the power of federal coercion was to be taken in extreme cases of threat to the security of the Federation owing to the failure of the State to perform its constitutional obligations. There is no provision for supersession of the State authorised by the federal authorities in matters of internal Government in cases of political deadlock or crisis, not amounting to violence or disorder.

#### INDIA

*Art. 356 : Proclamation on Failure of Constitutional Machinery in a State.*—The provisions of *our* Constitution relating to this matter attempt a combination of the provisions of sections 45 and 93 of the Government of India Act, 1935, with certain differences :

(i) While the Act of 1935 empowered the Governor-General to deal with a failure of the constitutional machinery at the Centre (section 45) and also empowered the Governor to deal with a similar situation in the Province (section 93),—the Constitution does not intend to suspend the constitutional machinery of the Union on the ground of any breakdown ; it seeks to suspend the constitution of a State in whole or in part in case of a failure of the constitutional machinery in the State, but empowers the President to take the steps in this behalf, though he shall have to act on the report of the Governor or Ruler of the State.

(ii) While under section 93 of the Government of India Act, 1935, the executive and legislative powers of the State could be assumed by the Governor, acting in his discretion,—the Constitution provides for the assumption of executive powers<sup>5</sup> of the State to the President (acting on the advice of his Ministers), and of the legislative powers of the State to the Union Parliament, though it would be open to Parliament to delegate such legislative powers to be exercised by the President or some other authority to be specified by him, on behalf of Parliament<sup>6</sup> and for suspension of any other authority in the State save the High Court<sup>7</sup>. The provision in the Constitution is a measure of 'federal coercion', while the corresponding provision in the Act of 1935 had no such implication. The object of the Act of 1935 was simply to withdraw power from popular control to the irresponsible Executive.

(iii) As under the Act of 1935, the assumption of the powers of the State is to be made by a Proclamation. As already stated, the Proclamation is to be made by the President under the Constitution, on being 'satisfied' that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. So, as in the case of a Proclamation of Emergency, it would not be open to the Courts to question the validity of the President's Proclamation under Art. 356.

(iv) As to duration, the provisions of Article 356 (3) are different from the provisions of section 93 of the Act of 1935, and are similar to those of Article 352 (2) which we have already discussed. Further, each approval by the Union Parliament will give the Proclamation a fresh lease of life for 6 months, subject to a maximum duration of 3 years for a Proclamation [Art. 356 (4)].

(5) Art. 356 (1) (a).

(6) Art. 356 (1) (b).

(7) Art. 356 (1) (c).

<sup>8</sup> *Government cannot be carried on in accordance with the provisions of the Constitution.*— This expression is used in the same sense in Arts. 355-6. It has a very wide scope. It means the failure of a State Government to work according to the Constitution, which has no necessary connection with external aggression, internal disturbance or violence, though these may be the cause of the failure in particular cases. When these take place so as to cause a *physical* breakdown of the machinery of the State Government, the Proclamation under the present Article may obviously be made<sup>8</sup>. The Article may also be invoked where there is a *political* breakdown<sup>9</sup>, such as want of a stable majority to form a ministry even after a dissolution of the Legislature. A failure within the meaning of the present Article may probably arise also in case of abuse of the constitutional powers by a State Government, gross misgovernment—(something more serious than 'maladministration').

It may be expected that the power under Art. 356 will be exercised by the Union only as a matter of last resort,—when all other constitutional means fail, such as giving directions, warning, fresh election and the like.<sup>10</sup>

**357.** (1) Where by a Proclamation issued under clause (1) of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

Exercise of legislative powers under Proclamation issued under article 356.

(a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf ;

(b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof ;

(c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.

(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a Proclamation under article 356, have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period, unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by Act of the appropriate Legislature.

(8) If Arts. 352-3 prove inadequate.

(9) The case of 'economic' breakdown is dealt with specifically in Art. 360, *post*.

(10) Cf. Constituent Assembly Proceedings, Vol. IX, p. 177.



ART. 357 : *Exercise of legislative powers under Article 356 (1) (b).*—This article simply amplifies the meaning of Art. 356 (1) (b). When the State Legislature is suspended under Art. 356 (1) (b), its powers shall be taken over by the Union Parliament. But owing to pressure of its own business, it may be difficult for Parliament to exercise the powers of the State Legislature by itself. So, Art. 357 empowers Parliament to delegate such State Legislative powers, subject to its ultimate authority.

Clause (1) lays down *how* the legislative powers may be exercised. Sub-Cl. (a) empowers Parliament to delegate the legislative powers of the State to the President, with power to 'sub-delegate'. (Without such express provision, sub-delegation would have been bad; see p. 53, *ante*.) Sub-Cl. (b) is similar to Art. 353 (b); it empowers Parliament, or the President or the sub-delegated authority who is exercising the State legislative powers for the time being, to confer powers or duties upon the Union or its officers and authorities, for the enforcement or execution of the laws so made. Sub-cl. (c) forms an exception to Art. 204 (3), read with Art. 114 (3). When the Union Parliament assumes the powers of the State Legislature, appropriations from the State Consolidated Fund would require Appropriation Acts made by Parliament. This sub-clause empowers the President to authorise such expenditure by his executive order, subject to ultimate sanction by Parliament, when the House of the People is not in session,—during the operation of a Proclamation under Art. 356.

Cl. (2) is analogous to the provision in Art. 249 (3)<sup>11</sup>, *ante*, but provides in addition, that the temporary laws made under Art. 357 (1) (a) may be continued by re-enactment by the State Legislature after it is revived, or may be repealed sooner than the expiry of one year after the Proclamation under Art. 356 has ceased to operate.

**358.** While a Proclamation of Emergency is in operation, nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Suspension of provisions of article 19 during emergencies.

**359.** (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

Suspension of the enforcement of the rights conferred by Part III during emergencies.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

(11) Substituting 'one year' for 'six months'.

## OTHER CONSTITUTIONS

*England.*—The experience of the last two World wars, particularly, World War II, has shown that in times of War it is essential for the safety of the realm to arm the Government with powers unthought of and often unknown in time of peace and that Courts have tolerated this in the interests of public safety.<sup>12</sup> The maxim is—*Inter arma silent leges* (when there is an armed conflict, the laws remain is lent).

In *England*, the Executive has no Emergency powers except under Parliamentary authority. There is no prerogative of the Crown to make a Proclamation of Emergency. But while the principles of Parliamentary Sovereignty and Rule of Law are kept unimpaired even in times of War, Parliament itself endows the Executive with authority to arrest without trial suspected persons by passing such Acts as the Defence of the Realm Act, 1914, Emergency Powers (Defence) Act, 1939,—and so warrants—

“extraordinary interference with the citizen’s most cherished rights of person and property which, in view of Parliament, may be necessary and proper in . . . grave national danger”.<sup>13</sup>

So long as Parliament itself authorises certain restrictions on liberty, the individual has nothing to complain of as he has got ample scope to have it tested in the Courts of law whether his liberty has been infringed in due conformity to the law enacted by Parliament.

But danger comes from what is called delegated legislation. When, in the nature of the situation, it is impossible for Parliament to meet every possible emergency by detailed legislation, Parliament is obliged to confer upon the Executive authorities themselves the power to promulgate subsidiary legislation by rules and regulations which have the same force as the law passed by Parliament itself. In such cases, the Executive becomes at once the legislator and the administrator, and so vast powers of discretion are vested upon itself by such rules and regulations, that it becomes as well a judge of its own action to a certain extent.<sup>13, 16</sup>

A concrete example of this took place in the notable case of *Liversidge v. Anderson*<sup>12</sup>. By the Emergency Powers (Defence) Act, 1939, Parliament had authorised the Government to make defence regulations under the Act “for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of *public safety or the defence of the realm*.” Regulation 18-B, made accordingly, authorised the Secretary of State, to detain without trial any person whom the Secretary of State “has *reasonable cause* to believe to be of hostile origin . . . .” It was *held*, in the above case,<sup>12</sup> by the House of Lords, that the Courts of justice had ■ jurisdiction to examine in any case whether the grounds of belief of the Secretary of State were reasonable or not, and that the Act of Parliament and the Regulation made under it only required the Secretary of State himself to be reasonably satisfied. In short, it was not subject to judicial review.<sup>17</sup>

In this case,<sup>12</sup> though it was observed that the rules of interpretation of statutes and regulation were the same in times of peace as well as of war, the House of Lords practically formulated the theory that what Parliament would not intend in time of peace, it would readily intend in times of war. See pp. 117 and 127, *ante*, where these principles have been fully explained.

In short, in *England*, a distinction is made between an emergency due to war, and ■ emergency in time of peace,—due to internal disorder.

(A) *In time of peace.*—The Emergency Powers Act, 1920, authorises the Crown to declare ■ state of emergency and to issue regulations by Order in Council ■ long ■ such declaration ■ in force. The declaration can be made by the

(12) *Liversidge v. Anderson*, (1942) A.C. 206.  
(13-16) Cf. *R. v. Halliday*, (1917) A.C. 260.

[(17) *Greene v. Home Secretary*, (1942) A.C. 284 (H.L.).

Executive only when the essentials of life are threatened, as defined by the statute. Since the declaration as well as the regulations are to be made by the Executive under statutory authority, these must be in conformity with the conditions laid down in the statute. The Proclamation must be laid before Parliament forthwith, and if Parliament is not sitting, it must be summoned within 5 days.

The only thing that the regulations issued under the English declaration of emergency can do is to secure and regulate the supply and distribution of the necessities of life and to empower the police for preserving peace. But the Executive have no power, under the statute, to issue regulations—

- (a) to impose military service or industrial conscription ;
- (b) to alter the existing procedure in criminal cases ;
- (c) to punish by fine or imprisonment without trial ;<sup>18</sup>
- (d) to *suspend the writ of habeas corpus*.<sup>19</sup>

(B) *In time of war* : Of course, in time of war, the powers of the Executive are larger even in England. But even then, these powers are derived from Parliament. Until World War I, Parliament used to help the Executive in proper prosecution of the war, by passing a *Habeas Corpus Suspension Act*, followed by an Act of Indemnity at the cessation of the War.

Since World War I, however, the practice of directly suspending the writ of *habeas corpus* has been abandoned. Instead, Parliament now passes an Act [e.g., the Defence of the Realm Act, 1914, or the Emergency Powers (Defence) Act, 1939], authorising the Executive to make Regulations for the public safety or the defence of the realm, including a power to detain without trial. And the House of Lords has laid down that the Courts would uphold such detention in the interest of national safety, except where there has been an abuse or *mala fide* use of the power or where there has been a *prima facie* wrong application of the power, as in a case of mistaken identity.<sup>20</sup>

But though the Courts would not interfere with the Executive power to detain without trial, except in the above cases of wrong use of the power,—it is to be noted that the *right of access to the Courts* has never been barred<sup>21</sup> either during World War I or II, and there have in fact been releases.<sup>22</sup>

But under the English system, the relaxation from the traditional rule of law is held justified only by pressing emergency and would not be tolerated beyond the duration of such exigency. As Lord Macmillan has put it in a recent article<sup>23</sup> :

“ We have had good reason to realise the truth of Cicero’s adage that amidst the clash of arms the laws are silent. The still, small voice of the law is quelled while men kill and destroy in defiance of its dictates. What we have to do is to restore the reign of law, to *reseat justice on her throne*, to cause right once more to prevail over wrong. The process of re-establishing the rule of law once it has been shattered is slow and difficult ; it is so much easier to destroy than to rebuild. But until the world once more becomes law-abiding it cannot hope to regain peace and happiness.”

U. S. A.—Art. I, Sec. 9 (2) of the Constitution says—

“ The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it ”.

It is clear from the above that nothing short of actual invasion<sup>24</sup> or rebellion may justify the suspension of the writ ; any internal “ disturbance ”, such as a general strike would not justify it. Further, it has been held<sup>25</sup> that the power to suspend the writ belongs exclusively to Congress. No doubt, during the earlier part of the Civil War, the President issued proclamations to suspend the writ, but Chief Justice Taney, in the case of *Ex parte Merryman*<sup>1</sup>, held that suspension of

(18) Keith, Constitutional Law, p. 216.

(19) Wade and Phillips, Constitutional Law, p. 320.

(20) *Liversidge v. Anderson*, (1942) A.C. 206 (H.L.).

(21) *Chester v. Bateson*, (1920) 1 K.B. 829.

(22) *Ex parte Budd*, (1942) 2 K.B. 14.

(23) 53 C.W.N. cxxxiii.

(24) *Ex parte Miligan*, 4 Wall. 2.

(25) *Ex parte Bollman*, 4 Cr. 75.

(1) *Ex parte Merryman*, Taney’s Rep. 246.



the writ was ■ *legislative* power which the President could not exercise, and since then, this view is upheld as the correct view by all authorities on American Constitutional Law, down to Willoughby<sup>2</sup>. Hence, the American President has no "interim power" to suspend the *habeas corpus*, without the sanction of Congress. As a matter of fact, in 1863, Congress had to specifically authorise the President to suspend the writ.

Again, it is for the Courts to determine whether conditions have arisen which would justify the suspension of the right of Congress. Thus, the Supreme Court held that a threatened invasion would not justify the suspension<sup>3</sup>.

As regards fundamental rights, *other than* the right to *habeas corpus*,—there is no provision in the American Constitution corresponding to Art. 358 of the Constitution of India, for suspension of any of the fundamental rights, either during war or any other emergency,—either by the Executive or by the Legislature. Nothing short of constitutional amendment may suspend the Bill of Rights. This was laid down by the early case of *Ex parte Miligan*<sup>4</sup>, where it was observed—

"No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its (Bill of Rights) provisions can be suspended during any of the great exigencies of the Government"<sup>5</sup>

Of course, times have changed since the above pronouncement by the Supreme Court, but the words contain such a perennial truth that they should ever ring in the ears of men who ardently desire for constitutional government<sup>6</sup>.

Of course, it does not mean that in the United States, the Executive or the Legislature has no ampler powers in times of emergency than in time of peace. But in every case, the excess of authority must be weighed by the balance of justice. What happens in the United States is that the Court recognises that in times of danger, the States requires an ampler "police power," and so the Court would uphold as valid such executive or legislative action as would not be tolerated in time of peace (*e.g.*, the Espionage and Sedition Acts, 1917-18)<sup>6</sup> or control of prices<sup>7</sup>, or conscription for raising an army<sup>8</sup>, or sending such army abroad<sup>9</sup>. Nevertheless, the Legislature is not the final authority to determine what constitutes proper exercise of Police power. [See pp. 45-6, *ante*.]

Thus, in upholding restrictions on freedom of speech in times of war, the Supreme Court said—

"Many things that might be said in time of peace are such ■ hindrance to its effort that their utterance will not be endured so long as men fight . . . . no court could regard them as protected by any constitutional right"<sup>10</sup>.

On the same principle, the Supreme Court upheld the Espionage Act, 1917, under which *inter alia*, the Post-master General was empowered to revoke the

(2) See authorities referred to in Willoughby's Constitutional Law of the United States, Vol. III, p. 1615; Black, Constitutional Law, 716.

(3) It is yet to be seen, in what light the Supreme Court views the Communist Control Act, 1950, which has just been passed by Congress, overriding the President's veto. This Act has the following provisions:—

(1) Authorizes the Attorney-General to intern potential spies and saboteurs in time of war, invasion or insurrection; (2) Requires Communist organizations and their members to register; (3) Provides for exclusion and deportation of Communist aliens (except diplomats) and denies naturalization rights to Communists; (4) Extends the Statute of Limitations on Espionage from the present three years to 10; and (5) Makes it a crime to (a) conspire to perform any act which would substantially contribute to the establishment within the U.S.A. of a totalitarian dictatorship, (b) employ know-

ingly a Communist in Government service, and (c) distribute Communist propaganda without labelling it ■ Communist.

(4) *Ex part. Miligan*, (1866) 4 Wall. 2.

(5) For similar observations in recent cases, see *Home Building Association v. Blaisdell*, (1933) 290 U.S. 398—"Even War does not remove constitutional limitations safeguarding essential liberties"; *Carter v. Carter Coal Co.*, 298 U.S. 238—"War does not nullify the constitution nor suspend its operation".

(6) *Schenck v. United States*, (1919) 249 U.S. 47; *Debs v. United States*, (1919) 249 U.S. 211.

(7) *Tyson v. Banton*, (1927) 273 U.S. 418 (peace); *Takus v. United States*, (1944) 321 U.S. 414.

(8) *Selective Draft Law Cases*, (1918) 245 U.S. 366.

(9) *Cox v. Wood*, (1918) 247 U.S. 3.

(10) *Schenck v. United States*, (1919) 249 U.S. 47 (52), per Holmes, J.

privilege of cheap postal rates from newspapers which published matters prescribed by law, *e.g.*, discouraging recruitment of soldiers.<sup>11</sup>

*Eire*.—Art. 28, Sec. 3 (3) of the Constitution of *Eire* says—

“Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in pursuance of any such law.”

This article in effect enables the Oireachtas (Parliament of *Eire*) to repeal the entire Constitution by ordinary legislation, in time of war, for under the present article, it will be impossible to invoke any provision of the Constitution to invalidate any law passed by the Legislature for securing the public safety or preservation of the State.<sup>12</sup> By the Amendment of 1939, the above sub-section has enlarged the powers of the Oireachtas further, by enabling it to legislate under the above sub-section even during a War in which *Eire* is not a participant, in case a national emergency has arisen out of such War.

The Irish Parliament passed the Emergency Powers Acts, 1939 and 1940, by virtue of the above provision of the Constitution. These Acts empowered the Government—(a) to control any of the supplies or services essential to the State; (b) to detain persons (including Irish citizens) where such detention is, in the opinion of the Minister, necessary or expedient in the interests of the public safety or preservation of the State<sup>13</sup>.

Under the Constitution of *Eire*, the Executive has no emergency powers independent of the Legislature, save to take immediate steps in case of an actual invasion. The provisions in this respect are contained in Article 28 (3) which says—

“In the case of actual invasion, however, the Government may take whatever steps they may consider necessary for the protection of the State, and Dail Eireann if not sitting shall be summoned to meet at the earliest practicable date.”

*German Reich*, 1919.—Art. 48 says—

“Where public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take the measures necessary for their restoration, intervening in case of need with the help of armed forces. For this purpose, he is permitted, for the time being, to abrogate either wholly or partially the fundamental rights laid down in articles 114,<sup>14</sup> 115,<sup>15</sup> 117,<sup>16</sup> 118,<sup>17</sup> 123,<sup>18</sup> 124<sup>19</sup> and 153.<sup>20</sup>

The President of the Reich must, without delay, inform the Reichstag of any measures taken in accordance with . . . this article. Such measures shall be abrogated upon the demand of the Reichstag.”

In pursuance of the above power, the German President placed the city of Berlin under martial law in 1920, and in 1924-25, the whole State was placed under martial law to meet the counter-revolution by Hitler and Ludendorff.

It will be seen that the above provision empowers the German President to ‘any measure necessary for restoration of public security and order,’ including the abrogation of fundamental rights such as personal liberty and freedom of speech, *etc.* Moreover, this emergency power is available even in cases of internal aggression or disorder.

#### INDIA

*Arts. 358-9: Effects of Proclamation of Emergency on Fundamental Rights*.—These two Articles lay down the effects of a Proclamation under Art. 352, upon fundamental rights.

(11) *Milwaukee S. D. Publishing Co. v. Burleson*, (1921) 255 U.S. 407. [In this case Holmes and Brandeis, JJ., dissented because of “the case with which the power claimed by the Postmaster could be used to interfere with very sacred rights.”]

(12) *In re McGrath*, (1941) I.R. 68 (76).

(13) (1944) 78 Irish Law Times 19.

(14) Personal liberty.

(15) Inviolability of dwelling.

(16) Secrecy of postal, telegraphic and telephonic communications.

(17) Freedom of speech and press.

(18) Right of peaceful assembly.

(19) Freedom of association.

(20) Property rights.

While Art. 358 provides that the State would be free from the limitations imposed by Art. 19, so that these *rights* would be non-existent against the State, during the operation of a Proclamation of Emergency,—Art. 359 deals with *all* the rights guaranteed by Part III on fundamental Rights.

But under Art. 359, the rights themselves would not be suspended but the right *to move the Courts* for the enforcement of the rights or any of them, would remain suspended, by order of the President.

On the other hand, while the suspension under Art. 358 will continue during the operation of the Proclamation, the duration of the suspension under Art. 359 may be made shorter by the President's order, so that it may not continue beyond the necessities of the case.

The peculiarity of these emergency provisions of *our* Constitution relating to suspension of fundamental rights is that no distinction is herein made between times of war and times of peace, for a Proclamation under Art. 352 may be made even in cases of external aggression or internal disturbance and that not only when they have actually taken place but also when there is 'imminent danger' thereof, according to the President's satisfaction, which is final on the point.

*Art. 358 : Suspension of provisions of Art. 19, during Emergency.*—This article provides that during a Proclamation of Emergency, the 'State' as defined in Art. 12, p. 47, *ante*, i.e., including legislative, executive and local authorities, shall be free from the restrictions imposed by Art. 19. Hence, the Legislature shall be competent to make any law and the Executive shall be at liberty to take any action, even though it contravenes or restricts the rights of freedom of speech and expression, assembly, association, movement, residence, acquisition and disposal of property, profession or occupation. So far as these rights are concerned, the citizen shall thus have no protection against the executive or legislative authorities during the operation of the Proclamation of Emergency. But the enlargement of the powers of the State under Art. 358 will continue only so long as the Proclamation itself remains in operation. Art. 19 will revive as soon as the Proclamation expires.

'*Except as respects things done or omitted to be done . . . .*'—These words obviate the necessity of enacting an Act of Indemnity after the Proclamation ceases to operate. By reason of these words, no action will lie for anything done by the State within the scope of Art. 358, even after the Proclamation ceases to operate.

*Art. 359 : Suspension of right to move Court.*—This Article empowers the President to suspend the right<sup>(21)</sup> to move the Court for enforcement of *any* of the fundamental rights, included in Part III of the Constitution, as may be specified in the Order of the President, during the operation of a Proclamation of Emergency.

The suspension shall be in force during the operation of a Proclamation of Emergency or such shorter period as may be specified in the Order of the President. But the President's Order shall not be final. It will be within the competence of Parliament to revoke or cancel the Order of the President by legislation or to otherwise express its disapproval of the Order of the President. It will, however, be within the power of the President to make delay in giving Parliament the opportunity to take up the matter, for though the President's Order is to be laid before each House of Parliament, no definite time limit is fixed for that purpose.

It is also to be noted that the Article does not provide for a general suspension of the right to move the Court for enforcement of *all* the fundamental rights, or in respect of the whole of the country. Only such rights and such parts of the country will be affected as are mentioned in the President's Order.

*Cl. (3) : "As soon as may be."*—These words leave it to the Executive itself to determine the time for laying the Order before Parliament,—without laying down a fixed time limit in the Constitution, itself. The expression "as soon as may be" means "as early as is reasonable in the circumstances of the particular case."<sup>(22)</sup>

(21) Art. 32 (1).

(22) Cf. *Mural v. Prov. of Bihar*, A.I.R. 1948

Pnt. 135 (139) (F.B.).



**360.** (1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

Provisions as to financial emergency.

(2) The provisions of clause (2) of article 352 shall apply in relation to a Proclamation issued under this article as they apply in relation to a Proclamation of Emergency issued under article 352.

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this Constitution—

(a) any such direction may include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State ;

(ii) a provision requiring all Money Bills or other Bills to which the provisions of article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State ;

(b) it shall be competent for the President during the period any Proclamation issued under this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

*Art. 360 : Financial Emergency.*—The effects of a declaration of financial emergency by the President under the present Article shall be as follows :—

(a) During the period any such Proclamation is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions.

(b) Any such direction may also include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State ;

(ii) a provision requiring all Money Bills or other financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State ;

(c) It shall be competent for the President during the period any such Proclamation is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.<sup>23</sup>

(23) Cl. (4) (b) of Art. 360, thus controls Arts. 125 [p. 387, *ante*] and 221 [p. 490, *ante*].

## PART XIX

## MISCELLANEOUS

**361.** (1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties :

Protection of President and Governors and Rajpramukhs.

Provided that the conduct of the President may be brought under review by any Court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61 :

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor or Rajpramukh of a State, in any Court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor or Rajpramukh of a State, shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor or Rajpramukh of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor or Rajpramukh of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor or the Rajpramukh, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

## OTHER CONSTITUTIONS

*U. S. A.*—(a) The President is not subject to the control of the Courts in the exercise of his powers which are to be exercised by him in his individual judgment, according to the Constitution. The Courts have no right to issue an injunction against the President,<sup>24</sup> or to compel him to perform even the most constitutionally imperative act,<sup>25</sup> or ■ merely ministerial act.<sup>1</sup> Nor can the President be compelled to attend ■ Court during term of his office.<sup>2</sup>

A *mandamus* is, of course, available against the heads of the Departments or their subordinates<sup>3</sup> but not when they are carrying out the *political* or discretionary authority of the President,<sup>4</sup> e.g., the act of execution of an Act of Congress, whether constitutional or unconstitutional.<sup>5</sup>

(24) *Mississippi v. Johnson*, (1866) 4 Wall. 475.

(25) *Marbury v. Madison*, (1803) 1 Cr. 137.

(1) *Weeks v. U.S.*, (1922) 277 Fed. 594.

(2) *Burr's Trial*, II, 536 ; III, 37.

(3) *Kendall v. U.S.*, 12 Pet. 524.

(4) *Marbury v. Madison*, (1803) 1 Cr. 137.

(5) *Georgia v. Stanton*, 6 Wall. 50.

As was explained by the counsel in the case of *Mississippi v. Johnson*<sup>6</sup>, the immunity from the process of any Court which is conferred upon the American President, does not proceed upon any theory like that 'the King can do no wrong,' i.e., the theory of any particular sanctity belonging to him as an individual, but on account of his office and so long as he remains in office. While in office, he is liable only to impeachment; but *after*<sup>7</sup> he is removed from office by impeachment, he may be tried in the ordinary courts for *torts or crimes* committed by him as President. But then he would no longer be a representative of the people or government, but an ordinary individual. But the President is not liable to any civil or criminal proceeding (save impeachment), for the performance of his duties under the Constitution.<sup>8</sup>

(b) The position of the Governor of the States is not uniform on all points. Generally speaking, the position of the Governor is similar to that of the President. Thus the Governor is not subject to the process of the Courts<sup>9</sup> nor will the Court attempt to control him personally,<sup>10</sup> nor interfere with his political acts.<sup>11</sup> But *mandamus* may lie for the performance of merely ministerial acts.<sup>12</sup> Again *quo warranto* is available against the Governor<sup>13</sup>, and an act of the Governor may be declared null and void by the Court if it is *ultra vires*<sup>14</sup>.

*Burma.*—Art. 62 of the Burmese Constitution says—

"(1) The President shall not be answerable to either Chamber of Parliament or to any Court for the exercise or performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions.

(2) The behaviour of the President may, however, be brought under review in either Chamber of Parliament for the purpose of section 54, or by any Court, tribunal or body, appointed or designated by either Chamber of Parliament for the investigation of its charges under the said section.

(3) The validity of anything purporting to have been done by the President under this Constitution shall not be called in question on the ground that it was done otherwise than in accordance with the provisions contained or referred to in the next succeeding section."

*Government of India Act, 1935.*—Sec. 306 (1) of the Act provided—

"No proceedings whatsoever shall lie in, and no process whatsoever shall issue from, any court in India against the Governor-General, against the Governor of a Province, or against the Secretary of State, whether in a personal capacity or otherwise, and, except with the sanction of His Majesty in Council, no proceedings whatsoever shall lie in any court in India against any person who has been the Governor-General, the Governor of a Province, or the Secretary of State in respect of anything done or omitted to be done by any of them during his term of office in performance or purported performance of the duties thereof :

Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Federation, a Province, or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of this Act."

#### INDIA

Cl. (1) : *Immunity of President, Governor or Rajpramukh for official acts.*—This clause gives personal immunity from legal action (whether during office or thereafter) to the President, Governor or Rajpramukh, for any act done or purported to be done by them in exercise of their powers and duties as laid down in this Constitution. But the President is not liable to be impeached under Sec. 61, though no action lies in the Courts. As to the Governor or Rajpramukh, they are liable to dismissal by the President in such cases [Art. 156 (1) p. 441, *ante*].

"Act purporting to be done in exercise of duties of office."—A public servant can only be said to act or to purport to act in the discharge of his official duty if his act is such as to lie within the scope of his official duty<sup>15, 16</sup>.

(6) Quoted in Willoughby, Constitutional Law of the United States, Vol. III, p. 1499.

(7) Willoughby, Constitutional Law, Vol. III, p. 1500.

(8) *Durand v. Hollis*, 4 Blatch 451.

(9) *Druecker v. Solomon*, 21 Wis. 621.

(10) *People v. Morton*, 156 N.Y. 126.

(11) Goodnow, Administrative Law of the

United States, p. 108.

(12) *Harpening v. Haight*, 2 Am. Rep. 432.

(13) *A.-G. v. Barstow*, 4 Wis. 367.

(14) *People v. Curtis*, 50 N.Y. 321.

(15) *Gill v. The King*, (1947) 2 D.L.R. 832 (P.C.)

(16) *Meads v. The King*, A.I.R. 1948 P.C. 156.



The following acts have been judicially held to be not done or purporting to be done in the exercise of his duties of any office :

- (a) The act of receiving illegal gratification<sup>17</sup> ;
- (b) A breach of trust<sup>18</sup> ;
- (c) Hiring out military property for unauthorised private purposes<sup>19</sup> ;
- (d) Fundamental misapplication of public money entrusted to his care<sup>20</sup>.

*Proviso (2) : Appropriate proceedings against the Government not barred.*—This Proviso makes it clear that the personal immunity of the Executive heads would not render the individual without any remedy, if any appropriate proceeding would otherwise lie against the Government concerned. The liability of the Government is, of course, subject to Art. 300, *ante*.<sup>21</sup>

*“ Appropriate proceedings ”.*—These words are intended to cover provisions which may be made by Parliament, subsequent to the commencement of the Constitution, dealing with the right to bring suits against the Government. [See Art. 300 (1), p. 630, *ante*].

*Availability of judicial writs against the Government.*—The Proviso makes it clear that there is no bar to the judicial writs as are mentioned in Arts. 32 (2) being issued against the Government, provided other conditions for their application are present. The difficulty faced by the Courts in this respect prior to the Constitution has thus been removed.

*Under the Government of India Acts*, it was held in a number of cases, that the writs of *prohibition* and *certiorari* did not lie against the Government of India or of a Province<sup>22</sup>. (Though such writs were issued against the East India Co.<sup>23</sup>).

As regards *mandamus*, Sec. 45 of the Specific Relief Act lays down that an order under that section would not be issued against the Secretary of State, Governor-General or Governors ; or against any servant of the Crown “ merely to enforce the satisfaction of a claim against the Crown ”.

But under the present clause of Art. 361 of the *Constitution*, though a *mandamus* would not issue against the President, Governor of Rajpramukh, there is no bar to a *mandamus* being issued against the Government concerned or against an officer thereof.<sup>24</sup> The theory of immunity of the Crown would not apply under the Constitution<sup>24</sup>. But, as in England<sup>25</sup> or in the United States,<sup>1</sup> *mandamus* will not lie against the Government or any officer in matters of discretion.<sup>2</sup> (See p. 175, *ante*).

*Cl. (2) : Immunity from criminal proceedings during term of office.*—While Cl. (1) refers to immunity from official acts, Cls. (2)-(3) relate to the immunity of the President, Governor or Rajpramukh, for their *personal* acts. But the privilege offered by both Cls. (2)-(3) is confined to their term of office. Thus, though the President or Governor or Rajpramukh cannot be hauled up before the Courts for any crime committed by them during their term of office, there is no bar to prosecute them

(17) *Hector v. King-Emperor*, A.I.R. 1944 F.C. 66.

(18) *Horiram v. The Crown*, A.I.R. 1939 F.C. 43.

(19) *Re Doraiswamy*, A.I.R. 1949 Mad. 16.

(20) *Meads v. King-Emperor*, A.I.R. 1948 P.C. 156.

(21) Cf. *Rao v. Khusaldas*, A.I.R. 1949 Bom. 277 (289, 300).

(22) *Venkatratnam v. Secretary of State*, A.I.R. 1930 Mad. 896 ; *Thyagarajan v. Government of Madras*, A.I.R. 1939 Mad. 940 ; *Kandaswami v. Province of Madras*, A.I.R. 1947 Mad. 443 ; *In re Banwarilal*, (1944) 48 C.W.N. 766 ; *Dinbai Petit v. Noronha*, A.I.R. 1945 Bom. 419 ; contra *Rao v. Khusalchand*, A.I.R. 1949 Bom. 277.

(23) *King v. Directors of E.I. Co.*, (1833) 4 B. & Ad. 530 ; *King v. Directors of E.I. Co.*, (1815) 4 M. & S., 279.

(24) Cf. *Brij Bhusan v. State of Delhi*, (1950) D.L.R. (S.C.) 48 (52) [*certiorari* and *prohibition*] ; *Rashid v. Municipal Board*, (1950) D.L.R. (S.C.) 53 [*mandamus*].

(25) *King v. Marshland Commissioners*, (1920) 1 K.B. 155 (165) ; *Ex parte Basset*, 119 E.R. 1251.

(1) In the matter of *Cutting*, 94 U.S. 14 ; *International Contracting Co. v. Lamont*, 155 U.S. 303 ; *Interstate Commerce Commission v. U.S.*, 260 U.S. 32.

(2) *Bagram v. State of Bihar*, (1950) D.L.R. Pat. 189 (190) (F.B.).

after they are removed from office, by impeachment or dismissal, as the case may be.

Cl. (3) : “*No process for the arrest or imprisonment*”.—This expression differs from the expression “no process whatsoever” in sub-Sec. (1) of Sec. 306 of the Act of 1935. So, there is no constitutional bar against *summoning* the President, Governor or Rajpramukh as a *witness*. But that exemption from personal appearance is provided by the ordinary law. Thus, Sec. 133 of the Code of Civil Procedure, 1908, says—

“(1) The Provincial Government may, by notification in the official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of such exemption . . . . .”

Such person may, however, be examined on commission [sub-Sec. (3) of Sec. 133].

The immunity offered by the present clause of the Constitution is from *arrest* or *imprisonment* of the President, Governor or Rajpramukh, under any civil or criminal process, *i.e.*, either as a debtor, accused, or witness.

*Exemption from arrest under civil process of certain other persons*.—Sec. 135 (1) of the Code of Civil Procedure, 1908,<sup>3</sup> says—

“No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.”

Sec. 135-A of the same Code,<sup>4</sup> again, provides—

“(1) No person shall be liable to arrest or detention in prison under civil process—

(a) If he is a member of a unicameral Legislature or of either Chamber of a bicameral Legislature . . . . ., during the continuance of any meeting of such Legislature or Chamber ;

(b) If he is a member of any committee of such Legislature or Chamber, during the continuance of any meeting of such Committee ;

(c) If he is a member of either Chamber of such a bicameral Legislature, during the continuance of a joint sitting, meeting, conference, or joint committee of the Chambers of that Legislature ;

and during *fourteen* days before and after such meeting or sitting.”

Cl. (4) : *Acts in personal capacity*.—While Cl. (1) relates to acts done by the President, Governor or Rajpramukh in their public capacity, Cl. (4) refers to acts done by them in their “personal” capacity, *i.e.*, as individuals, and not as President, Governor or Rajpramukh. The liability for such acts will come within the scope of the present clause, whether or not such acts were done before or after the President, Governor or Rajpramukh entered upon his office. But this clause is confined to *civil* proceedings.

In short, Cl. (4) says that subject to Cl. (3), civil proceedings may be brought against a President, Governor or Rajpramukh, in respect of their *personal* acts, but only if two months’ notice in writing has been delivered to the President or Governor or the Rajpramukh, according to this clause<sup>5</sup>.

*The position of Ministers*.—There is no immunity of Ministers for crimes or torts. Nor are they exempt from process of the Courts during their term of office. Their liability for personal acts is just the same as that of an ordinary individual. But as to *official* acts, the position under *our* Constitution shall be different from that in England. In *England*, every official act of the Crown must be counter-signed by a Minister who is responsible to the law and the Courts for that act. But though the principle of ministerial responsibility has been adopted in *our* Constitution, both at the Centre and in the States, the principle of legal responsibility has not been introduced in the English sense. There is no requirement that the acts

(3) See in this connection, p. 325, *ante*.

(4) Inserted by the Legislative Members Exemption Act (XXIII of 1925).

(5) Cf. Section 80 of the Civil Procedure Code which relates to civil proceedings against the Government or public officers.

of the President (*see* p. 273, *ante*) or of the Governor (*see* p. 447, *ante*) must be countersigned by a Minister. Further, the Courts are precluded from enquiring what advice was tendered by the Ministers to the President (p. 259, *ante*) or the Governor (p. 443 *ante*). It is clear, therefore, that the Ministers shall not be liable for the official acts done on their advice.

*Personal Liability of Public Officials in Discharge of Official Duties.*

*England.*<sup>6</sup>—Public officers cannot be sued personally (or in their official capacity), upon *contracts* made by them in their official capacity (the remedy being by petition of right). As regards *torts*, however, all *servants* of the Crown and public officials are *personally* responsible for wrongs committed by them in their official capacity. The command of the Crown<sup>7</sup> or of a superior officer, or *bona fides*, is no defence to an illegal act<sup>8</sup>.

The Public Authorities Protection Act, 1893, on the other hand, protects the acts of public servants done in pursuance of an Act of Parliament from challenge in the Courts after a *short* lapse of time. As regards *crimes*, there is no distinction between officials and ordinary citizens; they are subject to the *same liability*. Judicial officers, however, enjoy a special immunity for acts done or omitted to be done by them in their judicial capacity. The object of this rule is to secure the independence of the judges and to maintain their authority which is indispensable for the due administration of justice. In order to discharge their functions properly, they must be free from liability to harassing and vexatious actions at the instance of discontented parties. (i) In *Hamond v. Howell*<sup>9</sup>, it was decided that no action will lie against a judge for what he does judicially though *erroneously*. (ii) In *Anderson v. Gorrie*<sup>10</sup>, it was held, further, that no action will lie for judicial acts or omissions even if the motive of the judge has been *malicious*, and the acts or words have *not* been *done or spoken in the honest exercise* of his office. The above two immunities extend equally to judges of the superior and inferior Courts. (iii) In *Calder v. Halket*<sup>11</sup>, the Privy Council has laid down that a judge will not be liable even if he *exceeds his jurisdiction* unless he knew, or ought to have known, the absence of jurisdiction. In the case of *inferior* Courts, however, there is no such presumption of jurisdiction, and the judge must know the limits of his jurisdiction. In the latter case, the burden lies upon him to prove jurisdiction. Magistrates and justices of the peace are even liable for acts done within their jurisdiction, but *maliciously and without reasonable cause*<sup>12</sup>.

*U. S. A.*—The President and the State Governors are personally immune from action during the term of their office. But the officials who act under their command<sup>13</sup>, whether civil or military<sup>14</sup>, are personally liable for illegal acts, as in England. Thus, in *United States v. Lee*<sup>15</sup>, the Supreme Court observed—

“The defence stands here solely upon the absolute immunity from judicial inquiry of everyone who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power . . . . No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.”<sup>15</sup>

But a public officer when acting within the general scope of his authority, is not liable for mere *error* of judgment, in a matter which is not purely ministerial and the officer has to exercise his discretion<sup>16</sup>.

(6) *See* p. 631, *ante*.

(7) *Tobin v. The Queen*, (1864) 16 C.B. (N.S.) 310 (354).

(8) *Madrazo v. Willes*, (1820) 3 B. and Ald. 353; *Walker v. Baird*, (1892) A.C. 491.

(9) *Hamond v. Howell*, (1677) 2 Mod. 219.

(10) *Anderson v. Gorrie*, (1895) 1 Q.B. 670; *Scott v. Stansfield*, (1868) L.R. 1 Ex. 220.

(11) *Calder v. Halket*, (1839) 3 Moo. P.C. 28; *Haulden v. Smith*, (1850) 14 Q.B. 850.

(12) *Peacock v. Bell*, (1666) 1 Wms. 74;

*Dawkins v. Paulet*, (1869) 5 Q.B. 96; *Haggard v. Pelicir*, (1892) A.C. 61.

(13) *Hendricks v. Gonzales*, 67 Fed. Rep. 351.

(14) Excepting subordinate military officers, acting under orders which are *prima facie* legal [*R. Fair*, (1900) 100 Federal Rep. 149 [*see* p. 190 *ante*].

(15) *United States v. Lee*, (1822) 106 U.S. 196; *Little v. Barreme*, 1 Cr. 170.

(16) *Spaulding v. Vilas*, 161 U.S. 483.



Again, in giving relief against officials, the Courts will not attempt to control the political or discretionary powers that are constitutionally vested in the President.<sup>17</sup>

The immunity of Judges is the same as in England.<sup>18</sup>

*India.*—The Constitution of India contains no provision prescribing immunity of officials for anything done in the discharge of official duties, save in the matter of *contracts*, which has been already noticed [Art. 299 (1), p. 630, *ante*]. It is to be noted that the provisions of Secs. 270-1 of the Government of India Act<sup>19</sup>, 1935, have not been reproduced in the Constitution. In the result, the position of officers, under *our* Constitution, will be the same as that of private individuals except in so far as exceptions may be engrafted by *legislation*.

The principal statutory provisions, under the *existing law*, which give the officer a special protection, may be referred to, as follows:

#### I. The Judicial Officers' Protection Act (XVIII of 1850) provides—

“For the greater protection of Magistrates and others acting *judicially*; it is enacted — follows :

1. No Judge, Magistrate, Justice of the Peace, Collector or other person acting *judicially* shall be liable to be sued in any *Civil Court* for any act done or ordered to be done by him in the discharge of his official duty, whether or not within the limits of his jurisdiction : provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of ; and no officer of any Court or other person, bound to execute the lawful warrants or orders or any such Judge, Magistrate, Justice of the Peace, Collector or other person acting *judicially* shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.”

This protection is not available to the Police or a Magistrate, acting in the exercise of police powers<sup>20</sup>.

II. Apart from the above, there is no protection to officers in general in respect of *civil* liability for torts or illegal acts, unless he is acting *bona fide*, in the discharge of some *statutory* power. But even then, action will lie, if the act is proved to be malicious.<sup>21</sup> Some statutes make express provision, barring action against the officers for anything done or purported to be done under such statute. But even then action will lie on proof of *malice* (*see* p. 119, *ante*).

III. But all *civil* action against a “public officer in respect of any act purporting to be done by such public officer in his official capacity”, is subject to the procedural limitations laid down in Secs. 80-2 of the Code, of Civil Procedure, 1908. Sec. 80, in short, requires a two months' notice before institution of the suit. This provision is imperative and admits of no exception if the act is *purported* to be done in the officer's ‘official capacity’.<sup>22</sup>

On the expression “purported to be done”, *see* p. 698, *ante*. It follows that when the officer is not acting within the *scope* of his duties, no notice under Sec. 80 need be given<sup>23</sup>, for example, when he commits an assault, or otherwise acts as a private individual.

IV. As to *criminal* liability, the following provisions of the Indian Penal Code may be referred to :

(17) *Marbury v. Madison*, 1 Cr. 165.

(18) *Willoughby v. Constitutional Law*. III, p. 1433.

(19) *Huntley v. Emperor*, A.I.R. 1944 P.C. 66 ; *Maharani of Nabha v. Province of Madras*, A.I.R. 1944 P.C. 41 ; *Sarju Prasad v. Emperor*, A.I.R. 1946 F.C. 25 ; *Suraj v. Emperor*, A.I.R. 1945 F.C. 24 ; *Hori Ram v. Emperor*, A.I.R. 1939 F.C. 43 ; *Durga Prasad v. Government of United Provinces*, A.I.R. 1949 F.C. 50.

(20) *Sinclair v. Broughton*, (1882) 9 Cal. 341 (P.C.).

(21) *Spooner v. Juddoo*, (1848) 4 M.I.A. 353 (379) ; *Rogers v. Rajendra*, (1860) 8 M.I.A. 103 (134).

(22) *Bhagchand v. Secretary of State*, A.I.R. 1927 P.C. 176 ; *Province of Bombay v. Pestonji*, A.I.R. 1949 P.C. 143 (P.C.).

(23) *Vishnu v. Smith*<sup>9</sup> A.I.R. Nag. 232 ; *Ganoda v. Nalini*, (1909) 36 Cal. 28 ; *Dattatraya v. Annappa*, (1928) 52 Bom. 832 ; *Momtaz v. Lewis*, (1910) 7 A.L.J. 301 ; *Rebati v. Jatindra*, A.I.R. 1934 P.C. 96 ; *Narayan v. Surendra*, A.I.R. 1938 Nag. 449 ; *Debendra v. Official Receiver*, A.I.R. 1935 Cal. 191 ; *Raja v. Samuel*, A.I.R. 1940 Pat. 516 ; *Muhammad v. Pannalal*, (1904) 26 All. 220 ; *Peary v. Weston*, (1906) 16 C.W.N. 145 ; *Charu v. Snigdhendu*, (1948) D.L.R. (Cal.) 407.

"76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

*Illustrations*

(a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(b) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

77. Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order of a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction."

V. The procedural limitation as to prosecution of a public officer for any official act, is provided by Sec. 197 of the Code of Criminal Procedure, 1898, as follows :

"(1) Where any person who is a Judge within the meaning of Sec. 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a State Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Union, of the President ; and (b) in the case of a person employed in connection with the affairs of a State, of the Governor or Rajpramukh of that State. . . . ."

**362.** In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in clause (1) of article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State.

*Art. 362 : Guarantee of rights and privileges of Rulers of Indian States.*—This article gives constitutional recognition to those personal rights, privileges and dignities<sup>24</sup>, of the Rulers of Indian States [Art. 366 (22), *post*] which have been assured by covenant or agreement between the Government of India and such Rulers prior to the Constitution, *e.g.*, as to title, use of red plate in cars, etc.

**363.** (1) Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or other similar instrument.

Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.

(2) In this article—

(a) “Indian State” means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State ; and

(b) “Ruler” includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

*Art. 363 : Bar to interference by Courts.*—But though these covenants and agreements are recognised by Art. 362, any dispute arising out of such covenants, agreements, etc., is not justiciable. The only sanction behind them will be political negotiation between such Ruler and the President [who may consult the Supreme Court under Art. 143 (2), p. 422, *ante*].

“Indian State”, “Ruler”.—*Cf.* definition in Cls. (15) and (22) of Art. 366, pp. 708-9, *post*.

**364.** (1) Notwithstanding anything in this Constitution, the President may by public notification direct that as from such date as may be specified in the notification—

Special provisions as to major ports and aerodromes.

(a) any law made by Parliament or by the Legislature of a State shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification, or

(b) any existing law shall cease to have effect in any major port or aerodrome except as respects things done or omitted to be done before the said date, or shall in its application to such port or aerodrome have effect subject to such exceptions or modifications as may be specified in the notification.

(2) In this article—

(a) “major port” means a port declared to be a major port by or under any law made by Parliament or any existing law and includes all areas for the time being included within the limits of such ports ;

(b) “aerodrome” means aerodrome as defined for the purposes of the enactments relating to airways, aircraft and air navigation.

*Art. 364 : Special provisions as to major ports and aerodromes.*—Under Art. 245 (1) [p. 535, *ante*], the State Legislature has the power to make laws for the whole of the territory of its State, which includes the territory covered by ports and aerodromes. Exceptions from this authority of the State Legislature are provided by Entries 27 and 29 of List I, which give the Union Parliament exclusive legislative power over major ports [Entry 27] and provisions of aerodromes and their regulation and organisation [Entry 29]. But special provisions may be required as to the regulation and security of some major ports or aerodromes, owing to their importance or international character. The present Article, therefore, empowers the President to exclude or modify the application of any Union or State law as regards any particular major port or aerodrome as may be specified in such notification.

“Port,” “Aerodrome.”—*See* under Entries 27 and 29 of List I, 7th Sch., *post*.



**365.** Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State can not be carried on in accordance with the provisions of this Constitution.

Effect of failure to comply with, or to give effect to, directions given by the Union.

*Art. 365 : Effect of failure to comply with any directions of the Union.*—Arts. 256-7, 353 (a) and 360 (3) empower the Executive of the Union to give directions to the governments of States. The present article provides the sanction behind such directions. If any State fails to comply with any such direction, the President shall be entitled to exercise his power under Art. 356 [see p. 686, ante].

**366.** In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

Definitions.

*Scope of Interpretation Clause :* “ Unless the context otherwise requires.”—See p. 12, ante.

*Definitions in other Acts.*—It is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same Legislature, and more so when the reference is to enactments of other Legislatures.<sup>25</sup>

But the corresponding definitions in the Government of India Act, 1935, may be compared in order to appreciate the changes intended by the framers of the Constitution while drafting Art. 366.

(1) “ agricultural income ” means agricultural income as defined for the purposes of the enactments relating to Indian income-tax ;

“ *Agricultural income.* ”—This definition is taken, *verbatim*, from Sec. 311 (2) of the Government of India Act, 1935 (item 1). Hence “ agricultural income ” in the Constitution has the same meaning as contained in the definition given in Sec. 11 (1) of the Indian Income-tax Act (XI of 1922), which is as follows :—

“ agricultural income ” means—

(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such ;

(b) any income derived from such land by—

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii) ;

(c) any income derived from any building, owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on :

(25) *Adamson v. Melbourne Board*, A.I.R. 1929 P.C. 181 (183).

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue of the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as a dwelling-house, or as a store-house, or other out-building ;”

The following, *inter alia*, have been held to be ‘ agricultural income ’ :—

“ (i) Income derived from the letting out of pasture lands, provided the animals pastured are agricultural animals.<sup>1</sup> (ii) Amount paid by the mortgagor-lessee to the mortgagee under usufructuary mortgage, whether or not the amount is or ought to be appropriated towards the principal or interest of the mortgage or to any other purpose<sup>2,3</sup>. (iii) Malikana payable to a proprietor in lieu of surrender of all his proprietary rights, to a transferee, which is payable whether or not the lands are used for agricultural purposes<sup>2,3</sup>. (iv) Interest payable on arrears or rent, for, it is not payable for use of the land, but as compensation for delay in payment<sup>4</sup>. (v) Fixed sum payable as remuneration of mutwalli of wakf constituted of agricultural properties<sup>5</sup>. ”

But in order to be ‘ agricultural income,’ the land in question must be used for ‘ agricultural ’ purposes. Land cannot be said to be used for agricultural purposes unless there is some measure of cultivation of the land, some expenditure of skill and labour upon it.<sup>6</sup> Hence, the following is *not* agricultural income :

(i) Income from the sale of forest trees growing naturally, and without the intervention of human agency<sup>6</sup>. (ii) Salami or rent received in respect of a lease of land which is not *actually* used for agricultural purposes<sup>7</sup>.

Another primary condition under this definition is that the *land* should be “ subject to a local rate assessed and collected by officers of the Crown *as such*. ” Assessment of road cess by the Collector under the Bengal Cess Act (B. C. IX of 1890) is made by him as an officer of the Crown as such and not as a delegate of the District Board. Destination of the proceeds of the cess is immaterial for the purposes of the present definition.<sup>8</sup>

(2) “ an Anglo-Indian ” means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only ;

(3) “ article ” means an article of this Constitution ;

(4) “ borrow ” includes the raising of money by the grant of annuities, and “ loan ” shall be construed accordingly ;

“ Borrow. ”—This definition is taken, *verbatim*, from item 2 of Sec. 311 (2) of the Government of India Act, 1935. [See under Arts. 292-3, *ante*].

(5) “ clause ” means a clause of the article in which the expression occurs ;

(6) “ corporation tax ” means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled :—

(a) that it is not chargeable in respect of agricultural income ;

(1) *Mahendra v. Commissioner of Income-tax*, I.L.R. (1949) Nag. 330.

(2-3) *Mustafa v. Commissioner of Income-tax*, A.I.R. 1949 P.C. 13 ; *Income-tax Commissioner v. Maharajadhiraj*, (1935) 39 C.W.N. 1255 (P.C.).

(4) *In re Radhikamohan*, A.I.R. 1941 Cal. 443 ; *Pethaperumal v. Commissioner of Income-tax*, A.I.R. 1944 Mad. 76 ; contra *Durganarain v. Commissioner*, (1947) 1 D.L.R. (All.) 581.

(5) *Habibulla v. Commissioner of Income-tax*, (1942) 47 C.W.N. 518 (P.C.).

(6) *Mustafa v. Commissioner of Income-tax*, A.I.R. 1949 P.C. 13 ; *Tuvaraj v. Commissioner of Income-tax*, A.I.R. 1949 P.C. 294.

(7) *Commissioner of Income-tax v. Burdhan Estates*, (1949) I.T.R. 191.

(8) *Hulas Narain v. Province of Bihar*, (1942) 46 C.W.N. (F.R.) 21 (26).

(b) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals ;

(c) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals.

“ *Corporation tax.*”—The term ‘ corporation tax ’ was defined in item 4 of Sec. 311 (2) of the Government of India Act, 1935, thus :

“ Corporation tax means any tax on so much of the income of the companies as does not represent agricultural income, being a tax to which the enactments requiring or authorizing companies to make deductions in respect of income-tax from payments of interest or dividends or from other payments representing a distribution of profits, have no application ”.

In other words a corporation tax was a tax on such part of the income of companies (not being agricultural income) as was not subject to the application of legislation authorising deduction of the tax from payment of interest or dividends or representing a distribution of profits.

The Constitution adds sub-cl. (c) as an additional condition.

(7) “ corresponding Province ”, “ corresponding Indian State ” or “ corresponding State ” means in cases of doubt such Province, Indian State or State as may be determined by the President to be the corresponding Province, the corresponding Indian State or the corresponding State, as the case may be, for the particular purpose in question ;

(8) “ debt ” includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and “ debt charges ” shall be construed accordingly ;

“ *Debt.*”—This definition is taken, *verbatim*, from item (6) of Sec. 311 (2) of the Government of India Act, 1935.

(9) “ estate duty ” means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws made by Parliament or the Legislature of a State relating to the duty, of all property passing upon death or deemed, under the provisions of the said laws, so to pass ;

“ *Estate duty.*”—See under Entry 87, List I.

(10) “ existing law ” means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such law, Ordinance, order, bye-law, rule or regulation ;

“ *Existing law.*”—This definition corresponds to the definition of ‘ existing Indian law ’ in Sec. 311 (2) of the Act of 1935.

“ *Law.*”—Law in this clause means statute law, for the word ‘ passed ’ in this definition can only mean “ having received the sanction or imprimatur of the Legislature or legislative authority.”



Though Hindu Law has been applied in the administration of justice by directions of competent legislature, it does not follow that Hindu law was 'passed or made' by a Legislature. It cannot, therefore, be said to be an 'existing law' within this definition<sup>9-a</sup>; though it is included in the definition of 'law in force' in Explanation I of Art. 372 (3), *post*, where the definition uses the word 'includes' instead of the word 'means' which is used in the present definition of "existing law."

"*Ordinance*."—Before the commencement of this Constitution, an Ordinance might be made by the Governor-General and the Governor, under Secs. 42-3 and 88-9 of the Government of India Act, 1935.

"*Order*."—See p. 49, *ante*.

"*Rule*."—Rule means—

"a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment".<sup>10</sup>

See also p. 49, *ante*.

"*Regulation*."—Regulation means—

"a Regulation made by the Central Government under the Government of India Act, 1870 or the Government of India Act, 1915, or the Government of India Act, or under Sec. 95 or Sec. 96 of the Government of India Act, 1935".<sup>11</sup>

(11) "*Federal Court*" means the Federal Court constituted under the Government of India Act, 1935 ;

(12) "*goods*" includes all materials, commodities, and articles ;

"*Goods*."—This definition is taken from item 8 of Sec. 311 (2) of the Act of 1935.

(13) "*guarantee*" includes any obligation undertaken before the commencement of this Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount ;

"*Guarantee*."—This definition corresponds to item 9 of Sec. 311 (2) of the Act of 1935.

(14) "*High Court*" means any Court which is deemed for the purposes of this Constitution to be a High Court for any State and includes—

(a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and

(b) any other Court in the territory of India which may be declared by Parliament by law to be a High Court for all or any of the purposes of this Constitution ;

"*High Court*."—See pp. 400, 486, *ante*.

(15) "*Indian State*" means any territory which the Government of the Dominion of India recognised as such a State ;

"*Indian State*."—See pp. 503-6, *ante* ; Cf. List in App. LIX, White Paper on Indian States (M.S. 6).

(16) "*Part*" means a Part of this Constitution ;

(9-a) *Imperatur v. Atmaram*, (1948) 3 D.L.R. 187 (47).  
(Bom.).  
(10) General Clauses Act (X of 1897), Sec. 2 (46).  
(11) General Clauses Act (X of 1897), S. 3

(17) "pension" means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund ;

"*Pension.*"—This definition is a reproduction of the substantive portion of the definition in item 12 of Sec. 311 (2) of the Government of India Act, 1935.

(18) "Proclamation of Emergency" means a Proclamation issued under clause (1) of article 352 ;

(19) "public notification" means a notification in the Gazette of India, or, as the case may be, the Official Gazette of a State ;

"*Public notification.*"—The definition is taken from the definition in item 15 of Sec. 311 (2) of the Government of India Act, 1935.

(20) "railway" does not include—

(a) a tramway wholly within a municipal area, or

(b) any other line of communication wholly situate in one State and declared by Parliament by law not to be a railway ;

"*Railway.*"—This definition reproduces the definition in item 18 of Sec. 311 (2) of the Act of 1935, with the addition of sub-Cl. (b).

(21) "Rajpramukh" means—

(a) in relation to the State of Hyderabad, the person who for the time being is recognised by the President ■ the Nizam of Hyderabad ;

(b) in relation to the State of Jammu and Kashmir or the State of Mysore, the person who for the time being is recognised by the President as the Maharaja of that State ; and

(c) in relation to any other State specified in Part B of the First Schedule, the person who for the time being is recognised by the President as the Rajpramukh of that State, and includes in relation to any of the said States any person for the time being recognised by the President as competent to exercise the powers of the Rajpramukh in relation to that State ;

"*Rajpramukh.*"—See p. 505, *ante*. The power to 'recognise' includes the power to withdraw that recognition. Hence, ■ Rajpramukh shall be liable to be removed by the President, just as a Governor, for misconduct and the like.

(22) "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement ■ is referred to in clause (1) of article 291 was entered into and who for the time being ■ recognised by the President ■ the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler ;

"*Ruler.*"—In the power of recognition of ■ Ruler or his successor, the President ■ practically retaining power which belonged to the British Crown as the paramount





(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State specified in Part A or Part B of the First Schedule, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor or Rajpramukh, as the case may be.

(3) For the purposes of this Constitution "foreign State" means any State other than India :

Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order.

Cl. (1) : *Applicability of the General Clauses Act (X of 1897).*—See p. 16, *ante*.

#### CLAUSE (2).

Cl. (2) : 'Act' includes 'Ordinance.'—This clause practically reiterates the principle embodied in Arts. 123 (3) [p. 368, *ante*] and 213 (3) [p. 484, *ante*], viz., that the Ordinance-making power of the President is co-extensive with the legislative power of Parliament [similarly in the case of the State Governor or Rajpramukh] and that accordingly, wherever the Constitution mentions an 'Act', it will include an 'Ordinance.' This clause follows Sec. 311 (6) of the Government of India Act, 1935. It makes it clear that so far as legislative competence is concerned, there is no difference between the Ordinance-making power and the power of the corresponding Legislature, even though an Ordinance may be of temporary duration.<sup>13</sup>

#### CLAUSE (3).

*Status of Foreign States and their laws under private International law, as applied in England.*—The following rules are observed by English Courts in relation to foreign States.<sup>14</sup> These rules, it may be expected, will also be applied in India under the new Constitution :

(a) Any right which has been acquired under the law of any *civilised* country, which is applicable according to the English rules of conflict of laws, is recognised and enforced by English Courts ; except—

(i) Where the enforcement of such right involves the enforcement of foreign penal or confiscatory legislation or a foreign revenue law. (ii) Where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political and judicial institutions. (iii) Where the enforcement of such right involves interference with the authority of a foreign state within the limits of its territory.

(b) The Courts of any country are considered by English law to have jurisdiction over any matter with regard to which they can give *effective* judgment, and not to have jurisdiction over any matter with regard to which they cannot give an effective judgment.

(c) The Courts of any country are considered by English law to be able to exercise jurisdiction over any person who is resident in that country at the time of action, or voluntarily submits to their jurisdiction.

(d) An English Court has no jurisdiction, generally to entertain an action or other proceeding against any foreign sovereign against its will<sup>15</sup> ; any ambassador or diplomatic agent representing a foreign sovereign and duly accredited to England ; any person belonging to the suite of such ambassador or diplomatic agent (see further under 'Foreign Jurisdiction,' Entry 16, List I, *post*).

(13) *Emperor v. Benoarilal*, (1945) 49 C.W.N. 178 (P.C.) overruling *Emperor v. Benoarilal*. (1943) 2 Cal. 1 (F.C.).

(14) Adapted from Dicey's Conflict of Laws,

1949 (6th Edn.).

(15) Cf. *Province of East Bengal v. Tripura State*, (1949) 53 C.W.N. 368. [See this case as to 'waiver' of this immunity.]

(e) An English Court has, in general, no jurisdiction to entertain an action for the determination of title to, or the right to possession of, or for the recovery of damages for trespass to, immovable property situate in a foreign State; to administer a foreign charity under the supervision of the Court or to settle a scheme for such a charity; to entertain an action for the enforcement of a penal, revenue, or political law of a foreign State; or where the grounds of the action involve an "Act of State."

(f) An English Court has no jurisdiction during the continuance of war, to entertain an action brought by an *alien enemy*, unless he is living here under the licence or protection of the Crown, and the cause of action is personal to himself.

*Suits by and against Foreign States, in India.*—(A) When foreign States may sue : Sec. 84 of the Code of Civil Procedure provides—

"(1) A foreign State may sue in any Court of India except Part ■ States :

Provided that such State<sup>16</sup> has been recognized by the Government of India :

Provided also, that the object of the suit is to enforce a *private right* vested in the head of such State or in any officer of such State in his public capacity.

(2) Every State shall take judicial notice of the fact that a foreign State has or has not been recognized by the Government of India."

Suits lie to enforce only private rights as distinguished from *political rights*,<sup>16</sup> for which the only remedy is diplomatic action.

(B) Suits against Princes, Chiefs, Ambassadors and Envoys of foreign States : Sec. 86 of the Code of Civil Procedure provides—

"(1) Any (Sovereign) Prince or Ruling Chief, and any ambassador or envoy of ■ foreign State, may . . . . with the consent of the Government of India, certified by the signature of a Secretary to that Government, but not without such consent, be sued in any competent Court.

(2) Such<sup>17</sup> consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes . . . . ; but it shall not be given unless it appears to the consenting authority that the Prince, Chief, Ambassador or Envoy—

(a) *has instituted* a suit in the Court against the person desiring to sue him, or

(b) by himself or another *trades* within the local limits of the jurisdiction of the Court, or

(c) *is in possession of immovable property*<sup>17</sup>, situate within these limits and is to be sued with reference to such property or for money charged thereon . . . . ."

Sec. 87 provides—

"A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State."

The provisions of Secs. 86 and 87 are imperative and cannot be waived<sup>18</sup>. The reason is that these sections constitute exceptions to the general rule that a foreign State cannot be sued against its will.

*Validity and effects of Foreign Judgments.*—A foreign judgment is a judgment, decree or order having the nature of a judgment, which is pronounced by a foreign Court.

(A) *In England.*—The following rules are applied by *English law* to foreign judgments :

(a) A foreign judgment has no *direct* operation in England. Except under statute [*e.g.*, the Foreign Judgments (Reciprocal) Enforcement Act, 1933], a foreign judgment cannot be directly executed in England. The judgment-creditor has to bring "an action on the judgment" in England.

But an action cannot be maintained on a foreign judgment unless—

(i) it is valid,

(ii) it is final and conclusive,

(16) *Hajon v. Bur Singh*, (1885) 11 Cal. 17.

(17) *Compania Naviera v. Cristina*, (1938) A.C. 485; *Madan v. Ruler of Rampur*, A.I.R. 1940 Cal. 244; *Secretary of State v. Kamachee*, (1859)

13 Moo. P.C. 83.

(18) *Baroda State Ry. v. Hafiz*, A.I.R. 1938 P.C. 165.

(iii) if it is a judgment *in personam*,—the cause of action in respect of which the judgment was obtained is of such a character that it would have supported an action in England; but if it is a judgment *in rem*, it is binding everywhere as in the State where it was pronounced.

(b) A valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any *error* therein of fact or law.

But a valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was pronounced.

If, however, it is conclusive on the *merits*, it is a good defence to an action in England on the same matter when either—

(a) the judgment was in favour of the defendant, or

(b) the judgment, being in favour of the plaintiff, has been satisfied.

(c) An invalid foreign judgment has *no effect* as a judgment in this country. A foreign judgment is invalid according to English law on the following grounds:

“(i) that it was obtained by fraud; (ii) that the proceedings in which the judgment was obtained was opposed to natural justice, e.g., for want of due notice to the party affected thereby or denial of opportunity to be heard.”

Any foreign judgment is presumed to be a valid foreign judgment until it is shown to be invalid.

(B) *In India*.—The foregoing principles are followed also in India. According to Sec. 2 (5)-(6) of the Code of Civil Procedure, 1908,—

“‘Foreign judgment’ means the judgment of a foreign Court,” and

“‘Foreign Court’ means a Court situate beyond the limits of the whole of India except Part B States which has no authority in the whole of India except Part B States and is not established or continued by the Government of India.”

A foreign judgment cannot be executed in India, except in the cases mentioned in Sec. 44 (Execution of decrees passed by the Courts in Part B States) and Sec. 44-A (Execution of decrees of Courts in the United Kingdom and other “reciprocating territory”)<sup>19</sup>. Nor can a foreign judgment be transferred for execution in India<sup>20</sup>. The only manner in which a foreign judgment, other than those mentioned in Secs. 44-44A of the Code of Civil Procedure, may be enforced in India, is to bring an independent *suit* in India, upon that foreign judgment, within 6 years from the date of the judgment (Art. 117, Indian Limitation Act, 1908).

In such suit, the defendant may raise any of the pleas mentioned in Sec. 13 of the Code, which is as follows:

“A foreign judgment shall be conclusive as to any matter thereby directly adjudicated<sup>21</sup> upon between the same parties or between parties under whom they or any of them litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction;<sup>22</sup>

(b) where it has not been given on the merits of the case<sup>23</sup>;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable<sup>24</sup>;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice<sup>25</sup>;

(e) where it has been obtained by fraud<sup>1</sup>;

(f) where it sustains a claim founded on a breach of any law in force in British India.”

(19) Pakistan is not a ‘reciprocating territory’ [*Sushama v. Osman*, (1950) 54 C.W.N. 491.]

(20) Conversely, a decree of an Indian Court cannot be executed in, nor transferred for execution in Pakistan, in the absence of any agreement between India and Pakistan in this behalf [*Sushama v. Osman*, (1950) 54 C.W.N. 491.]

(21) *Brijlal v. Govindram*, A.I.R. 1947 P.C. 192.

(22) *Gurdayal v. Raja of Faridkot*, (1895) 22 I.A.

171; see Mulla’s Civil Procedure Code, 1941 Ed., p. 96.

(23) *Mallappa v. Raghavendra*, A.I.R. 1938 Bom. 173; *Oppenheim v. Mahomed*, A.I.R. 1922 P.C. 120.

(24) *Panchapakesa v. Hussain*, A.I.R. 1934 Mad. 145.

(25) *Rama v. Hallagna*, (1918) 41 Mad. 205.

(1) *Nistarini v. Kundo*, (1899) 26 Cal. 891.



S. 14, again, provides—

“The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.”

The question whether a foreign Court is the competent Court to deal with a particular matter according to the law of the foreign country, is a question solely for the determination by the Courts of that country. When therefore a tribunal in a foreign country which is invested with the power to interpret its own law and rules of procedure decides that a particular Court in that country is the Court of “competent jurisdiction”, that decision must be regarded as conclusive.<sup>2</sup>

*Jurisdiction of Indian Courts on the question of boundaries between India and Pakistan.*—The question of the territory of sovereign States is the subject-matter of the law of nations.<sup>3</sup> Hence, disputes as to boundaries between two contiguous States cannot be the subject of enquiry by the municipal Courts exercising jurisdiction in either State. Ordinarily, the Court takes judicial notice of the boundaries of a State, but when in doubt, it obtains information on the point from its own Government.<sup>4</sup> Hence, in case of a dispute between India and Pakistan as to boundaries, the Indian Courts must act upon the assertions of, and information supplied by, the Government of India.<sup>5</sup>

*Proviso to Cl. (3) : Declaration as to Foreign States.*—Under the present Proviso read with Art. 392 (3), the Governor-General has declared<sup>6</sup>—

“Subject to the provisions of any law made by Parliament every country within the Commonwealth is hereby declared not to be a foreign State for the purposes of this Constitution.”

“*Every country within the Commonwealth.*” —The countries within the Commonwealth at present are—the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan, Ceylon.<sup>7</sup>

“*For the purposes of this Constitution.*”—The scope of the Declaration as to Foreign States Order, 1950, should be determined with reference to the above words. It does not make other members of the Commonwealth to be treated as other than a Foreign State, not for all purposes, but only ‘for purposes of this Constitution.’ In the result, wherever the words ‘foreign State’ appears in the Constitution, it is to be held that the members of the Commonwealth are not included therein, thus :

“ART. 9 : Voluntary acquisition of the citizenship of Pakistan will not be a ground for loss of Indian citizenship (*see p. 42*), unless Parliament legislates to the contrary.

CLS. (2)-(4) OF ART. 18 : There will be no bar to acceptance of title from Pakistan.

ARTS. 102 (1) (d) AND 191 (1) (d).—Voluntary acquisition of Pakistan citizenship or adherence to or acknowledgment of allegiance to Pakistan will be no disqualification for membership of Parliament or a State Legislature.”

But there is no doubt that outside the purview of the above provisions of the Constitution, other members of the Commonwealth will be deemed to be foreign States. Thus, the United Kingdom or Pakistan<sup>8</sup> cannot be sued in an Indian Court without its own consent.

(2) *Brijlal v. Govindram*, A.I.R. 1947 P.C. 192.

(3) Oppenheim, International Law, 7th Ed., Vol. I, p. 408.

(4) *Duff Development Co. v. Kelantan*, (1924) A.C. 797; *Foster v. Globe Syndicate*, (1900) 1 Ch. 811.

(5) *Midnapore Zamindary Co. v. Province of Bengal*, (1949) F.L.J. 139 (F.C.) (142).

(6) The Constitution (Declaration as to Foreign States) Order, 1950, C.O. 2, dated 23rd January, 1950 = *Gazette of India (Extraordinary)*, dated 24th January, 1950 = *Cal. Gazette*, dated

16th February, 1950, Part I-A, p. 44.

(7) Cf. Declaration, dated 27th April, 1949, at the Prime Minister's Conference, London.

(8) Partial exceptions to the above rule are contained in Art. 12 (2) of the Indian Independence (Rights, Property and Liabilities) Order, 1947; Art. 4, the Indian Independence Act (Legal Proceedings) Order, 1947 [*Province of East Bengal v. Tripura State*, (1948) 53 C.W.N. 368], as regards transferred liabilities etc. [Cf. Art. 294, p. 625, *ante*].

## PART XX

## AMENDMENT OF THE CONSTITUTION

**368.** An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :

Procedure for amendment  
of the Constitution.

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI. or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

## OTHER CONSTITUTIONS

*U. S. A.*—Art. V of the United States Constitution says—

“The Congress, whenever, two-thirds<sup>(9)</sup> of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress ; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article ; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.”

Thus, amendments may be proposed in either of two ways—(i) by a  $\frac{2}{3}$  vote of both Houses of Congress ; or (ii) by a Convention called together on the application of the Legislatures of  $\frac{2}{3}$  of the States. An amendment proposed in either of the above two ways has then to be ratified by (a) by the Legislatures of, or (b) by Conventions in  $\frac{3}{4}$  of the States. After a proposed amendment is ratified in either of the above two modes, it becomes a part of the Constitution. Congress determines which method of ratification shall be used in each specific case. By a combination of the two alternative modes of proposal and two alternative modes of ratification, there are four possible modes of amendment of the Constitution of the U. S. A. In actual practice, all the 21 amendments so far made have all been proposed in one mode, viz., proposal by a  $\frac{2}{3}$  vote in each House of Congress. But both methods of ratification have been used.

(9) ‘Two-thirds’ — 2/3 of the members present, assuming the presence of a quorum

[*National Prohibition Cases*, (1920) 253 U.S. 350].

Either mode of ratification is 'unwieldy and cumbrous' and there is no time limit for a State to ratify or to refuse it. It is striking to note that a proposal for amendment passed by the Congress in 1924, to limit, regulate and prohibit the labour of persons under 18 years of age has not yet been ratified by the required number of States. Up to 1939, it has received ratification by only 28 States. The Supreme Court being asked to declare whether the amendment was still before the States for ratification, left the matter for determination by Congress.<sup>10</sup> It has, however, been held that a State may ratify an amendment even after having refused its assent previously<sup>11</sup>; but that it cannot withdraw its ratification after having notified it to the Secretary of State.<sup>10</sup>

It is interesting to note that since 1787, there have been only 21 amendments to the Constitution of the U. S. A., during the course of over one and a half century.<sup>12-13</sup>

The last sentence of Art. V preserves the federal form of the Constitution.

*Canada.*—There is no provision in the British North America Act for amendments thereto. As a statute of the Imperial Parliament, it could be amended only by that authority. The Statute of Westminster, 1931, did not effect any change in this position, for by Sec. 7 it provided—

"Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder."

This power was expressly reserved from the Dominion Parliament in order to preserve the federal form of the Constitution.<sup>14</sup> But though the Dominion Parliament could not amend any provision of the Constitution Act, a convention had grown by which the Imperial Parliament passed as a matter of course, any amendment suggested by the Dominion Parliament, by *a joint address of both Houses* to the Crown. A further convention was that in matters affecting the Provinces, their consent should be obtained before presenting the address by the Dominion Parliament.<sup>15</sup>

But as to that portion of the British North America Act which relates to the Provincial Constitution, the Act itself gives the Provincial Legislatures unfettered power to amend that portion in the ordinary process of legislation, "excepting on one point only, *viz.*, the office of the Lieutenant-Governor" [Sec. 92 (1)].

On the other hand, by an Act of 1949, the Imperial Parliament has empowered the Canadian Parliament to amend that part of the Constitution, which relates to matters within the jurisdiction of the Dominion Parliament,—without reference to the British Parliament.

*Australia.*—Sec. 128 of the Commonwealth of Australia Constitution Act, 1900, provides—

"This constitution shall not be altered except in the following manner :—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than 2 nor more than 6 months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of 3 months the first-mentioned House in the same or the next

(10) *Coleman v. Miller*, (1939) 307 U.S. 433.

(11) *Chandler v. Wise*, (1939) 307 U.S. 474.

(12-13) Changes in the American Constitution have been effected, not so much by formal amendment as by judicial interpretation [see my Article on 'The Indian Constitution through American Eyes, (1949) F.L.J. pp. 156, et seq.]

(14) Clokie, *Canadian Government and Poli-*

*tics*, p. 68.

(15) But this convention was not followed at the time of enactment of the British North America Act, 1943, which was passed in spite of the protest of Quebec which was most aggrieved by the passing of that amendment Act (*vide* Clokie, p. 69.) See also Dawson, *Government of Canada*, 1949, p. 142 et seq.



session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House and such other House rejects or fails to pass it or passes it with any amendment to which the first mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting, approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State or in any manner affecting the provision of the constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law."

(a) By reason of Sec. 8 of the Statute of Westminster, 1931, the Commonwealth Parliament has no power to amend Secs. 1-8 of the Constitution Act, which established the Federation under the Crown of the United Kingdom.<sup>16</sup>

(b) Various sections of the Constitution Act authorise the Commonwealth Parliament to amend certain provisions of the Constitution Act relating to matters of detail, in the ordinary process of legislation, *e.g.*—

"(i) the method of voting for federal Senators (Sec. 7) ; (ii) the number of federal representatives and their qualifications (Secs. 27, 34) ; (iii) the privileges of the two Houses (Sec. 49) ; (iv) the number of federal ministers of State (Sec. 65) ; (v) the appointment and dismissal of federal civil servants (Sec. 67) ; (vi) the creation of federal Courts (Sec. 71) ; (vii) within limits, the conferring of additional original jurisdiction on the High Court and investing State Courts with federal jurisdiction (Sec. 77) ; (viii) the admission or establishment of new States (Sec. 121) ; (ix) the government of territories acquired or accepted by the Commonwealth (Sec. 122) ; (x) the seat of Government (Sec. 125)."

(c) Barring the above, other provisions of the Constitution can be amended only in the manner provided by Sec. 128, which requires that the proposed amendment—

(i) should be agreed to either by an absolute majority of both Houses of Parliament or by an absolute majority of one House in two votes separated by at least three months, and (ii) then approved by a majority of the electors voting both in a majority of the States and in the Commonwealth.

But no alteration diminishing the proportionate or minimum representation of, or affecting the provisions of the Constitution with regard to any State, can become law unless approved by a majority of the electors of *that* State.<sup>17</sup>

Thereafter the Bill shall be presented to the Governor-General for his assent.

*Eire.*—Sec. 46 of the Constitution of 1937 provides—

"(1) Any provision of this constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this article.

(2) Every proposal for an amendment of this constitution shall be initiated in Dail Eireann as a bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by referendum to the decision of the people in accordance with the law for the time being in force relating to the referendum.

(3) Every such bill shall be expressed to be An Act to amend the Constitution.

(4) A bill containing a proposal or proposals for the amendment of this constitution shall not contain any other proposal.

(16) Keith, *The Dominions as Sovereign States*, p. 523.

(17) Keith, *Constitutional Law*, p. 506.

(5) A bill containing a proposal for the amendment of this constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section (1) of article 47 of this constitution and shall be duly promulgated by the President as a law."

*Burma.*—Secs. 207-210 of the Burmese Constitution, 1948, provide—

"207. Any provision of this Constitution may be amended, whether by way of variation, addition or repeal, in the manner hereinafter provided.

208. (1) Every proposal for an amendment of this Constitution shall be in the form of a Bill and shall be expressed as a Bill to amend the Constitution.

(2) A Bill containing a proposal or proposals for the amendment of the Constitution shall contain no other proposals.

209. (1) Such Bill may be initiated in either Chamber of Parliament.

(2) After it has been passed by each of the Chambers of Parliament, the Bill shall be considered by both Chambers in joint sitting.

(3) The Bill shall be deemed to have been passed by both Chambers in joint sitting only when not less than two-thirds of the then members of both Chambers have voted in its favour.

(4) A Bill which seeks to amend—

(a) the State Legislative List in the Third Schedule, or

(b) the State Revenue List in the Fourth Schedule, or

(c) an Act of the Parliament making a declaration under paragraph (iv) of sub-section (1) of section 74 removing the disqualification of any persons for membership of the Parliament as representative from any of the States,

shall not be deemed to have been passed at the joint sitting of the Chambers unless a majority of the members present and voting, representing the State or each of the States concerned, as the case may be, have voted in its favour.

(5) A Bill which seeks to abridge any special rights conferred by this Constitution on Karens or Chins shall not be deemed to have been passed by the Chambers in joint sitting unless a majority of the members present and voting, representing the Karens or the Chins, as the case may be, have voted in its favour.

210. Upon the Bill being passed in accordance with the foregoing provisions of this Chapter, it shall be presented to the President who shall forthwith sign and promulgate the same."

## INDIA

*Art. 368 : Amendment of the Constitution.*—Though the Constitution of India is a written one and also federal in character,—in matter of *amendment*, it has sought to avoid the difficult processes laid down by the American and Australian Constitutions relating to amendment. The Indian Constitution will be partly flexible and partly rigid, and a large number of provisions of the Constitution will be open to amendment by the Union Parliament in the ordinary process of legislation.

The reason for introducing this element of flexibility in the Constitution was explained by Pandit Nehru in the following words :

"While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people . . . . .

In any event, we could not make this Constitution so rigid that it cannot be adapted to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do to-day may not be wholly applicable to-morrow."

So, the Indian Constitution lays down three different modes for amendment of different provisions of the Constitution :

I. A very large number of provisions are open to alteration by the Union Parliament, by a simple majority, *e.g.* :

(a) Creation of new States or reconstitution of existing States.<sup>18</sup> (b) Creation or abolition of Upper Chambers in the States.<sup>19</sup> (c) Constitutions of Centrally administered areas<sup>20</sup>. (d) Administration of Scheduled Areas and Scheduled Tribes<sup>21</sup>.

(18) Art. 4 (2) ; p. 39 *ante*.

(19) Art. 169 (3) ; p. 450, *ante*.

(20) Art. 240 (2) ; p. 511, *ante*.

(21) Paragraph 7 of the 5th Schedule and Paragraph 21 of the 6th Schedule.

These matters will *not* be treated as "amendments of the Constitution".

II. In the case of a few matters relating to the federal structure of the Constitution, a special mode is prescribed, *viz.*, that the Bill for amendment must be passed by a two-thirds majority of either House of Parliament, and also ratified by the Legislatures of half of the States<sup>22</sup>. These matters are—

(a) The manner of election of the President<sup>23</sup>. (b) Extent of the executive power of the Union and the States<sup>24</sup>. (c) The Supreme Court and the High Courts.<sup>25</sup> (d) Distribution of legislative powers between the Union and the States.<sup>1</sup> (e) Representation of States in Parliament<sup>1</sup>. (f) Provisions of Art. 368 itself.

III. The remaining provisions of the Constitution shall be liable to be amended by Parliament by a majority of two-thirds of the members of each House present and voting. No ratification by the State Legislatures will be required for these amendments (Art. 368).

*No time limit for ratification by States.*—Like the Constitution of the U. S. A., *our* Constitution does not prescribe any time limit within which States must signify their ratification or refusal of the amendment referred to them. In the *United States* it has been held that in case of delay by the States for any length of time (say 15 years), it is not for the Courts but for Congress to say whether any Bill for amendment is dead or not.<sup>2</sup> [See p. 716, *ante*].

*Whether President can refuse his assent.*—It is to be noted that while Art. 111 provides that when an ordinary Bill is presented to the President, the President must declare either (i) that he assents to the Bill or that (ii) he withholds assent therefrom, Art. 368 makes no reference to the President's power to withhold his assent to a Bill for amendment of the Constitution. The difference in the language is marked, the words in Art. 368 being—

"upon such assent being given to the Bill . . . . ."

In the *United States* constitutional amendments are not presented to the President at all [Art. V], so that the President has no power to veto a constitutional amendment in any form. It seems that under *our* Constitution, the President's assent to a *duly* passed amendment will be a matter of course. Like the President of *Eire* [Art. 46 (5)], *our* President shall, however, be entitled to refuse assent if the procedure laid down in Art. 368 has not been duly followed.

## PART XXI

### TEMPORARY AND TRANSITIONAL PROVISIONS

**369.** Notwithstanding anything in this Constitution, Parliament shall, during a period of five years from the commencement of this Constitution, have power to make laws with respect to the following matters as if they were enumerated in the Concurrent List, namely :—

Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List.

(a) trade and commerce within a State in, and the production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or *kapas*), cotton seed, paper (including newsprint), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil-cakes and other concentrates), coal (including coke and derivatives of coal), iron, steel and mica ;

(22) Proviso to Art. 368. [It is to be noted that in the U.S.A. ratification by  $\frac{2}{3}$  of the States is required.]

(23) Arts. 54-5.

(24) Arts. 73, 162.

(25) Art. 241, Ch. IV of Part V, Ch. V of Part VI.

(1) Ch. I of Part XI ; 7th Sch.

(2) *Coleman v. Miller*, (1939) 307 U.S. 433.



(b) offences against laws with respect to any of the matters mentioned in clause (a), jurisdiction and powers of all Courts except the Supreme Court with respect to any of those matters, and fees in respect of any of those matters but not including fees taken in any Court ;

but any law made by Parliament, which Parliament would not but for the provisions of this article have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of the said period, except as respects things done or omitted to be done before the expiration thereof.

*Art. 369 : Temporary power of Parliament to legislate with respect to certain matters in the State List.*—For better control of the production, supply and distribution of certain articles during a transitional period of 5 years, Parliament is given concurrent power of legislation as regards the matters specified in Cls. (a) and (b), relating to these articles.

The present Article thus affects the following Entries in the State List (II) in relation to the commodities specified in Cl. (a), for a period of 5 years ; Entries 26, 27, 64, 65, 66 of List II. These Entries will be treated as Concurrent, for a period of 5 years and with respect to the commodities specified in Cl. (a).

*Existing Law.*—The Essential Supplies (Temporary Powers) Act (XXIV) of 1946, as amended by Act XIX of 1949.

Temporary provisions with respect to the State of Jammu and Kashmir.

**370.** (1) Notwithstanding anything in this Constitution,—

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir ;

(b) the power of Parliament to make laws for the said State shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State ; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

*Explanation.*—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948 ;

(c) the provisions of article 1 and of this article shall apply in relation to that State ;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify :

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State :

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify :

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

*Art. 370 : Temporary Provisions with respect to the State of Jammu and Kashmir.*—The State of Jammu and Kashmir is a part of the territory of India according to its Instrument of Accession,<sup>3</sup> and it is included in the list of States in Part II of the First Schedule of the Constitution. Nevertheless, the provisions relating to the constitution of the States in Part B contained in Art. 238, shall *not* apply to the State of Jammu and Kashmir and entirely separate provisions for this State are made in the present Article.

The reasons for this special treatment of Jammu and Kashmir are mostly political. In view of the commitment of the Government of India that the people of this State, by a plebiscite would finally determine whether the people would remain within the Union of India and that they would, through their own Constituent Assembly, determine the Constitution of this State, and the Union jurisdiction over it,—until the holding of the plebiscite and the sitting of the Constituent Assembly of the State, the Constitution of India could only provide an interim arrangement regarding this State.

The only Articles of this Constitution which apply of their own force to Jammu and Kashmir are—Arts. 1 and 370. The application of the other Articles will be determined by the President in consultation with the Government of this State. The legislative authority of Parliament over this State, again, will be confined to those items of the Union and Concurrent Lists as correspond to matters specified in the Instrument of Accession.

The above interim arrangement will continue until the Constituent Assembly for Jammu and Kashmir is convened and makes its decision. It will then communicate its recommendations to the President, who will either abrogate Art. 370 or make such modifications as may be recommended by that Constituent Assembly.

(3) The Ruler of this State executed the Instrument of Accession in Appx. XLIX of the

White Paper ■ Indian States (M.S. 6), on 26-10-47 [see p. 111 of the White Paper.]

*Cl. (1) : Sub-Cl. (b) (i).*—See para. 2 and the First Schedule to the Constitution (Application to Jammu and Kashmir) Order, 1950.

*Sub-Cl. (d).*—See para. 3 and the 2nd Schedule to the Constitution (Application to Jammu and Kashmir) Order, 1950.

*The Constitution (Application to Jammu and Kashmir) Order, 1950<sup>4</sup>.*

In exercise of the powers conferred by clause (1) of article 370 of the Constitution of India, the President, in consultation with the Government of the State of Jammu and Kashmir, is pleased to make the following Order, namely :

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 1950.

(2) It shall come into force at once.

2. For the purpose of sub-clause (b) (i) of article 370 of the Constitution, the matters specified in the First Schedule to this Order, being matters in the Union List, are hereby declared to correspond to matters specified in the Instrument of Accession governing the accession of the State of Jammu and Kashmir to the Dominion of India as the matters with regard to which the Dominion Legislature may make laws for the State, and accordingly, the power of Parliament to make laws for that State shall be limited to the matters specified in the said First Schedule.<sup>5</sup>

3. In addition to the provisions of article 1 and article 370 of the Constitution, the only other provisions of the Constitution which shall apply in relation to the State of Jammu and Kashmir shall be those specified in the Second Schedule to this Order, and shall so apply subject to the exceptions and modifications specified in the Second Schedule.

### THE FIRST SCHEDULE.

(See paragraph 2).

(Note.—The number of each entry in this Schedule is the number in the corresponding entry in the Union List.)

1. Defence of India and every part thereof including preparation for defence.
2. Naval, military and air force work : and other armed forces of the Union.
3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.
4. Naval, military and air force works.
5. Arms, firearms, ammunition and explosives.
6. Atomic energy for the purpose of defence and mineral resources necessary for its production.
9. Preventive detention for reasons connected with defence, Foreign Affairs or the security of India.
10. Foreign Affairs ; all matters which bring the Union into relation with any foreign country.
11. Diplomatic, consular and trade representation.
12. United Nations Organisation.
13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
15. War and peace.
16. Foreign jurisdiction.
17. Naturalisation and aliens.
18. Extradition.
19. Admission into, and emigration and expulsion from, India ; passports and visas.
20. Pilgrimages to places outside India.
21. Piracies and crimes committed on the high seas or in the air ; offences against the law of nations committed on land or on the high seas or in the air.

22. Railways, but as respects any railway owned by the State of Jammu and Kashmir, and either operated by that State or operated on its behalf otherwise than in accordance with a contract with the State by the Government of India, limited to the regulation thereof in respect of safety, maximum and minimum rates and fares, station and service terminal charges, inter-change of traffic and the responsibility of the railway administration as carriers of goods and passengers, and as respects any railway which is wholly situate within the State and does not form a continuous line of communication with a railway owned by the Government of India, whether of the same gauge or not, limited

(4) C. O. 10, d. 26-1-50=Gaz. of India Extraordinary, 26-1-50.

(5) App. LVI, White Paper on Indian States, MS. 6.



to the regulation thereof in respect of safety and the responsibility of the railway administration as carriers of goods and passengers.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters ; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

28. Port quarantine, including hospitals connected therewith ; seamen's and marine hospitals.

29. Airways ; aircraft and air navigations ; provision of aerodromes ; regulation and organisation of air traffic and of aerodromes ; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railway, sea or air.

31. Posts and telegraphs, telephones, wireless, broadcasting and other like forms of communication.

41. Trade and commerce with foreign countries.

72. Elections to Parliament, and the offices of President and Vice-President ; the Election Commission.

73. Salaries and allowances of member of Parliament, the Chairman and Deputy Chairman of the Council of States, and the Speaker and Deputy Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House ; enforcement of attendance of persons for giving evidence or producing documents before committee of Parliament or commissions appointed by Parliament.

75. Salaries and allowances of the Ministers for the Union ; the salaries allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the accounts of the Union.

77. Constitution and organisation of the Supreme Court, and the fees taken therein ; persons entitled to practise before the Supreme Court.

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

93. Offences against laws with respect to any of the matters aforesaid.

94. Inquiries and statistics for the purpose of any of the matters aforesaid.

95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters aforesaid, but, except with the consent of the State Government, not so as to confer any jurisdiction or powers upon any courts other than courts ordinarily exercising jurisdiction in, or in relation to, the State ; admiralty jurisdiction.

96. Fees in respect of any of the matters aforesaid, but not including fees taken in any court.

## THE SECOND SCHEDULE

(See paragraph 3).

<i>Provisions of the Constitution applicable.</i>	<i>Exceptions.</i>	<i>Modifications.</i>
<b>Part V</b>	.. Articles 72 (1) (c), 72 (3), 133, 134, 135, 136, 138, 145 (1) (c) and 151 (2).	(1) Articles 80 and 81 shall apply subject to the modification that the representatives of the State in the Council of States and the House of the People, respectively, shall be chosen by the President in consultation with the Government of the State. (2) Articles 149 and 150 shall apply subject to the modification that the references therein to the State shall be construed as not including the State of Jammu and Kashmir.
<b>Part XI</b>	.. Articles 247 to 252, clauses (3) and (4) of article 257 and articles 260, 262 and 263.	(1) Clause (1) of article 246 shall apply subject to the provisions of paragraph 2 of this Order, and clauses (2) and (3) of article 246 shall not apply in relation to the State. (2) Clause (1) of article 259 shall apply subject to the modification that after the words 'until Parliament by law otherwise

*Provisions of the Constitution applicable.**Exceptions.**Modifications.*

			provides', the words 'and the concurrence of the State to such law has been obtained' shall be deemed to be inserted.
Part XII	.. Articles 264 and 265, clause (2) of article 267, articles 268 to 281, clause (2) of article 283, articles 286 to 291, 293, 295, 296, and 297.	(1) Article 266 shall apply only in so far as it relates to the Consolidated Fund of India and the public account of India. (2) Articles 282 and 284 shall apply only in so far as they relate to the Union or the public account of India. (3) Articles 298, 299 and 300 shall apply only in so far as they relate to the Union or the Government of India.	
Part XV	.. Articles 325 to 329	.. Article 324 shall apply only in so far as it relates to elections to Parliament and to the offices of the President and Vice-President.	
Part XVI	.. Articles, 332, 333 and 337 to 342.	(1) Article 330 shall apply only in so far as it relates to seats reserved for Scheduled Castes. (2) Article 334 shall apply only in so far as it relates to the House of the People. (3) Article 335 shall apply only in so far as it relates to the Union.	
Part XVII	.. Nil	.. The provisions of this Part shall apply only in so far as they relate to the official language of the Union and to proceedings in the Supreme Court.	
Part XIX	.. Articles 362, 363 and 365..	(1) Article 361 shall apply only in so far as it relates to the President. (2) Article 364 shall apply only in so far as it relates to the laws made by Parliament.	
Part XX	.. Nil	.. Article 368 shall apply subject to the additional proviso : 'Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of article 370.'	
Part XXI	.. Articles 363, 371 and 373, clause (4) of article 374, articles 376 and 378 and clause (2) of article 388.	(1) In clause (3) of article 379 after the words 'Minister for any such State', the words "other than the State of Jammu and Kashmir" shall be deemed to be inserted. (2) Article 389 shall apply only in so far as it relates to Bills pending in the Dominion Legislature. (3) Article 390 shall apply only in so far as it relates to the Consolidated Fund of India.	
Part XXII	.. Nil	.. Nil.	
First Schedule	.. Nil	.. Nil.	
Second Schedule	.. Paragraph 6	.. Nil.	
Third Schedule	.. Forms V, VI, VII and VIII.	.. Nil.	
Fourth Schedule	.. Nil	.. Nil.	
Eighth Schedule	.. Nil	.. Nil.	

**371.** Notwithstanding anything in this Constitution, during a period of ten years from the commencement thereof, or during such longer or shorter period as Parliament may by law provide in respect of any State, the Government of every State specified in Part B of the First Schedule shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by, the President :

Temporary provisions with respect to States in Part B of the First Schedule.

Provided that the President may by order direct that the provisions of this article shall not apply to any State specified in the order.

*Art. 371 : Temporary supervision of the Union over States in Part B.*—This Article provides, that notwithstanding Art. 238 [p. 505, *ante*], the States in Part B shall,—during a period of 10 years or such period as Parliament provides,—remain under “the general control of, and comply with such particular directions as may be given by, the President”. The object of this Article is to promote the consolidation and good administration of these States during the transitional period, by Central supervision and control. The agencies of such supervision<sup>6</sup> are—(a) The appointment by the Union, of Regional Commissioners who act as Advisers to the Rajpramukhs, and as agents of the Government of India in respect of such matters as civil supplies, extradition, and the like. (b) Previous scrutiny of legislative proposals in these States by the Government of India. (c) Approval of budget estimates. (d) Consultation with the Government of India, in the matter of key appointments<sup>7</sup>.

**372.** (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

Continuance in force of existing laws and their adaptation.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date ■ may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed—

(6) See pp. 106-7, White Paper on Indian States (MS. 6).

(7) A serious question recently arose in Parliament, in connection with the escape of Laik Ali, ■ to the extent of the power of control conferred by Art. 371, upon the Union, viz., whether it extended to matters of internal administration of these States, and whether the Government of India had any corresponding

responsibility in the matter. The Author agrees with Sree Nambiar [‘Scope of Art. 371 of the Constitution of India’, in (1950) S.C.J. 63-6 (Journal)], to answer both questions in the affirmative. The reason is that the power of ‘general control’ given by Art. 371 is even wider than the emergency power given by Art. 353 (a), p. 683, *ante*.



(a) to empower the President to make any adaptation or modification of any law after the expiration of two years from the commencement of this Constitution ; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

*Explanation I.*—The expression “law in force” in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

*Explanation II.*—Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

*Explanation III.*—Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

*Explanation IV.*—An Ordinance promulgated by the Governor of a Province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

#### CL. (1) : OTHER CONSTITUTIONS<sup>8</sup>

*Government of India Act, 1935.*—Sec. 292 was as follows :

“notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.”

#### INDIA

*Object of Cl. (1) : Saving of existing laws.*—The general rule is that with the repeal of a statute, all bye-laws made thereunder cease to be valid, unless there is a saving clause in the new statute, preserving the old bye-laws<sup>9</sup>. On this principle, laws passed under the previous Government Acts would have ceased to operate on the commencement of this Constitution, by reason of Art. 395, *post*.

<sup>8</sup> (8) See also Sec. 129 of Br. North America Act, 1867 ; Sec. 108 of the Australian Constitution Act, 1900 ; Sec. 135 of the Union of South

Africa Act, 1909.

(9) *Watson v. Winch*, (1916) 1 K.B. 688.

The object of the present clause is to sanction the continuance of the existing laws until they are repealed or amended by a competent authority under the new Constitution.

The present Article, however, does not mean that the pre-existing laws are repealed and then re-enacted by the Constitution. It means that the pre-existing laws shall be continuous in their operation, until repealed in the manner prescribed by the present Article<sup>10</sup>.

*Repeal may be retrospective.*—The competent Legislature under the new Constitution may repeal the existing laws with a retrospective effect, and even with effect from dates earlier than when the Constitution comes in force<sup>11</sup>.

*Repeal may be express or implied.*—As in the case of repeals of other laws, the repeal of any of the law in force may be also implied by an interpretation of some provision of the Constitution or some subsequent Act of the Legislature. Thus, in a case relating to *Ireland*, it was held that a new system of judicature having been established in Ireland under the Irish Free State Act, 1922, the English Judgment Extension Act could not operate in regard thereto<sup>12</sup>.

But until there is a repeal or amendment in the due course, the existing laws are to continue in the form<sup>13</sup> as they were at the date of commencement of the Constitution, subject, however, to the provisions of this Constitution, e.g., Art. 13 (1), *ante*.

*Whether repeal would take away existing rights ipso facto.*—Art. 367 (1) *ante*, says that “unless the context otherwise requires, the General Clauses Act, 1897 shall apply for the interpretation of this Constitution”.

Now, section 6 of the General Clauses Act, says—

“Where this Act, or any Act . . . made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(c) “affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed.”

Hence, *prima facie*, the repeal of any existing law, unless the repealing enactment expressly says so, will not take away or affect rights accrued under the existing law which is repealed.

“*All the law in force*”.—This expression includes not only the enactments of the Indian Legislature but also the common law of the land which is being administered by the Courts in British India. This includes not only the *personal laws*, viz., the Hindu and Mahomedan laws, but also the rules of English Common law, e.g., the law of torts, in so far as it has been applied to India as being consonant with the rules of justice, equity and good conscience; as well as customary laws.<sup>14</sup>

It is to be noted that the definition of “law in force” in Explanation I of the present Article differs from the definition of “existing law” in Art. 366 (10) in this that while the word “means” is used in Art. 366 (10), the word “includes” is used in the present Explanation. Now, ■ Legislature uses the word “means” where it wants to *exhaust* the significance of the term defined, and the word “includes” where it intends that while the term defined should *retain* its ordinary meaning its scope should be *widened* by specific enumeration of certain matters which its ordinary meaning may or may not comprise, so as to make the definition enumerative but *not exhaustive*<sup>15</sup>. Hence, existing laws other than those enumerated in Art. 366 (10) will be included within the definition of “laws in force” but not within that of “existing law”.

(10) Cf. *Umayachal v. Lakshmi*, A.I.R. 1945 F.C. 25 (29).

(11) Cf. *United Provinces v. Atiqua*, A.I.R. 1941 F.C. 16 (24, 31).

(12) *Wakeley v. The Triumph*, (1924) 1 K.B.D. 214.

(13) *Performing Right Society v. Urban Council*, A.I.R. 1930 P.C. 314 (322).

(14) Cf. *United Provinces v. Atiqua*, A.I.R. 1941 F.C. 16 (31).

(15) Cf. *Province of Bengal v. Hingalkumari*, A.I.R. 1946 Cal. 217 (224).

"*All the law*" would also include those Acts of the British Parliament which were applicable to India on the date of commencement of the Constitution<sup>16</sup>. It is to be noted that Sec. 6 (4) of the Indian Independence Act, 1947, provided that no Act of the British Parliament passed after the 15th August, 1947, shall extend to India, by its own force. But the Independence Act did not affect the applicability of British statutes passed prior to 15-8-47.

*Cl. (2) : Adaptation of Existing laws.*—Under the present clause, the President has made the Adaptation of Laws Order, 1950<sup>17</sup>, and the Adaptation of Laws (Amendment) Order, 1950<sup>18</sup>.

**373.** Until provision is made by Parliament under clause(7) of article 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier the said article shall have effect as if for any reference to Parliament in clauses (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President.

Power of President to make order in respect of persons under preventive detention in certain cases.

*Legislation by Parliament.*—See pp. 131-2, *ante*.

**374.** (1) The Judges of the Federal Court holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the Supreme Court and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under article 125 in respect of the Judges of the Supreme Court.

Provisions as to Judges of the Federal Courts and proceedings pending in the Federal Court or before His Majesty in Council.

(2) All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court.

(3) Nothing in this Constitution shall operate to invalidate the exercise of jurisdiction by His Majesty in Council to dispose of appeals and petitions from, or in respect of, any judgment, decree or order of any court within the territory of India in so far as the exercise of such jurisdiction is authorised by law, and any order of His Majesty in Council made on any such appeal or petition after the commencement of this Constitution shall for all purposes have effect

(16) *Cf. McKelvey v. Meagher*, (1906) 4 C.L.R. 265.

(17) C.O. 4, *Gazette of India*, Extraordinary,

dated, 26-1-50.

(18) C.O. 17, S.R.O. 115, *Gazette of India*, Extraordinary, Part II, Sec. 3. P. 51.



as if it were an order or decree made by the Supreme Court in the exercise of the jurisdiction conferred on such Court by this Constitution.

(4) On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.

(5) Further provision may be made by Parliament by law to give effect to the provisions of this article.

*Cl. (4).—*The Supreme Court has framed rules for disposal of appeals transferred to itself from the Judicial Committee of Hyderabad<sup>19</sup>.

**375.** All Courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of this Constitution.

Courts authorities and officers to continue to function subject to the provisions of the Constitution.

**376.** (1) Notwithstanding anything in clause (2) of article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under article 221 in respect of the Judges of such High Court.

Provisions as to Judges of High Courts.

(2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in clauses (1) and (2) of article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.

(3) In this article, the expression "Judge" does not include an acting Judge or an additional Judge.

(19) See Part X, O. XLVI of the Supreme Court Rules, 1950, added by No V. 10/49-F.C.J.,

dated 19-8-50, *Gazette of India*, Extraordinary Part, I (1), dated 21-8-50.

**377.** The Auditor-General of India holding office immediately before the commencement of this Constitution shall, unless he has elected otherwise, become on such commencement the Comptroller and Auditor-General of India and shall thereupon be entitled to such salaries and to such rights in respect of leave of absence and pension as are provided for under clause (3) of article 148 in respect of the Comptroller and Auditor-General of India and be entitled to continue to hold office until the expiration of his term of office as determined under the provisions which were applicable to him immediately before such commencement.

**378.** (1) The members of the Public Service Commission for the Dominion of India holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the Union and shall, notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

(2) The members of a Public Service Commission of a Province or of a Public Service Commission serving the needs of a group of Provinces holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the corresponding State or the members of the Joint State Public Service Commission serving the needs of the corresponding States, as the case may be, and shall, notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

**379.** (1) Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution shall be the Provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament.

*Explanation.*—For the purposes of this clause, the Constituent Assembly of the Dominion of India includes—

(i) the members chosen to represent any State or other territory for which representation is provided under clause (2), and

(ii) the members chosen to fill casual vacancies in the said Assembly.

(2) The President may by rules provide for—

(a) the representation in the provisional Parliament functioning under clause (1) of any State or other territory which was not represented in the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution,

(b) the manner in which the representatives of such States or other territories in the provisional Parliament shall be chosen, and

(c) the qualifications to be possessed by such representatives.

(3) If a member of the Constituent Assembly of the Dominion of India was, on the sixth day of October, 1949, or thereafter at any time before the commencement of this Constitution, a member of a House of the Legislature of a Governor's Province or of an Indian State corresponding to any State specified in Part B of the First Schedule or a Minister for any such State, then, as from the commencement of this Constitution the seat of such member in the Constituent Assembly shall, unless he has ceased to be a member of that Assembly earlier, become vacant and every such vacancy shall be deemed to be a casual vacancy.

(4) Notwithstanding that any such vacancy in the Constituent Assembly of the Dominion of India as is mentioned in clause (3) has not occurred under that clause, steps may be taken before the commencement of this Constitution for the filling of such vacancy, but any person chosen before such commencement to fill the vacancy shall not be entitled to take his seat in the said Assembly until after the vacancy has so occurred.

(5) Any person holding office immediately before the commencement of this Constitution as Speaker or Deputy Speaker of the Constituent Assembly when functioning as the Dominion Legislature under the Government of India Act, 1935, shall on such commencement be the Speaker or, as the case may be, the Deputy Speaker of the provisional Parliament functioning under clause (1).

*Provisional Parliament.*—The Constituent Assembly which framed the Constitution has been constituted the Provisional Parliament, by the present Article. It will function as the Parliament of the Union until the first Parliament is elected under Arts. 80-81, *ante*. The first election is expected to take place sometime in 1951.

Till the election is held and both Houses of Parliament are duly constituted and summoned [Art. 85 (2) (a), *ante*], this provisional Parliament will exercise all the powers and perform all the duties which are by this Constitution conferred on "Parliament". It is obvious that the Provisional Parliament is a single chamber Legislature. Hence, consequential changes in various articles of the Constitution which refer to "Parliament" are necessary, during this transitional period when the provisional Parliament is to function. These changes or adaptations have been made by the Constitution (Removal of Difficulties) Order No. II<sup>20</sup>.

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(20) C.O. 5, *Gazette of India*, Extraordinary, dated 26-1-50.



**380.** (1) Such person as the Constituent Assembly of the Dominion of India shall have elected in that behalf shall be the President of India until a President has been elected in accordance with the provisions contained in Chapter I of Part V and has entered upon his office.

Provision as to President.

(2) In the event of the occurrence of any vacancy in the office of the President so elected by the Constituent Assembly of the Dominion of India by reason of his death, resignation, or removal, or otherwise, it shall be filled by a person elected in that behalf by the provisional Parliament functioning under article 379, and until a person is so elected, the Chief Justice of India shall act as President.

**381.** Such persons as the President may appoint in that behalf shall become members of the Council of Ministers of the President under this Constitution, and, until appointments are so made, all persons holding office as Ministers for the Dominion of India immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of the President under this Constitution.

Council of Ministers of the President.

**382.** (1) Until the House or Houses of the Legislature of each State specified in Part A of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the House or Houses of the Legislature of the corresponding Province functioning immediately before the commencement of this Constitution shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of such State.

Provisions as to provisional Legislatures for States in Part A of the First Schedule.

(2) Notwithstanding anything in clause (1), where a general election to reconstitute the Legislative Assembly of a Province has been ordered before the commencement of this Constitution, the election may be completed after such commencement as if this Constitution had not come into operation, and the Assembly so reconstituted shall be deemed to be the Legislative Assembly of that Province for the purposes of that clause.

(3) Any person holding office immediately before the commencement of this Constitution as Speaker or Deputy Speaker of the Legislative Assembly or President or Deputy President of the Legislative Council of a Province shall on such commencement be the Speaker or Deputy Speaker of the Legislative Assembly or the Chairman or Deputy Chairman of the Legislative Council, as the case may be, of the corresponding State specified in Part A of the First Schedule while such Assembly or Council functions under clause (1):

Provided that where a general election has been ordered for the reconstitution of the Legislative Assembly of a Province before the commencement of this Constitution and the first meeting of the Assembly as so reconstituted is held after such commencement, the provisions of this clause shall not apply and the Assembly as reconstituted shall elect two members of the Assembly to be respectively the Speaker and Deputy Speaker thereof.

*Provisional Legislatures in States in Part A.*—See notes under Art. 379, *ante*, and the Constitution (Removal of Difficulties) Order, No. II.

**383.** Any person holding office as Governor in any Province immediately before the commencement of this Constitution shall on such commencement be the Governor of the corresponding State specified in Part A of the First Schedule until a new Governor has been appointed in accordance with the provisions of Chapter II of Part VI and has entered upon his office.

Provision as to Governors of Provinces.

**384.** Such persons as the Governor of a State may appoint in that behalf shall become members of the Council of Ministers of the Governor under this Constitution, and, until appointments are so made, all persons holding office as Ministers for the corresponding Province immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as, members of the Council of Ministers of the Governor of the State under this Constitution.

Council of Ministers of Governors.

**385.** Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body or authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding Indian State shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified.

Provision as to provisional Legislatures in States in Part B of the First Schedule.

**386.** Such persons as the Rajpramukh of a State specified in Part B of the First Schedule may appoint in that behalf shall become members of the Council of Ministers of such Rajpramukh under this Constitution, and, until appointments are so made, all persons holding office as Ministers for the corresponding Indian State immediately before the commencement of this Constitution shall on such commencement become, and shall continue to hold office as members of the Council of Ministers of such Rajpramukh under this Constitution.

Council of Ministers for States in Part B of the First Schedule.

**387.** For the purposes of elections held under any of the provisions of this Constitution during a period of three years from the commencement of this Constitution, the population of India or of any part thereof may, notwithstanding anything in this Constitution, be determined in such manner as the President may by order direct, and different provisions may be made for different States and for different purposes by such order.

**388.** (1) Casual vacancies in the seats of members of the provisional Parliament functioning under clause (1) of article 379, including vacancies referred to in clauses (3) and (4) of that article, shall be filled, and all matters in connection with the filling of such vacancies (including the decision of doubts and disputes arising out of, or in connection with, elections to fill such vacancies) shall be regulated—

(a) in accordance with such rules as may be made in that behalf, by the President, and

(b) until rules are so made, in accordance with the rules relating to the filling of casual vacancies in the Constituent Assembly of the Dominion of India and matters connected therewith in force at the time of the filling of such vacancies or immediately before the commencement of this Constitution, as the case may be, subject to such exceptions and modifications as may be made therein before such commencement by the President of that Assembly and thereafter by the President of India :

Provided that where any such seat as is mentioned in this clause was, immediately before it became vacant, held by a person belonging to the Scheduled Castes or to the Muslim or the Sikh Community and representing a Province or, ■ the case may be, a State specified in Part A of the First Schedule, the person to fill such seat shall, unless the President of the Constituent Assembly or the President of India, as the case may be, considers it necessary or expedient to provide otherwise, be of the same community :

Provided further that at an election to fill any such vacancy in the seat of a member representing a Province or a State specified in Part A of the First Schedule, every member of the Legislative Assembly of that Province or of the corresponding State or of that State, as the case may be, shall be entitled to participate and vote.

*Explanation.*—For the purposes of this clause—

(a) all such castes, races or tribes or parts of or groups within castes, races or tribes as are specified in the Government of India (Scheduled Castes) Order, 1936, to be Scheduled Castes in relation to any Province shall be deemed to be Scheduled Castes in relation



to that Province or the corresponding State until a notification has been issued by the President under clause (1) of article 341 specifying the Scheduled Castes in relation to that corresponding State ;

(b) all the Scheduled Castes in any Province or State shall be deemed to be a single community.

(2) Casual vacancies in the seats of members of a House of the Legislature of a State functioning under article 382 or article 385 shall be filled, and all matters in connection with the filling of such vacancies (including the decision of doubts and disputes arising out of, or in connection with, election to fill such vacancies) shall be regulated in accordance with such provisions governing the filling of such vacancies and regulating such matters as were in force immediately before the commencement of this Constitution subject to such exceptions and modifications as the President may by order direct.

*Cl. (1) : Rules made by President.*—Under Art. 388 (1) (a), the President has made the Provisional Parliament (Filling of Casual Vacancies and Election Petitions) Rules, 1950<sup>21</sup>.

*Cl. (2) : Order made by President.*—Under Cl. (2) of the present article, the President has made the Provisional State Legislatures (Casual Vacancies) Order, 1950<sup>22</sup>.

**389.** A Bill which immediately before the commencement of this Constitution was pending in the Legislature of the Dominion of India or in the Legislature of any Province or Indian State may, subject to any provision to the contrary which may be included in rules made by Parliament or the Legislature of the corresponding State under this Constitution, be continued in Parliament or the Legislature of the corresponding State, as the case may be, as if the proceedings taken with reference to the Bill in the Legislature of the Dominion of India or in the Legislature of the Province or Indian State had been taken in Parliament or in the Legislature of the corresponding State.

Provision as to Bills pending in the Dominion Legislature and in the Legislatures of Provinces and Indian States.

**390.** The provisions of this Constitution relating to the Consolidated Fund of India or the Consolidated Fund of any State and the appropriation of moneys out of either of such Funds shall not apply in relation to moneys received or raised or expenditure incurred by the Government of India or the Government of any State between the commencement of this Constitution and the thirty-first day of March, 1950,

Moneys received or raised or expenditure incurred between the commencement of the Constitution and the 31st day of March, 1950.

(21) No. F. 11/50-C (1), dated 5-4-50.

(22) S. R. O. 63, dated 20-5-50.

both days inclusive, and any expenditure incurred during that period shall be deemed to be duly authorised if the expenditure was specified in a schedule of authorised expenditure authenticated in accordance with the provisions of the Government of India Act, 1935, by the Governor-General of the Dominion of India or the Governor of the corresponding Province or is authorised by the Rajpramukh of the State in accordance with such rules as were applicable to the authorisation of expenditure from the revenues of the corresponding Indian State immediately before such commencement.

*Adaptation.*—For a period of two years from 26th January, 1950, Art. 390 shall be subject to the following adaptations<sup>23</sup> :—

“(a) To article 390, the following shall be added, namely :—

“or is authorised in accordance with the provisions of article 390-A”.

(b) After article 390, the following article shall be inserted, namely :—

“390-A. (1) If in respect of the financial year ending on the thirty-first day of March, 1950, further expenditure from the revenues of India becomes necessary over and above the expenditure theretofore authorised for that year, the President shall cause to be laid before Parliament a supplementary statement showing the estimated amount of that expenditure, and the provisions of sections 33, 34 and 35 of the Government of India Act, 1935, shall subject to necessary modifications have effect in relation to that statement and that expenditure as they would have had effect in relation to the annual financial statement and the expenditure mentioned therein if this Constitution had not come into force.

(2) If in respect of the said financial year further expenditure from the revenues of a State specified in Part A of the First Schedule becomes necessary over and above the expenditure theretofore authorised for that year, the Governor of the State shall cause to be laid before the House or Houses of the Legislature of the State a supplementary statement showing the estimated amount of that expenditure, and the provisions of sections 78, 79 and 80 of the Government of India Act, 1935, shall subject to necessary modifications have effect in relation to that statement and that expenditure as they would have had effect in relation to the annual financial statement and the expenditure mentioned therein if this Constitution had not come into force.

(3) If in respect of the said financial year expenditure from the revenues of a State specified in Part B of the First Schedule becomes necessary over and above the expenditure theretofore authorised for that year, the Rajpramukh of the State shall authorise such expenditure in accordance with the rules in force immediately before the commencement of this Constitution governing the authorisation of such expenditure from the revenues of the corresponding Indian State subject to necessary modifications.

(4) In their application to the Patiala and East Punjab States Union, this article and article 390 shall have effect as if for any reference therein to the thirty-first day of March, 1950, there was substituted a reference to the twelfth day of April, 1950.”

**391.** (1) If at any time between the passing of this Constitution and its commencement any action is taken under the provisions of the Government of India Act, 1935, which in the opinion of the President requires any amendment in the First Schedule and the Fourth Schedule, the

Power of the President to amend the First and Fourth Schedules in certain contingencies.

President may, notwithstanding anything in this Constitution, by order, make such amendments in the said Schedules as may be necessary to give effect to the action so taken, and any such order may contain such supplemental, incidental and consequential provisions as the President may deem necessary.

(23) The Constitution (Removal of Difficulties) Order No. III, 1950, (C. O. 6 of 26-1-50), *Gazette of India*, Extraordinary, dated 26-1-50.

(2) When the First Schedule or the Fourth Schedule is so amended, any reference to that Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

*Amendments of the First and Fourth Schedules.*—Under the present Article read with Art. 392 (3), the Governor-General of India made the Constitution (Amendment of the First and Fourth Schedules) Order, 1950,<sup>24</sup> making certain amendments which are noted under the First and Fourth Schedules, *post*.

**392.** (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient :

Power of the President to remove difficulties.

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

(2) Every order made under clause (1) shall be laid before Parliament.

(3) The powers conferred on the President by this Article, by Article 324, by clause (3) of Article 367 and by Article 391 shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India.

*Cl. (1) :* The President has made the following Orders, under the present power :

1. The Constitution (Removal of Difficulties) Order No. II (C.O. 5) of 1950, 26th January, 1950,<sup>25</sup> making adaptations necessary prior to the election of Parliament and the State Legislatures in conformity with the Constitution.

2. The Constitution (Removal of Difficulties) Order No. III (C.O. 6 of 26th January, 1950) of 1950,<sup>1</sup> making adaptations in Arts. 149, 270, 273, 275, 390, paragraph 13 of Sch. VI and inserting Art. 390-A, for a period of two years from 26th January, 1950.

3. The Constitution (Removal of Difficulties) Order No. II (Amendment) Order.

4. The Constitution (Removal of Difficulties) Order No. II (Second Amendment) Order.<sup>2</sup>

*Cl. (3) :* The Governor-General promulgated the following Orders in exercise of the power conferred by this clause :

1. The Constitution (Removal of Difficulties) Order No. I (C.O. I) of 7th January, 1950,<sup>3</sup> providing that until a President has been elected in accordance with Ch. I of Part V of the Constitution, the President shall be "such person as the Constituent Assembly shall have elected in that behalf . . . .". President Rajendra Prasad was elected on 26th January, 1950, in conformity with the above Order.

(24) G. O. 3, *Gazette of India, Extraordinary*, dated 25-1-50.

(25) C. O. 5, *Gazette of India, Extraordinary*, dated 26-1-50.

(1) C. O. 6, *Ibid.*

(2) C. O. 20=S. O. R. 384, dated 11-8-50.

(3) Republished in *Calcutta Gazette, Part, I-A*, 19-1-50, p. 19.



2. The Constitution (Declaration as to Foreign States) Order (C.O. 2), 1950, 23rd January, 1950,<sup>4</sup> declaring members of the Commonwealth not to be 'foreign States' for the purposes of the Constitution [*vide* Art. 367 (3), *ante*.]

3. The Constitution (Amendment of the First and Fourth Schedules) Order, 1950 (C.O. 3, dated 25th January, 1950)<sup>4</sup>.

## PART XXII

### SHORT TITLE, COMMENCEMENT AND REPEALS

Short title.

**393.** This Constitution may be called the Constitution of India.

Commencement.

**394.** This Article and Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 shall come into force at once, and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.

Repeals.

**395.** The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed.

*Effects of repeal.*—In view of S. 6 of the Indian General Clauses Act (X of 1897), the repeal of the Acts mentioned, does not affect rights and liabilities already accrued under those Acts.<sup>5</sup>

#### *Illustration.*

A claim available against the Province of West Bengal under the Indian Independence (Rights, Property and Liabilities) Order, 1947, would be available against the successor Government, *i.e.*, the State of West Bengal, notwithstanding the repeal of the Indian Independence Act.<sup>5</sup>

(4) *Gazette of India, Extraordinary*, dated 24-1-50  
=Republished in *Calcutta Gazette*, Part I-A,  
16-2-50, p. 44.

(5) *Madan Gopal v. Province of West Bengal*,  
(1950) 54 C.W.N. 807 (809).

## FIRST SCHEDULE

(Articles 1, 4 and 391)

*The States and the territories of India*

## PART A

<i>Names of States</i>	<i>Names of corresponding Provinces</i>
1. Assam	Assam
2. Bihar	Bihar
3. Bombay	Bombay
4. Madhya Pradesh	The Central Provinces and Berar
5. Madras	Madras
6. Orissa	Orissa
7. Punjab	East Punjab
8. Uttar Pradesh <sup>6-7</sup>	The United Provinces
9. West Bengal	West Bengal

## TERRITORIES OF STATES

The territory of the State of Assam shall comprise the territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas.

[The territory of the State of West Bengal shall comprise the territory which immediately before the commencement of this Constitution was comprised in the Province of West Bengal]<sup>8</sup>.

The territory of each of the other States in this Part shall comprise the territories which immediately before the commencement of this Constitution were comprised in the corresponding Province and the territories which, by virtue of an order made under section 290-A of the Government of India Act, 1935, were immediately before such commencement being administered ■ if they formed part of that Province.

*Indian States merged in Bihar<sup>9</sup> :*

“Kharsawan, Seraikella.”

*Indian States merged in Bombay<sup>10</sup> :*

“Akalkot, Aundh, Bhor, Jamkhandi, Jath, Kurundwad (Junior), Kurundwad (Senior), Miraj (Junior), Miraj (Senior), Mudhol, Ramdurg, Sangli, Savanur, Sawantwadi, Wadi, Janjira and Phaltan, Balasinor, Bansda, Baria, Cambay, Chhota-Udepur, Dharampur, Jawhar, Lunawada, Rajpipla, Sachin, Sant, Idar, Vijaynagar, Danta, Palanpur, Jumbughoda and Ambaliara, Earoda, Bhaderwa, Ghodasar, Ilol, Kolhapur, Khatosan, Khadal, Mohanpur, Malpur, Mansa, Punadra,

(6-7) The ■■■ “Uttar Pradesh” has been substituted for ‘the United Provinces,’ by the United Provinces (Alteration of Name) Order, 1950 (Not. No. S. O. 32, dated 24-1-50 = Current Statutes (1950) Not. Central 29 = C.O. 3, *Gazette of India, Extraordinary*, dated 25-1-50.

(8) This paragraph relating to the territory of West Bengal has been omitted by the Constitution (Amendment of the First and Fourth

Schedules) Order, 1950 = C. O. 3, *Gazette of India, Extraordinary*, 24-1-50.

(9) The States’ Merger, (Governors’ Provinces) Order, 1949 (App. XLIV, White Paper on Indian States).

(10) The States’ Merger (Governors’ Provinces) Order, 1949 (App. XLIV, White Paper on Indian States).

Ranasan, Sudasna, Surgana, Sanjeli, Thrad, Valasna, Varsoda, Vasna, Wao, following areas of the Sirohi State<sup>11</sup>—

1. Abu Road	34. Ambaveri	67. Kivarli.
2. Kesarganj	35. Mahikheda	68. Tunka
3. Akra	36. Fatehpura	69. Derna
4. Manpur	37. Chotila	70. Tartoli
5. Santpur	38. Rokhada	71. Vasada
6. Ganka	39. Muliya Mahadeo	72. Morthala
7. Khadat	40. Forest Chotila	73. Deldar (Jagir)
8. Umarni	41. Chandravati	74. Deldar (Devasthan)
9. Kui	42. Upli Bor	75. Arna
10. Siawa	43. Upla Garh	76. Oria
11. Sangna	44. Upla Khejra	77. Govagam
12. Panduri	45. Kiyariya	78. Javai
13. Maval	46. Tokiya	79. Dhundhai
14. Redwa Mota	47. Deri	80. Torna
15. Dona Kakar	48. Jambudi	81. Dilwara
16. Dan Vav	49. Jaydara	82. Salagam
17. Mudarla	50. Taleti	83. Achalgadh
18. Kiyara	51. Dotra	84. Masgam
19. Kiyariya	52. Nichala Garh	85. Sanigam
20. Khara	53. Nichli Bor	86. Hetamji
21. Bhesa Sen	54. Nichala Kherja	87. Block No. 1 (excluding
22. Amba	55. Pava	all that portion to the west
23. Mungthala	56. Buja	of a line drawn from western
24. Mirgarh	57. Bori Buj	boundaries of Badarpura,
25. Adaliya	58. Bosa	Fatehpura, Maliakhera to
26. Aval	59. Dhamariya	south-west point of Block No.
27. Chandela	60. Men	3 and village Masgam).
28. Girwar	61. Ranora	88. Portion of Block No. 2 on
29. Bageri	62. Rada	south of the Abu Road.
30. Redwa Chhota	63. Surpagala	89. Utraj village Survey Nos.
31. Behadurpura	64. Amthala	771 to 785."
32. Chanar	65. Od	
33. Talvarankanaka	66. Karoli	

*Enclaves transferred from Rajasthan to Bombay :*

"Mial Village of former Jodhpur State."

*Enclaves transferred from Saurashtra to Bombay :*

"1. The following villages of former Limbdi State :—

Fatepur, Gounjar, Pachham and Ratanpur.

2. Otaria and Sandhida villages of former Bhavanagar State.

3. The following villages of former Lakhtar State :—

Jalampur, Karakthal, Kishol (Moti), Lishol (Nani), Rupavati, Wasan and Wasawa.

4. Mithapur and Odki villages of former Dasada State.

5. The following villages of former Jetpur State :—

Khijidiya, Pania and Venivadar.

6. The following villages of former Lakhapadar Thana :—

Ghadia, Kaner, Lakhapadar, Nini-Garmli, Patla and Vaghavdi.

7. Khantadi village of former Eastern Kathiawar States Agency."

*Enclaves transferred from Hyderabad to Bombay<sup>12</sup> :*

"1. Belwara village of Patoda taluk in District Bid.

2. Borgaon village of Osmanabad Taluka in District Osmanabad.

3. The following villages of Parendra Taluka in District Osmanabad :—Anjangaon, Bhawarja (Byarg), Bujrugvadi, Chavanvadi, Dhanora, Hatkarvadi, Jamgaon (Byarg), Kapsewadi, Kairo, Kevada, Manegaon, Pachpunwadi, Ridhore, Shelgaon, Sindri Jagir, Shirpad Pimpri, Sultanpur, Upla village including hamlets of Wangiwadi, Irla and Tawarvadi.

4. Andewadi (J) village in District Gulbarga, Kakerbli, Madbal, and Dholar villages in Jeevargi Taluk.

5. Bhatnoor and Nagarbeta villages in Taluk Shorapur.

6. Gadesankpur village in Taluk Lingsugur.

7. The following villages in Taluq Kushtagi :—

Mullapur (J.), Sarjapur, Santgira, Baliguda, Chigalgundi, Hanamsagar, Kurballal (J.), Itgi (J.), Gulguli (J.), Mugli.

(11) The States' Merger (Bombay) Order, 1950 [S. O. 34=App. XVII, White Paper on Indian States, p. 193].

(12) India and Hyderabad (Exchange of Enclaves) Order, 1950, S. O. 36 [App. LII of the White Paper on Indian States].



8. Hirlagundi (J.) village in District Raichur.

9. The following villages of Tuljapur Taluka in District Osmanabad :—

Raulgaon, Astha, Pophali, Virwad Khurd, Shivni, Karamba (J.), Warlegaon, Chikhelli (J.), Yellamwadi, Pawarwadi, Bopla, Yekoda, Mangoli, Baherwadi, Waloja, Degaon, Sasoor, Ghorpadi, Daksal, Mansi, Bhagachiwadi, Kowtali, Saklewadi, Kalman, Maslachowadhari, Padshili, Wangi, Inchgaon, Khaneshwar, Bhoir, Ranmasla, Dharpal, Nanaj, Mohtechiwadi, Gharilachiwadi.

10. The following villages of Ashti Taluka in District Bid :—

Kavadgaon, Hasnabad, Girvalli, Pimpalkhed, Chandi, Aghi, Khamgaon, Dhanora, Fakhirabad, Halgaon, Nanj, Wagh, Javalki, Dhanegaon, Kawla, Tartgaon, Balgaon, Rodegaon, Borgaon, Dimeshwar."

NOTE.— 'J' shown against a village indicates Jahagir.

*States merged in Central Provinces and Berar (Madhyapradesh)*<sup>13,14</sup> :

"Bastar, Changbhakar, Chhuikhadan, Jashpur, Kankar, Kawardha, Khairagarh, Korea, Makrai, Nandgaon, Raigarh, Sakti, Sarangarh, Surguja, Udaipur."

*Enclaves transferred from Vindhya Pradesh to Madhya Pradesh :*

"1. The following villages of former Nagod State :—

Harduwa, Pipra, and Chori.

2. Dhanwahi and Kherwa villages of former Maihar State.

3. The following villages of former Panna State :—

Kherpura, Patha, Dighi, Niwas, Dhoria, Madanpura, Syamer, Singhi, Bhechmai, Udaipura, Baudha, Paira and Paperi.

4. The following villages of former Bijawar State :—

Sewra, Barkhera and Seondha."

*Indian States merged in Madras*<sup>13,14</sup> :

"Banganapalle, Pudukkottai, Sandur."

*Enclaves transferred from Mysore to Madras :*

"1. The following villages of Molakalmurru Taluk, District Chittaldurg :—Jodi, Kasenai-kanahalli, Gauripura, Bommagatta, Budenahalli, Jodi Bommunhalli, Inam Ohlapura, Sarva.

2. The following villages of Bangarpet Taluk in District Kolar :—Bayapparaddihalli, Chinnara-doddi, Gollahalli, Harakchinnapalli, Hosapete, Jodi, Volgalkuppa, Kayamgutta, Vardikuppa.

3. Kaladasapura village of Malur Taluk, District Kolar.

4. Badagalpur village of Chamrajuagar Taluk in Mysore."

*Enclaves transferred from Travancore-Cochin to Madras :*

"The following areas of former Cochin State :—1. Isolated bit of Nalleppali village (117 acres 30 cents). 2. Isolated bit of Chittoor village (31 acres 99 cents). 3. Thattamangalam village (159 acres 89½ cents) and 4. Vallanazhi village (51 acres 19 cents)."

*Enclaves transferred from Hyderabad to Madras*<sup>15</sup> :

The following villages of Madhira Taluk, Warrangal District : Kodavatkallu including the hamlets of Ustepalli and Kondapeta, Patiala, Battulpadu, Mogalura, Atkura, Peta, Tekalpalli, Santapalli, Gangapadu Kottaru, Pullarlamudi, Chikalgudam, Buruvancha, Malavalli, Pullampad.

*Territory of Orissa.*—Orissa was constituted a separate Province, by curving out the Orissa Division from the Province of Bihar and Orissa, by the Government of India (Constitution of Orissa) Order, 1936<sup>16</sup> and ~~some~~ other territories from the Provinces of Madras and the Central Provinces. The areas and boundaries of the Province of Orissa under the above Order are—

#### "PART I

##### AREAS COMPRISED ■ THE PROVINCE OF ORISSA

1. That portion of the Province of Bihar and Orissa which is at the date of this Order known as the Orissa division thereof,

2. Areas transferred from the Presidency of Madras :—

(i) The Ganjam Agency Tracts ;

(ii) The following areas in the non-Agency portion of the Ganjam district, viz., the taluks of Ghumsur, Aska, Surada, Kodala and Chatrapur, and ■ much of the taluks of Ichapur and Berhampur ■ lies to the north and west of the line described in Part II of this schedule ;

(13-14) The States' Merger (Governors' Provinces) Order, 1949 [App. XLIV, White Paper ■ Indian States, M. S. 6].

(15) The India and Hyderabad (Exchange of

Enclaves) Order, 1951 [App. LII, White Paper on Indian State].

(16) See also Sec. 289 (1) (b) of the Government of India Act, 1935.

(iii) So much of the Parlakimedi Estate as lies to the north and east of the said line ; and  
 (iv) The following areas in the Vizagapatam district, that is to say, the Jeypore (Impartible) Estate and so much of the Pottangi taluk as is not included in that estate.

3. Areas transferred from the Central Provinces :—

(i) The Khariar Zamindari in the Raipur district ; and  
 (ii) The Padampur Tract in the Bilaspur district, that is to say, the detached portion of that district consisting of fifty-four villages of the Chandrapur-Padampur estate and also of the following seven villages, namely, Kuhakunda, Badimal, Panchpudgia (Soda), Barhampura (Malguzari), Panchpuragia (Palsada), Jogni, and Thakurpali (Jogni).

## PART II

### THE LAND BOUNDARY OF ORISSA

#### A. The main portion of Orissa.

The boundary follows a line which starts in latitude  $19^{\circ}5'$  (approximate), at the point on the coast of the Bay of Bengal where the boundary of Patisonnapuram village, after following the coast from north to south, turns inland. From that point it runs along the existing village boundary (so as to include the village in Orissa) until it meets the boundary of the Berhampur taluk at a sharp re-entrant angle in that boundary ; thence along the northern arm of that taluk boundary until it meets the south-eastern boundary of Chikati estate : thence along that estate boundary westwards and southwards until it again meets the boundary of the Berhampur taluk ; thence along that taluk boundary south-westwards until it meets the boundary of Jalantra estate ; thence along that estate boundary westwards until it meets the boundary of the Ganjam Agency ; thence south-westwards along the boundary of that Agency until it meets the boundary of the Parlakimedi Estate ; thence eastwards and southwards along that boundary to the point where the southern boundary of Peddahamsa village leaves the estate boundary ; thence through the estate to the south-west corner of the village of Pedda Murangi along existing village boundaries so as to include in Orissa the villages of Peddahamsa, Labonyogodo, Baduobada, Mamidipalle and Pedda Murangi (including Lavanya Kotta Reserved Forest) ; from the south-west corner of Pedda Murangi along the west boundary of the village of Mara, the north-western forest boundary of Banapuram Reserved Forest, the northern boundary of the village of Bagadalla and the northern boundary of the village of Surjam to the most northerly point (approximately) of the last-mentioned boundary ; thence in a northerly direction for a distance of about half a mile across the saddle in the hills to the south-eastern corner of the village of Kosali ; thence to the point where the south-west corner of the village of Omora meets the Mahendranaya river along existing village boundaries so as to include in Orissa the villages of Kosali, Jangalapadu, Saradapuram, Agarakhandi ; Bhinnola ; Dhamidigam and Omora ; from the last-mentioned point in a westerly direction along the middle line of that river to the south-west corner of the village of Kaviti Khaspa ; thence to the point where the western boundary of the village of Singupuram Agraharam meets the southern forest boundary of the Kurlanda Reserved Forest along existing village boundaries so as to include in Orissa the village of Kaviti Khaspa, Cheruvudiguvu, Venkatapuram ; Peddakhingra (I), Mukkidipadu (I), Ranipeta ; Siddamanugu (I) and Singupuram Agraharam ; thence along the southern forest boundary of Kurlanda Reserved Forest until it meets the boundary of the village of Minigam ; thence to the point where the eastern boundary of the village of Kinigam meets the Vamsadhara river along existing village boundaries so as to include in Orissa Kurlanda Reserved Forest, the villages of Minigam, Sitapuram, Kharada, Vistala, Hadolhang, Jayapuram, Nilapuram and Kinigam ; thence in a north westerly direction along the middle line of the river until it meets the boundary of the Ganjam district ; thence along that district boundary, which is there the boundary also of the Jeypore (Impartible) Estate ; westwards and southwards until that estate boundary diverges from the district boundary ; thence along that estate boundary (so as to include the estate in Orissa) until it meets the eastern boundary of the Pottangi taluk ; thence along that taluk boundary (so as to include the taluk in Orissa) until it again meets the boundary of the Jeypore (Impartible) Estate ; thence along that estate boundary until it meets the boundary of the Madras Presidency ; thence northwards, south-eastwards and again northwards along the Presidency boundary until it meets the boundary of the south-western portion of the Angul District ; thence along the west, north and east boundaries of that portion of that district until it again meets the Presidency boundary at a point where that boundary is also the boundary of the Eastern States Agency ; thence along the boundary of that Agency until it meets the boundary of the Bengal Presidency ; and thence in a south-easterly direction along the Presidency boundary to the sea.

B. The detached portion of the Province formed by the part of the existing Angul District of the Province of Bihar and Orissa which is wholly surrounded by Indian States.

The boundary follows the existing boundary.

C. The detached portion of the Province formed by the Sambalpur district of the Province of Bihar and Orissa and the two areas transferred from the Central Provinces.

The boundary follows the existing boundaries."

#### *Indian States merged in Orissa<sup>17</sup> :*

"Athgarh, Athmalik, Bamra, Barainba, Bandh, Bonai, Daspalla, Dhenkanal, Gangpur, Hindol, Kalahandi, Keonjhar, Khandpara, Mayurbhanj, Narsingpur, Nayagarh, Nilgiri, Pal Lahara, Patna, Rairakhol, Ranpur, Sonapur, Talchar, Tigiria."

(17) The States' Merger (Governors' Provinces) Order, 1949 [App. XLIV of the White

Paper on Indian States, M. S. 6, p. 297].

*Indian States merged in the United Provinces.*<sup>18</sup>—Banaras, Rampur, Tehri-Garhwal.

“Banaras, Rampur, Tehri-Garhwal.”

*Enclaves transferred from Vindhya Pradesh to Uttar Pradesh :*

- “ 1. Math and Rampur villages of former Orchha State.
2. The former Samthar State consisting of 101 villages.
3. The following villages of former Datia State :—Sami, Baroda, Pulia, Bannao, Padri, Babli, Girwasa, Dogkhajrai, Khajuri, Akrol, Dong Akrol, Garaia, Duggattia, Sajera, Dugsajera, Kurcholi, Dung Chabria, Kemra, Nadi Gaon, Dung Kherai, Beri Dong, Chandu Pura, Kampura, Khera, Parsani, Dhasuri, Simora, Jaitpura, Chilora, Mohammad Pura, Bhohahi, Sipura, Salampura, Barkara, Sikuribujurg, Pajania, Arjunpura, Akinwa, Bara, Jabalpur, Ankhar, Dhanori, Sabali Bajurg, Adlispura, Babupura, Katpuri Bhim, Katpuribhoj, Panasi, Katpuri Bujurg, Chakwahi, Jakhela, Sikandarapura, Alampura, Janeshpura, Lalpura, Shikari Kkurd, Basit, Rajipura, Sirsajpura, Dogarpur, Karmara, Mehanpura, Babini, Rampura, Jara, Killa, Kanahari, Masodpura, Tiliphpura, Sahpura, Mahalpura, Kharaundi Khurd, Anspuri, Chintapura, Rura, Dabri, Seoni Khurd, Beona, Gangthara, Ranipura, Jhillara, Raipura.
4. The following 28 villages of former Orchha State :—Bachawali, Barethi, Berisalpur, Muratha, Lohargaon, Kolasra, Ghat, Kalyanpur, Budhupura, Bagra Bagri, Laundi, Bhandokar, Amli, Sirwo, Dadpura, Dadpura (Jagir), Chokari, Patha Karka, Rampur, Jalwauli, Sedna, Jhala, Gundaha, Tahauli Kalan, Dhawari, Tai, Pajra Rai, Silauri and Madhpura.
5. The former Dhurwari State consisting of nine villages.
6. The former Tori Fatehpur State consisting of thirteen villages.
7. Banka Pahari village of former Banka Pahari State.
8. The following villages for former Bijna State :—Bagrani, Bhawara, Bijna, Haboli and Basar.
9. The following villages of former Garrauli State :—Richora, Sataura, Slipura, Lokharia, Padaria, Kanora, Amanpura, Banchor, Salat and Bhataura.
10. The former Bihat State consisting of 9 villages.
11. Rabai and Churari villages of former Naigawan Rebai State.
12. The former Jigni State consisting of 6 villages.
13. The former Sarila State consisting of 11 villages.
14. The former Baoni State consisting of 52 villages.
15. The former Beri State consisting of 12 villages.
16. Nimahipur, Bankolan Kalan, Sahban and Ladpahari villages of former Ajaigarh State.
17. The former Baraundha State consisting of 4 villages.
18. The following 18 villages of former Paldeo State—Baroti, Baglai, Bihra, Chakla, Gurbaba, Dhar Thol, Dugwan, Kharaha, Khurd, Lakoria, Linjha, Mahai, Makundpur, Makra Khurd, Makri Kalan, Padri, Rampura, Rampur, Rehunta.
19. The former Bhaisaundha State consisting of 5 villages.
20. Chhamu village of former Rewa State.
21. The former Taraon State consisting of 15 villages.
22. The following villages of Pehra State :—Pahra, Bhikampur, Bharatpur, Mahai and Sheorajpur.
23. The following villages of former Charkhari State :—Beri, Kunwa, Pipwara, Pahartha, Garhari, Patha, Kanri, Salwa, Kamkhra, Sirhar, Katroli, Rehuniyan, Bihari, Sijora, Kakun, Bamahaurikalan, Purura-Bajpai, Tiratipura, Bamheria, Natari, Panchampura, Jatora, Kumai, Rawai, Markui, Jawari, Latora Santoshpura, Nib Bari, Garranti, Ururi, Dumduma, Khirya, Guptmauk, Kohari, Chanikhurd, Sabuba, Kutama, Bamahauri Khurd, Patistha, Bakhretha, Regal, Gurha, Lowpuri, Dhurwai, Bijalpur, Sudamapuri, Kaneda, Rajora, Kakra, Bampitha, Notara, Barikera, Imlikhera, Bamrara, Roshanpura, Sohjana, Itwan, Malkhanpur, Udaipura, Rainpur, Maharajnagar, Rupnagar, Sohargaon, Fatehpur, Majhor, Jardingjanj, Mitlenganj, Bagraun, Dayalpura, Karoradang, Milya, Maharajpura, Gopalpura, Brajpura, Mahauli, Badanpur, Aurera, Padra, Akona, Chakbangaon, Kazipur, Bahgaon, Kudar.”

*Enclaves transferred from Rajasthan to Uttar Pradesh :*

“The following villages of former Bharatpur State :—Nagla Borha, Nagori, Umri, Shampur, Bad, Bhainsa, Dharampura, Karahi and Khera Jat.”

*Territories of West Bengal and Assam.*—S. 3 of the Indian Independence Act, 1947, which partitioned the Province of Bengal into the Provinces of East Bengal and West Bengal provided—

“(2) If, whether before or after the passing of this Act, but before the appointed day, the Governor-General declares that the majority of the valid votes cast in the referendum which, at the date of the passing of this Act, ■ being ■ has recently been held in that behalf under his authority in the District of Sylhet are ■ favour of that District forming part of the new Province of East Bengal, then, as from that day, ■ part of the Province of Assam shall, in accordance with the provisions of subsection (3) of this section, form part of the new Province of East Bengal.

(18) The States' Merger (United Provinces) : ■ Indian States, M. S. 6, p. 304].  
Order, 1949 [App. XLV of the White Paper



(3) The boundaries of the new Provinces aforesaid and, in the event mentioned in sub-Sec. (2) of this section, the boundaries after the appointed day of the Province of Assam, shall be such as may be determined, whether before or after the appointed day, by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until the boundaries are so determined—

(a) the Bengal Districts specified in the First Schedule to this Act, together with, in the event mentioned in sub-Sec. (2) of this section, the Assam District of Sylhet, shall be treated as the territories which are to be comprised in the new Province of East Bengal ;

(b) the remainder of the territories comprised at the date of the passing of this Act in the Province of Bengal shall be treated as the territories which are to be comprised in the new Province of West Bengal ; and

(c) in the event mentioned in sub-Sec. (2) of this section, the District of Sylhet shall be excluded from the Province of Assam.

### FIRST SCHEDULE

#### BENGAL DISTRICTS PROVISIONALLY INCLUDED IN THE NEW PROVINCE OF EAST BENGAL.

In the Chittagong Division, the districts of Chittagong, Naokhali and Tippera.

In the Dacca Division, the districts of Bakarganj, Dacca, Faridpur and Mymensingh.

In the Presidency Division, the districts of Jessore, Murshidabad and Nadia.

In the Rajshahi Division, the districts of Bogra, Dinajpur, Malda, Pabna, Rajshahi and Rangpur."

The result of the referendum referred to in S. 3 (2) above, was against the Province of Assam and in favour of East Bengal ; hence the District of Sylhet was to be excluded from the Province of Assam.

The Boundary Commission was thereafter constituted<sup>19</sup>, and its report, known as the ' Radcliffe Award ' was as follows :

#### " THE RADCLIFFE AWARD.

##### *Bengal Report.*

10. . . . . The demarcation of the boundary line is described in detail in the schedule which forms Annexure A to this award, and in the map annexed thereto, Annexure B. The map is annexed for purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated on the map in Annexure B, the description in Annexure A is to prevail.

#### ANNEXURE A.

1. A line shall be drawn along the boundary between the Thana of Phansidewa in the District of Darjeeling and the Thana Tetulia in the District of Jalpaiguri from the point where that boundary meets the Province of Behar and then along the boundary between the Thanas of Tetulia and Rajganj ; the Thanas of Pachagar and Rajganj, and the Thanas of Pachagar and Jalpaiguri, and shall then continue along the northern corner of the Thana Debiganj to the boundary of the State of Cooch-Bihar. The District of Darjeeling and so much of the District of Jalpaiguri as lies north of this line shall belong to West Bengal, but the Thana of Patgram and any other portion of Jalpaiguri District which lies to the east or south shall belong to East Bengal.

2. A line shall then be drawn from the point where the boundary between the Thanas of Haripur and Rajganj in the District of Dinajpur meets the border of the Province of Bihar to the point where the boundary between the Districts of 24 Parganas and Khulna meets the Bay of Bengal. This line shall follow the course indicated in the following paragraphs. So much of the Province of Bengal as lies to the west of it shall belong to West Bengal. Subject to what has been provided in paragraph 1 above with regard to the Districts of Darjeeling and Jalpaiguri, the remainder of the Province of Bengal shall belong to East Bengal.

3. The line shall run along the boundary between the following Thanas :

Haripur and Rajganj ; Haripur and Hemtabad ; Ranisankail and Hemtabad ; Pirganj and Hemtabad ; Pirganj and Kaliganj ; Bochaganj and Kaliganj ; Biral and Kaliganj ; Biral and Kushmundi ; Biral and Gangarampur ; Dinajpur and Gangarampur ; Dinajpur and Kumarganj ; Chirirbandar and Kumarganj ; Phulbari and Kumarganj ; Phulbari and Balurghat. It shall terminate at the point where the boundary between Phulbari and Balurghat meets the north-south line of the Bengal-Assam Railway in the eastern corner of the Thana of Balurghat. The line shall turn down the western edge of the railway lands belonging to that railway and follow that edge until it meets the boundary between the Thanas of Balurghat and Panchbibi.

4. From that point the line shall run along the boundary between the following Thanas :

Balurghat and Panchbibi ; Balurghat and Joypurhat ; Balurghat and Dhamaairhat ; Tapan and Dhamaairhat, Tapan and Patnitala ; Tapan and Porsha ; Bamangola and Porsha ; Habibpur and Porsha ; Habibpur and Gomastapur ; Habibpur and Bholahat ; Malda and Bholahat ; English

(19) *Cazette of India (Extraordinary)*, dated the 30th June, 1947.

Bazar and Bholahat ; English Bazar and Shibganj ; Kaliachak and Shibganj ; to the point where the boundary between the two last mentioned thanas meets the boundary between the districts of Malda and Murshidabad on the river Ganges.

5. The line shall then turn south-east down the River Ganges along the boundary between the Districts of Malda and Murshidabad ; Rajshahi and Murshidabad ; Rajshahi and Nadia ; to the point in the north-western corner of the District of Nadia where the channel of the River Mathabanga takes off from the River Ganges. The district boundaries, and not the actual course of the River Ganges, shall constitute the boundary between East and West Bengal.

6. From the point on the River Ganges where the channel of the River Mathabanga takes off, the line shall run along that channel to the northernmost point where it meets the boundary between the Thanas of Daulatpur and Karimpur. The middle line of the main channel shall constitute the actual boundary.

7. From this point the boundary between East and West Bengal shall run along the boundaries between the Thanas of Daulatpur and Karimpur ; Gangani and Karimpur ; Meherpur and Karimpur ; Meherpur and Tehatta ; Meherpur and Chapra ; Damurhuda and Chapra ; Damurhuda and Krishnaganj ; Chuadanga and Krishnaganj ; Jibannagar and Krishnaganj ; Jibannagar and Hanskhali ; Maheshpur and Hanskhali ; Maheshpur and Ranaghat ; Maheshpur and Bongaon ; Jhikargacha and Bongaon ; Sarsa and Bongaon ; Sarsa and Gaighata ; Gaighata and Kalaroa ; to the point where the boundary between those thanas meets the boundary between the districts of Khulna and 24 Parganas.

8. The line shall then run southwards along the boundary between the Districts of Khulna and 24 Parganas, to the point where that boundary meets the Bay of Bengal."

#### SYLHET REPORT

" 13. . . . A line shall be drawn from the point where the boundary between the Thanas of Patharkandi and Kulaura meets the frontier of Tripura State and shall run north along the boundary between those Thanas, then along the boundary between the Thanas of Patharkandi and Barlekha, then along the boundary between the Thanas of Karimganj and Barlekha, and then along the boundary between the Thanas of Karimganj and Beani Bazar to the point where that boundary meets the river Kusiya. The line shall then turn to the east taking the river Kusiya as the boundary and run to the point where that river meets the boundary between the Districts of Sylhet and Cachar. The centre line of the main stream or channel shall constitute the boundary. So much of the District of Sylhet as lies to the west and north of this line shall be detached from the Province of Assam and transferred to the Province of East Bengal. No other part of the Province of Assam shall be transferred.

14. For purposes of illustration a map marked A is attached on which the line is delineated. In the event of any divergence between the line as delineated on the map and as described in paragraph 13, the written description is to prevail."

#### THE BAGGE DECISION

Certain disputes having arisen as to the interpretation of the Radcliffe Award, these were referred to an Indo-Pakistan Boundary Disputes Tribunal, having as its Chairman Hon'ble Algot Bagge (former member of the Supreme Court of Sweden).

The four disputes referred to, were as follows :—

" (a) East-West Bengal disputes concerning (i) the boundary between the district of Murshidabad (West Bengal) and the district of Rajshahi including the thanas of Nawabganj and Shibganj of pre-partition Malda district (East Bengal); and (ii) that portion of the common boundary between the two Dominions which lies between the point on the river Ganga where the channel of the river Mathabanga takes off according to Sir Cyril Radcliffe's award and the northernmost point where the channel meets the boundary between the thanas of Daulatpur and Karimpur according to that award.

(b) East Bengal-Assam disputes concerning (i) the Patharia Hill Reserve Forest ; and (ii) the course of the Kusiya river."

The Tribunal's decision<sup>20</sup> has been as follows :

" (a) (i)<sup>21</sup> In the dispute the district boundary line, consisting of the land boundary portion of the district boundary as shown on the map Annexure ' B ' and as described in the Notification No. 10413-Jur., of 11-11-49, and the boundary following the middle of the midstream of the main channel of the river Ganges as it was at the time of the Award given by Sir Cyril Radcliffe, in his Report of August 12, 1947, is the boundary between India and Pakistan to be demarcated on the site. If the demarcation of this line is found to be impossible, the boundary between India and Pakistan in this area shall then be a line consisting of the land portion of the above-mentioned boundary and of the boundary following the course of the midstream of the main channel of the river Ganges as determined on the date of demarcation and not as it was on the date of the Award. The demarcation of this line shall be made as soon as possible and at the latest within one year from the date of the publication of this decision.

(ii)<sup>22</sup> The boundary between India and Pakistan shall run along the middle line of the main channel of the river Mathabanga which takes off from the river Ganges in or close to the north-west-

(20) *Gazette of India, Extraordinary*, dated 2-5-50, Part I, Sec. 1, p. 49, *et seq.*

(21) Referred to in the Decision as ' Dispute I. '

(22) Referred to in the Decision as ' Dispute II. '

tern corner of the district of Nadia at a point west-south-west of the police station and the camping ground of the village Jalangi as they are shown on the air photograph map of 1948, and then flows southwards to the northernmost point of the boundary between the thanas of Daulatpur and Karimpur. The point of the off-take of the river Mathabhanga shall be connected by a straight and shortest line with a point in the midstream of the main channel of the river Ganges, the said latter point being ascertained as on the date of the Award or if not possible as on the date of the demarcation of the boundary line in Dispute I. The said point so ascertained shall be the south-easternmost point in the boundary line in Dispute I, this point being a fixed point.

(b) (i)<sup>23</sup> The red line indicated in the map 'A' attached to the Award given by Sir Cyril Radcliffe in his Report of August 13, 1947, is the boundary between India and Pakistan.

(ii)<sup>24</sup> From the point where the boundary between the thanas of Karimganj and Beani Bazar meets the river described as the Sonai river on the map 'A' attached to the Award given by Sir Cyril Radcliffe in his Report of August 13, 1947 (Gobindapur) up to the point marked 'B' on the said map (Birasri) the red line indicated on the said map is the boundary between India and Pakistan. From the point 'B' the boundary between India and Pakistan shall turn to the east and follow the river which according to the said map runs to that point from the point 'C' marked on the said map on the boundary line between the districts of Sylhet and Cachar."

*Indian State merged in West Bengal.*<sup>25</sup>

"Cooch Behar."

*Territory of Punjab.*—By S. 4 of the Indian Independence Act, the old Province of the Punjab was divided into two Provinces—West Punjab and East Punjab. The Province of East Punjab [which is simply 'Punjab' under the Constitution], was to provisionally include the rest of the old Province of Punjab left after excluding the following districts included in the Second Schedule, subject to the report of the Boundary Commission.

#### "SECOND SCHEDULE

##### DISTRICTS PROVISIONALLY INCLUDED IN THE NEW PROVINCE OF WEST PUNJAB

In the Lahore Division, the districts of Gujranwala, Gurdaspur, Lahore, Sheikhupura and Sialkot.

In the Rawalpindi Division, the districts of Attock, Gujrat, Jhelum, Mianwali, Rawalpindi and Shahpur.

In the Multan Division, the districts of Dera Ghazi Khan, Jhang, Lyallpur, Montgomery, Multan and Muzaffargarh."

#### RADCLIFFE AWARD

##### PUNJAB REPORT

"7. . . . . The demarcation of the boundary line is described in detail in the schedule which forms Annexure A to this award, and in the map attached thereto, Annexure B. The map is annexed for purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated on the map in Annexure B, the description in Annexure A is to prevail.

##### ANNEXURE A

1. The boundary between the East and West Punjab shall commence on the north at the point where the west branch of the Ujh river enters the Punjab Province from the State of Kashmir. The boundary shall follow the line of that river down the western boundary of the Pathankot Tahsil to the point where the Pathankot, Shakargarh and Gurdaspur tahsils meet. The tahsil boundary and not the actual course of the Ujh river shall constitute the boundary between the East and West Punjab.

2. From the point of meeting of the three tahsils above mentioned, the boundary between the East and West Punjab shall follow the line of the Ujh river to its junction with the river Ravi and thereafter the line of the river Ravi along the boundary between the tahsils of Gurdaspur and Shakargarh, the boundary between the tahsils of Batala and Shakargarh, the boundary between the tahsils of Batala and Narowal, the boundary between the tahsils of Ajnala and Narowal, and the boundary between the tahsils of Ajnala and Shadara, to the point on the river Ravi where the district of Amritsar is divided from the district of Lahore. The tahsil boundaries referred to, and not the actual course of the Ujh or the river Ravi, shall constitute the boundary between the East and West Punjab.

3. From the point on the river Ravi where the district of Amritsar is divided from the district of Lahore, the boundary between the East and West Punjab shall turn southwards following the boundary between the tahsils of Ajnala and Lahore and then the tahsils of Tarn Taran and Lahore, to the point where the tahsils of Kasur, Lahore and Tarn Taran meet. The line will then turn southward along the boundary between the tahsils of Lahore and Kasur to the point where that boundary meets the north-east corner of village Theh Jharolian. It will then run along the eastern boundary

(23) Referred to in the Decision as "Dispute III."

(24) Referred to in the Decision as "Dispute IV."

(25) The States' Merger (West Bengal) Order, 1949 [App. XLVI, White Paper on Indian States].



of that village to its junction with village Chathanwala, turn along the northern boundary of that village and then run down its eastern boundary to its junction with village Waigal. It will then run along the eastern boundary of village Waigal to its junction with village Kalia, and then along the southern boundary of village Waigal to its junction with village Panhuwan. The line will then run down the eastern boundary of village Panhuwan to its junction with village Gaddoke. The line will then run down the eastern border of village Gaddoke to its junction with village Nurwala. It will then turn along the southern boundary of village Gaddoke to its junction with village Katluni Kalan. The line will then run down the eastern boundary of village Katluni Kalan to its junction with villages Kals and Mastgarh. It will then run along the southern boundary of village Katluni Kalan to the northwest corner of village Kals. It will then run along the western boundary of village Kals to its junction with village Khem Karan. The line will then run along the western and southern boundaries of village Khem Karan to its junction with village Maewala. It will then run down the western and southern boundaries of village Maewala, proceeding eastward along the boundaries between village Mahaidepur on the north and villages Sheikhpura, Kubna, Kamalpuran, Fatehwala and Mahewala. The line will then turn northward along the western boundary of village Sahjra to its junction with villages Mahaidepur and Machhike. It will then turn north-eastward along the boundaries between villages Machhike and Sahjra and then proceed along the boundary between villages Rattoke and Sahjra to the junction between villages Rattoke, Sahjra and Mabbuke. The line will then run north-east between the villages Rattoke and Mabbuke to the junction of villages Rattoke, Mabbuke and Gajjal. From that point the line will run along the boundary between villages Mabbuke and Gajjal, and then turn south along the eastern boundary of village Mabbuke to its junction with village Nagar Aimanpur. It will then turn along the north-eastern boundary of village Nagar Aimanpur, and run along its eastern boundary to its junction with village Masteke. From there it will run along the eastern boundary of village Masteke to where it meets the boundary between the tahsils of Kasur and Ferozepur.

For the purpose of identifying the villages referred to in this paragraph, I attach a map of the Kasur tahsil authorised by the then Settlement Officer, Lahore District, which was supplied to the Commission by the Provincial Government.

4. The line will then run in a south-westerly direction down the Sutlej River as the boundary between the Districts of Lahore and Ferozepore to the point where the districts of Ferozepore, Lahore and Montgomery meet. It will continue along the boundary between the districts of Ferozepore and Montgomery to the point where this boundary meets the border of Bahawalpur State. The District boundaries, and not the actual course of the Sutlej River, shall in each case constitute the boundary between the East and West Punjab.

5. It is my intention that this boundary line should ensure that the canal headworks at Sulemanke will fall within the territorial jurisdiction of the West Punjab. If the existing delimitation of the boundaries of Montgomery District does not ensure this, I award to the West Punjab so much of the territory concerned as covers the headworks, and the boundary shall be adjusted accordingly.

6. So much of the Punjab Province as lies to the west of the line demarcated in the preceding paragraphs shall be the territory of the West Punjab. So much of the territory of the Punjab Province as lies to the east of that line shall be the territory of the East Punjab."

*Indian States merged in Punjab.<sup>1</sup>—*

"Dujana, Loharu, Patandi."

*Enclaves transferred from Himachal Pradesh to East Punjab<sup>2</sup> :*

"1. Built up areas of Sanjauli (201 acres) ; Barari (62 acres) ; Chakkar (61 acres) (including Himachal Pradesh portion of Prospect Hill).

2. Built up area of Kasumpti (excluding the area in which Himachal Pradesh Courts are located) Area 203 acres."

*Enclaves transferred from Patiala and East Punjab States Union to East Punjab<sup>2</sup> :*

"1. The following 24 villages of sub-Tehsil Bhunga of Kapurthala, Abbawal, Badala, Baich, Bhatonlian, Bhunga, Chak Khela, Daulat Pur, Dhoot, Dhaulowal, Goraya, Hajipur, Hussainpur, Kabirpur, Koont, Kotli, Lalowal, Nadali, Noorpur, Pandori, Phumbra, Sandhar, Sotla, Shababdin and Taggar.

2. The following villages of Tehsil Sirhind, in Fatehgarh District :—

Machhiwara, Khanpur, Kotala, Salana, Hiatpura, Gausgarh, Raipur, Akalgarh, Haidon, Loharian, Garhi Sainian, Bhurla, Sharian, Majri Sikhan, Chaurian, Sarwatgarh, Bahumajra, Kauri, Bhatian, Libera, Ikolahi, Iraq, Dhanda, Kotla, Kiri Afghanan, Dolran, Bassi Gujran, Shamashpur, Amargarh, Mansurpur, Jatana Uncha, Khamanonkamli, Khamanon-Kalan, Fraur, Maheshpura, Ranama, Balaspur, Thikriwal, Bhambri, Bhathan Kalan, Sanghol, Bhattan Khurd, Bhota, Chari, Bhamian, Dalwan, Mohan Majra, Pani-Chan, Khera, Raipur Rainan, Jhadiwala, Ramgarh, Lakhanpur, Jatana Newan, Manderan, Khamanon Khurd, Amrara, Dhianomajra, Kalewal, Polomajra, Naglan, Raia and Bir Ramgarh.

(1) The States' Merger (Governors' Provinces) Order, 1949 [App. XLIV, White Paper, Indian States].

(2) The Provinces and States [Absorption of Enclaves] Order, 1950 [S. O. 35=App. LI, White Paper on Indian States, p. 343].

3. Four Revenue Estate of Kapurthala near Jullundur City :—Bastinau, Bastishahkuli, Kotla and Kotsaddiq.
4. The following 6 villages in Bhatinda District :—Lakhnaurasahib, Mohri, Klalmajra, Tejan, Nadiali, and Khera.
5. Sub-Tehsil Bawal of Magindargarh District divided into two enclaves and comprising 75 villages.
6. Two enclaves of Tehsil Rajpur District Patiala consisting of 6 villages.
7. Chhachrauli area of former Kalsia State (excluding villages of Police Station Dera Sassi) consisting of 115 villages including 13,228 acres of the following Forests area :—Bagpat, Khallanwala, Kansali, Jakkan, Shehzhadwala, Darpur, Ibrahimpur, Jatanwala, Taharpur, Salinpur Kohi, Ban Sankor and Khol Fatchgarh.”

*Enclaves transferred from Rajasthan to East Punjab<sup>2-a</sup> :*

“ Khorl and Neemkhera villages of former Bharatpur State.”

## PART B

### NAMES OF STATES

- |   |                       |
|---|-----------------------|
| 1. Hyderabad.                               | 6. Rajasthan.         |
| 2. Jammu and Kashmir                        | 7. Saurashtra.        |
| 3. Madhya Bharat.                           | 8. Travancore-Cochin. |
| 4. Mysore.                                  | * * * *               |
| 5. Patiala and East Punjab<br>States Union. |                       |

### TERRITORIES OF STATES

The territory of the State in this Part shall comprise the territory which, immediately before the commencement of this Constitution was comprised in, or administered by the Government of, the corresponding Indian State, and in the case of the State of Madhya Bharat, shall also comprise the territory which, immediately before such commencement was comprised in the Chief Commissioner's Province of Panth Piploda<sup>4</sup>.

*Enclaves transferred from Madras to Hyderabad<sup>5</sup> :*

- “ 1. The following villages in Lingagiri Group of District Kistna :—Kalvapalli, Kavasaram Guddam, Sarwa Varam, Laxmi Puram, Linga Giri, Lekka Varam, Srinivas Puram, Sitaram Puram, Kundish Guddam, Ganuga Banda, Amravaram, Ayanna Guddam (Anjneyapuram).
2. The following villages of District Warrangal :—Mulu Kumadeo (Mulugumadu), Malla Varam and Rumapi Malla (Rumpimalla).”

*Enclaves transferred from Bombay to Hyderabad<sup>5</sup> :*

- “ 1. The following villages of Nandgaon Taluka in District Nasik :—  
Kawitkhede, Anchalgaon, Balhegaon, Hingane Kanad, Sakegaon, Pokhat Kanad, Babul Khede, Khirdi Kanad, Salegaon, Malegaon, Bhokargaon.
2. The following villages of Chalisgaon in District East Khandesh :—Narsingpur, Maranpur, Malpur, Vadali Pra Kanad, Bokangaon, Palasgaon, Banshendra, Hatnur, Jamadi Pra Kanad, Chapaner, Jalgaon Pra Kanad, Wodolwadi, Chikalthan, Withalpur.

(2-a) Vide Footnote (2), page 747.

(3) ‘Vindhya Pradesh’, which was State No. 9 of Part B, has been transferred to Part C, by the Constitution (Amendment of the First and Fourth Schedules Order, 1950, C. O. 3, *Gazette of India, Extraordinary*, dated 25-1-50.

(4) This paragraph was substituted for the

original Cls. (a) and (b), by the Constitution (Amendment of the First and Fourth Schedules) Order, 1950, *Gazette of India, Extraordinary*, dated 25-1-50.

(5) The India and Hyderabad (Exchange of Enclaves) Order, 1950 [App. LII, White Paper, on Indian States].

3. Malunja (Budruk) village of Nevasa Taluka in District of Ahmednagar.
4. The following villages of Patardi Taluka in District Ahmednagar :—Arvi, Jhapwadi, Saroor, Kanujwadi, Koalwadi, Rakshas Bhawan, Hinganwadi, Gomalwadi, Hingalwadi, Pimpalwadi.
5. The following villages of Jamkhed Mahal in District Ahmednagar :—Khokar Mohu, Ghogawadi, Buragwadi, Rupawadi, Shirasmarga, Kalwadi, Bandalwadi, Taratwadi, Deemakwadi, Soangaon, Murshidpur, Khelad, Dongargaon, Devi Nimbagaon Kada, Seri (Khurd), Gandiwadi, Kansiwadi, Amwadi, Kaswadi, Brahmangaon, Bhalaoni, Hajipur, Handewadi, Amalner, Pimpalwadi, Pangri, Ambawadi, Maserwadi, Chendowadi, Jadowadi, Saradwadi, Bidarwadi, Depotwadi, Kusulamb, Godewadi, Bharatwadi, Nalwadi, Bongarkinni, Batachiwadi, Naskwadi, Pimpalgaon Dhar, Nirgudi, Kodewadi, Tirumalwadi, Bidawadi, Domri, Maibwadi, Ganjwadi, Bhidasangvi.
6. The following villages of Sholapur Taluka in District Sholapur :—Hadalgi, Kukramhawadi, Thadala, Kukramba, Katachiwadi, Mangrole Sardwadi, Khandikarwadi, Arlibudruka, Kalegaon, Kesarjawalga.
7. The following villages of Barsi Taluka in District Sholapur :—Savargaon Upla, Wagoli, Kajla, Pawarwadi, Rajwadi.
8. Sonari Village of Karmala Taluka in District Sholapur.
9. Ainapur and Bhilwad villages of Sindgi Taluka in District Bijapur.
10. The following villages of Ron Taluka in District Dharwar :—Hagdahal, Hirejundgud, Hirebahadurdinni, Hanmanhal."

*Indian States forming Madhya Bharat<sup>6</sup>.—*

"Alirajpur Barwani, Dewas (Junior), Dewas (Senior), Dhar, Gwalior, Indore, Jaora, Jhabua, Khilchipur, Narsingarh, Rajgarh Ratlam, Sailana, Sitamau, Jobat, Kathiwar, Kurwai, Mathwar, Piploda Nimkhera, Pathari, Muhammadgarh."

**BHUMIA STATES**

*Enclaves transferred from Madhya Pradesh to Madhya Bharat<sup>7</sup> :*

"The following villages of Khandwa Tehsil in District Nimar :—Nagawan, Laundi, Bijgohan, Shahpur, Kanapur, Dalchi, Selda, Balabad, Katora, Sangwi, Kheri, Rawer, Pachla, Kankaria, Jaikher, Phangaon, Bhogwan Sipani, Mahegaon, Tajpura, Bhogawan, Nipani, Khanpura, Takli, Dobhan, Lachhan, Kalan, Jamnia, Amba, Beria, Khas Bagda, Buzrug, Bania Khurd, Guraria, Tamolia, Amarapura, Nimkheri, Chitawad, Bhulgaon, Nilkanth, Raharkot, Arsi, Mirzapur, Barud."

<sup>7</sup>NOTE.—Total area 93.28 sq. miles including 18 sq. miles of Reserve Forest and the Government tank at Lachhora.

*Enclaves transferred from Uttar Pradesh to Madhya Bharat<sup>8</sup> :*

"Katha village of Tehsil and District Jalaun."

*Enclaves transferred from Bhopal to Madhya Bharat<sup>8</sup> :*

1. The following villages of Ashta Tehsil :—Dodi, Haru Kheri, Semli Khera.
2. The following villages of Piklon Tehsil :—Deoli, Sankrod, Bhainswaya, Nah, Suneti, Ram Nagar, Chopra, Bisrai, Birsaya, Mala, Piklon.
3. The Parlia Mohibba village of Jawar Tehsil.
4. The following villages of Sehore Tehsil :—Jamner, Unchod."

*Enclaves transferred from Vindhya Pradesh to Madhya Bharat<sup>8</sup> :*

"1. The following villages of former Khaniadhana State :—Badali, Bineka, Badanpur, Dabia, Deori, Durgapur, Dharampura, Ganesh Khera, Hukumpur, Himatpur, Khairia, Kumhari, Kundoli, Khaniadhana, Kanchanpur, Jalimpur, Mahrauli, Mudia, Nadanwara, Nimkhera, Panihara, Pothai, Pura, Sanawal Kalan, Silawal Khurd, Silpura, Urahi.

2. The following villages of former Orcha State :—Garrera, Rajapur.

3. The following villages of former Datia State :—Barodi, Atta, Birpur, Bader, Barkachari, Bedna, Bisaipur, Bhusalai Khurd, Beri Nokora, Chharetta, Chanderi, Gaigahari Dabri, Jagdor, Kalan Toria Khurd, Kodila, Kamanpura, Kolaria, Kumaria Rai, Kurgawana, Lada, Lohrahawaili, Mau, Naganpur, Pali Pawari, Pardhana, Piprauli, Phuskar Reo, Rai Neja, Sawawali Khurd, Sohdownra, Tal Bheo, Taka Bujurg, Taka Khurd."

*Enclaves transferred from Rajasthan to Madhya Bharat<sup>9</sup> :*

"1. The following villages of Tehsil Begum District Chittoor.—Kalpura, Tokra, Khokra, Kanwarji ka Khera, Khanpura, Jaswantpura, Pand Kuri, Palasia, Kanwalpura, Ranpur, Kanwarji

(6) App. XXXVIII, White Paper Indian States.

(7) App. LI, *ibid*.

(8) App. LI, *ibid*.

(9) App. LIII, *ibid*.



ka Khera, Luwa, Manakpur, Sujanpura, Ralaita, Sanwaria, June Purana, Naya Purana, Bhanwar ka Rajpura, Fatchkheri, Khoarakuri, Dingaria, Kulmia, Ubran, Kolpura, Umedpura, Bora Kuri, Inderji ka Khera, Piplia Gurha.

2. The following villages of Tehsil Chhoti Sadri District Chittoor.—Bisalwas, Bharbharia, Sarwana Borkheri, Ucher, Piplia Waria, Lusuria, Sir ka Khera, Semli, Milki, Palsoda, Nal Khera, Ranpura, Hadmatia.

3. Bhanwar Kua village of Shahbad Pargana in Kotah District.

4. Nimrol village of former Dholpur State.

5. Chappon village of Sironj in former Tonk State."

*Enclaves transferred from Madras to Mysore<sup>10</sup> :*

"1. The following villages of Madakasire Taluk of District Anantapur :—Burdakunte, Palyam, Bettur, Bettagaudahalli, Ballasamudram, Badigondanahalli, Bhilmanakunta, Bullasamudram, Erragattupalim, Honnapuram, Kanajanahalli, Kotagerlahalli, Narasapuram, Sarjammanahalli, Tsautikuntapalli, Virpugeodanahalli.

2. The following villages of Salem District :—Angisattipalli, Adesundatti, Agraharam, Arleri, Balapanapalli, Bandapuram, Ettakodi, Chattihallikere, Karagatannapalli, Kuntanahalli, Madiralam, Moreasure, Nagnyakkanapalli, Rayasandiram, Settipalli, Talasandodi, Tulukanapalli, Turusandapalli.

3. The following villages of Goondapur Taluk in District South Canara :—Bailgi, Benhatti, Baijkal, Birdemaru, Gurtakair, Garte, Gachika, Habbige, Hennamagane R.F., Honnar, Hosahalli, Hologaru, Hosagudde, Halumane, Hologarugudda, Honnar Magane R.F., Kote Shirur, Kottegudda, Kalkamadi, Lakmane, Maigudda, Nagodi, Nittur, Manchagalale, Menasinagudde R.F., Markatta, Malekoppa, Ratihalli, Shirar, Uruthi."

*Indian States forming Patiala and East Punjab States Union<sup>10</sup> :*

"Faridkot, Jind, Kapurthala, Malerkotla, Nabha, Patiala, Kalsia, Nalagarh."

*Enclaves transferred from East Punjab to Patiala and East Punjab States Union<sup>10</sup> :*

"1. Dagshai. 2. Barauli including Sabattu. 3. Sanawar. 4. Kasauli. 5. Khallag. 6. Kala.

7. The following 40 villages of Tahsils Samrala and Ludhiana in Ludhiana District :—Gajan Majra, Rurki Kalan, Rurki Khurd, Ladewal, Dheromajra, Jabomajra, Sandhur, Manke, Khiali, Sanor, Chakrohi, Chananwal, Raisar, Bhotna, Chung, Bidhata, Shehana, Burj Fatehgarh, Patti Darska, Malianwala, Kaira, Bakhatgarh, Pakhoke, Chima, Jodhpur, Pholewal, Sandharkhurd, Ghanda Banna, Dhapali, Dhingarh, Alike, Jathoke, Ghareli, Bhunder, Chaoke, Pirkot, Bhaini Chuhr, Bhupwali, Bagriam and Jandiali Kalan.

8. One enclave of Police Station Budhlada of Hissar District consisting of 15 villages.

9. The following 32 villages of Tahsils Kaithal and Thanesar in Karnal District :—Bibipur Khurd, Dhandhian, Naraingarh, Gutmenrha, Bishangarh, Katakheri, Khakat Khurd, Budhanpur, Jattan, Baran, Sidhowal, Rakherha, Main, Mardaheri, Nanansu, Batoi, Khurd, Shadipur, Fatehpur, Kakra, Mavi, Chatehrha, Tullewal, Kishangarh *alias* Darola, Daroli, Nasurpur, Asarpur, Toddarpur, Jamalpur, Paharpur, Danipur-Khudadadpur, Harigarh-Butasinghwala, Kharyal, Rattakheri.

10. One enclave consisting of the following 16 villages of Tehsil Kharar in Ambala District :—Bibipur, Batta, Silkapra, Sil, Lonon, Mulanpur, Sadiqpur, Kajjalmajri, Garangan, Ghugha Kheri, Malan Majri, Roopa Heri, Kheri Birusingh, Dadiana, Railon, Bhaganpur and Gadh Hera."

*Enclaves transferred from Himachal Pradesh to Patiala<sup>11</sup> and East Punjab States Union :*

"Two small portions of Himachal consisting of Rampur Vanka and Kotah villages lying between Simla and Bharauli."

*Indian States forming Rajasthan<sup>12</sup>—*

"Alwar, Bharatpur, Dholpur, Karauli, Bikaner, Jaipur, Jaisalmer, Jodhpur, Partabgarh, Kotah, Kishengarh, Jhalawar, Bundi, Tonk, Banswara, Shahpura, Dhungarpur, Udaipur (Mewar)."

*Enclaves transferred from Bombay to Rajasthan<sup>13</sup> :*

"Varanba and Sarvane villages of former Wav State."

*Enclaves transferred from East Punjab to Rajasthan<sup>14</sup> :*

"1. The following villages of Tehsil Ferozepur Jhirka in Dt. Gurgaon :—Fatehpur, Ghaimika, Gajuka, Hasamdika.

2. The following villages of Tehsil Rewari in District Gurgaon :—Sansairi, Shahajahanpur, Foladpur Boari and Chaubara."

*Enclaves transferred from Uttar Pradesh to Rajasthan<sup>14</sup> :*

"1. Phulwara village of District Muttra.

(10) App. LI, White Paper on Indian States.

(11) App. LI, *ibid.*

(12) App. XL, *ibid.*

(13) App. LI, *ibid.*

(14) App. LI, *ibid.*

2. The following villages of District Agra :—Mai Gujar, Samauna, Indauli, Jarga.”

*Enclaves transferred from Madhya Bharat to Rajasthan<sup>15</sup> :*

“1. The following villages of Tehsil Neemuch in District Mandsaur :—Chirkheda (including Khera and Sedh), Miloni Khera (Meroli), Gangapur (including Khera Sundan), Bhandera, Arnia, Udaliavyas, Khajuria, Naithal, Majhawas, Surawas, Padliavyas, Piplivyas, Surajpura J, Narabadia J, Pipliadeoda J, Koshial J, Radaikheda J, Karoli J, Bhatoli-Gujran J, Nimgoan, Jhadsadri J, Mewada J, Madfia, Ghodakheda J, Bhutkheda J, Chadlia J, Pilana M, Utelheda M, Nikumbh J, Punaoli J, Pindoda J, Dhedasutaran J, Bhatolibrahman J, Kachumbra J, Padlia, Rajpura, Kesoda, Chatera M (Gatod), Khedakundal J (Motipura), Nanumantiakundal, Chandoli, Basedikundal J (Nankia), Jalodia J, Bhukanganj, Bhichor, Pohampur, Nal, Basota, Allunpur, Mahesara, Muroli, Sheopura J, Nadwal, Amarkhal, Amalda-Jhalanpur, Narsinghpur, Bhanoda, Dewri, Madheopur, Bhawanipura, Gudha (including Kurantia), Nimods, Tejpura, Haripura, Annadpur, Tawa, Jhadol, Kishanpura, Hardeopura, Chawadia-Bhichor, Gopalpur, Kethoda, Madona, Bhawancha, Tukrai, Ramnagar, Nayagaon, Basifatehpur, Raeti, Awalaheda, Kheda, Karanpura, Rakiakheda, Deopur, Dhanora, Gulana, Bemanheda, Jaisinghpura, Padawas, Mankeshwar, Haripura, Nilwadah (Charsa), Dhamancha Kalda.

2. Amalheda village of Tehsil Sheopur in District Morena.”

*Indian States forming Saurashtra<sup>16</sup> :*

“Nawanagar, Bhavnagar, Porbandar, Dharangadhra, Morvi, Gondal, Jafrabad, Wankaner, Palitana, Dhrol, Limbdi, Rajkot, Wadhwan, Lakhtar, Sayla, Chuda, Vala, Jasdan, Amarnagar, Thana Devli, Vadia, Lathi, Muli, Bajana, Virpur, Maliya, Kotda-Sangani, Jetpur, Bilkha, Patdi, Khirasra, Junagadh and Manavadar.”

*Enclaves transferred from Bombay to Saurashtra<sup>17</sup> :*

“1. The following villages of Viramgam Taluka in Ahmedabad District :—Derwala, Dhanchi, Gedia, Kherwa, Modhwana, Sakar, Savlana and Tanmania.

2. The following villages of Rampur Mahal in Ahmedabad District :—Bhadla Mota, Bodana, Chorvira, Gangajal, Goraiya, Harania, Loya, Matra Nana, Nadala, Nagadka, Ninama, Noli, Ori, Samadiala, Sangoi, Shekhdod.

3. Bhader and Bhalgam villages of Dhari Taluka in Amreli District.

4. Khakhbai and Ningala villages of Khanbha Mahal in Amreli District.

5. The following villages of Damnagar Mahal of Amreli District :—Ganeshgad, Ishvaria, Rupavati and Shiyanagar.”

6. Bhimkatta and Pati villages of Okhmandal Taluka in Amreli District.

7. Muglana and Navagam Mota villages of Ghogho Mahal in Amreli District.

8. Panavi and Muldhari villages of Dhanduka Taluka of Ahmedabad District.”

*Enclaves transferred from Madras to Travancore-Cochin<sup>18</sup> :*

“1. The following areas of Tirunelveli District :—Anjengo (100 acres), Thangasseri (275 acres), Panagudi (15 acres).

2. The following areas of Malabar District :—Theneri (82, 58 acres), Vadavannur (63, 41 acres), Peruvemba, (51, 72 acres), Kootallur (4, 81 acres), Elapully (31, 06 acres), Elavancheri (6, 06 acres), Panayur (11, 84 acres) and Palathulli, 1, 62 acres.”

## PART C

### NAMES OF STATES

- |              |                                    |
|--------------|------------------------------------|
| 1. Ajmer.    | 5. Delhi.                          |
| 2. Bhopal.   | 6. Himachal Pradesh.               |
| 3. Bilaspur. | 7. Kutch.                          |
| * * * * *    | 8. Manipur.                        |
| 4. Coorg.    | 9. Tripura.                        |
|              | 10. Vindhya Pradesh. <sup>20</sup> |

(15) App. LIII, White Paper on Indian States.

(16) Apps. XXXIV, XXXVI, *ibid*.

(17) App. LI, *ibid*.

(18) App. LI, *ibid*.

(19) Cooch-Bihar, which was State No. 4 of Part C, has merged with West Bengal.

Hence, it has been omitted from the Part, by the Constitution (Amendment of the First and Fourth Schedules) Order, 1950 [C. O. 3, *Gazette of India, Extraordinary*, 25-1-50].

(20) Vindhya Pradesh has been transferred from Part II to Part C, by the XXXX Order.

## TERRITORIES OF STATES

The territory of each of the States of Ajmer, Coorg and Delhi shall comprise the territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Provinces of Ajmer-Merwara, Coorg and Delhi, respectively.

The territory of each of the other States in this Part shall comprise the territories which, by virtue of an order made under section 290-A of the Government of India Act, 1935, were immediately before the commencement of this Constitution being administered as if they were a Chief Commissioner's Province of the same name.

## PART D

## The Andaman and Nicobar Islands.

*Indian States forming Himachal Pradesh<sup>21</sup> :*

"Baghal, Baghat, Balsan, Bashahr, Bhajji, Bija, Darkoti, Dhamsi, Jubbal, Keonthal, Kumharsain, Kunihar, Kuthar, Mahlog, Sangri, Mangal, Sirmur, Tharoch, Chamba, Mandi, and Suket."

*Enclaves transferred from East Punjab to Himachal Pradesh<sup>22</sup> :*

"Solan Cantonment, Kothkhai, Kotgarh."

*Enclaves transferred from Uttar Pradesh to Himachal Pradesh<sup>22</sup> :*

"Sansog and Bhattar villages of Chakrata Tahsil in Dehra Dun District."

*Enclaves transferred from Patiala and East Punjab Union to Himachal Pradesh<sup>23</sup> :*

"1. The area called Kufri of Pinjaur District.

2. The following villages of former Nalagarh State :—Dhar Khulag, Goila, Jamrarha, Nathal, Kunjiara, Sureta and Baragraon Jungle."

*Areas included in Kutch<sup>24</sup> :*

"(i) The State of Kutch, excluding the area known as Kutchigarh situate in Okhamandal.

(ii) That part of the United State of Saurashtra which is comprised in the Adhoi Mahal of Morvi, consisting of the seven villages Adhoi, Dhama, Gamdan, Halara, Lakhpat, Rampur and Vasatava."

*Manipur and Tripura :* [See Apps. XXXI-XXXII of the White Paper on Indian States.]

*Indian States forming Vindhya Pradesh<sup>25</sup> :*

"Ajaigarh, Baoni, Baraundha, Bijawar, Chhatarpur, Charkhari, Datia, Maihar, Nagod, Orchha, Panna, Rewa, Samthar, Alipur, Banka Pahari, Beri, Bhaisaundha, Bihat, Bijna, Dhurwai, Gaurihar, Garrauli, Jaso, Jigini, Kamta-Rajaula, Khaniadhana, Kothi, Lugasi, Naigawan-Rohai, Pahra, Paldeo (Nayagaon), Sararila, Sohawal, Taraon and Tori-Fatehpur."

*Enclaves transferred from Central Provinces and Berar to Vindhya Pradesh<sup>1</sup> :*

"1. Budera village of Banda Tahsil—(District Saugor). 2. The following villages of Hatta, Tahsil (District Saugor)—Madanwa (Bhensroi) Kupi, Udla. 3. The following villages of Murwara Tahsil (District Jabulpore)—Mand, Banjaria, Gundan, Pitchra, Guraiya, Jhanbar, Pachoha, Junwahi, Bara, Khalond and Kai."

*Enclaves transferred from Uttar Pradesh to Vindhya Pradesh<sup>1</sup> :*

"1. The following villages of Jhansi District :—

(21) The States Merger (Chief Commissioners' Provinces) Order, 1949 [App. XLVII, White Paper on Indian States, p. 313].

(22) The Provinces and States (Absorption of Enclaves) Order, 1949 [S. O. 35=App. LI, White Paper on Indian States, p. 341].

(23) App. LI, White Paper on Indian States [M.S. 6].

(24) The States' Merger (Chief Commissioners' Provinces) Order, 1949 [S. O. 26=App. XLVII, White Paper on Indian States, p. 314].

(25) App. XXXIII, White Paper on Indian States.

(1) The Provinces and States (Absorption of Enclaves) Order, 1950 [S. O. 35=App. LI, White Paper on Indian States, p. 341].



- (a) Tila, Kainan and Jugyai villages of Jhansi Tehsil.
- (b) Jer, Khiston, Kharon, Jarua and Pahari Buzurg villages of Mau Tehsil.
2. Negawan village of Tehsil Kulpahar in District Hamirpur.
3. The following villages of Banda District :—
  - (a) Jai Baram, Matra Brahmanan, Khaddi and Silap villages of Tehsil Banda.
  - (b) Narainpur, Majhgawan, Nayagaon and Sidhpur Kalan villages of Tehsil Naraini.
4. Chaukhandi and Khoha villages of Tehsil Karchahana in District Allahabad."

## SECOND SCHEDULE

[Articles 59 (3), 65 (3), 75 (6), 97, 125, 148 (3), 158 (3), 164 (5),  
186 and 221]

### PART A

#### PROVISIONS AS TO THE PRESIDENT AND THE GOVERNORS OF STATES SPECIFIED IN PART A OF THE FIRST SCHEDULE

1. There shall be paid to the President and to the Governors of the States specified in Part A of the First Schedule the following emoluments per mensem, that is to say :—

The President	.. 10,000 rupees
The Governor of a State	.. 5,500 rupees

2. There shall also be paid to the President and to the Governors of the States so specified such allowances as were payable respectively to the Governor-General of the Dominion of India and to the Governors of the corresponding Provinces immediately before the commencement of this Constitution.<sup>2</sup>

3. The President and the Governors of such States throughout their respective terms of office shall be entitled to the same privileges to which the Governor-General and the Governors of the corresponding Provinces were respectively entitled immediately before the commencement of this Constitution.<sup>2</sup>

4. While the Vice-President or any other person is discharging the functions of, or is acting as, President, or any person is discharging the functions of the Governor, he shall be entitled to the same emoluments, allowances and privileges as the President or the Governor whose functions he discharges or for whom he acts, as the case may be.

### PART B

#### PROVISIONS AS TO THE MINISTERS FOR THE UNION AND FOR THE STATES IN PART A AND PART B OF THE FIRST SCHEDULE

5. There shall be paid to the Prime Minister and to each of the other Ministers for the Union such salaries and allowances as were payable respectively to the Prime Minister and to each of the other Ministers for the Dominion of India immediately before the commencement of this Constitution.

(2) The provisions relating to the allowances and privileges of the Governors, immediately preceding the commencement of this Constitution are to be found in the Government of India (Governors' Allowances and Privileges)

Order, 1950, which came into force from January 1, 1950 [Gazette of India, Extraordinary, dated 16-1-50] replacing the Government of India (Governors' Allowances and Privileges) Order, 1936.

6. There shall be paid to the Ministers for any State specified in Part A or Part B of the First Schedule such salaries and allowances as were payable to such Ministers for the corresponding Province or the corresponding Indian State, as the case may be, immediately before the commencement of this Constitution.

### PART C

PROVISIONS AS TO THE SPEAKER AND THE DEPUTY SPEAKER OF THE HOUSE OF THE PEOPLE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE COUNCIL OF STATES AND THE SPEAKER AND THE DEPUTY SPEAKER OF THE LEGISLATIVE ASSEMBLY OF A STATE IN PART A OF THE FIRST SCHEDULE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE LEGISLATIVE COUNCIL OF ANY SUCH STATE

7. There shall be paid to the Speaker of the House of the People and the Chairman of the Council of States such salaries and allowances as were payable to the Speaker of the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution, and there shall be paid to the Deputy Speaker of the House of the People and to the Deputy Chairman of the Council of States such salaries and allowances as were payable to the Deputy Speaker of the Constituent Assembly of the Dominion of India immediately before such commencement.

8. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly of a State specified in Part A of the First Schedule and to the Chairman and the Deputy Chairman of the Legislative Council of such State such salaries and allowances as were payable respectively to the Speaker and the Deputy Speaker of the Legislative Assembly and the President and the Deputy President of the Legislative Council of the corresponding Province immediately before the commencement of this Constitution and, where the corresponding Province had no Legislative Council immediately before such commencement, there shall be paid to the Chairman and the Deputy Chairman of the Legislative Council of the State such salaries and allowances as the Governor of the State may determine.

### PART D

PROVISIONS AS TO THE JUDGES OF THE SUPREME COURT AND OF THE HIGH COURTS IN STATES IN PART A OF THE FIRST SCHEDULE

9. (1) There shall be paid to the Judges of the Supreme Court, in respect of time spent on actual service, salary at the following rates per mensem, that is to say :—

The Chief Justice	.. 5,000 rupees
Any other Judge	... 4,000 rupees

Provided that if a Judge of the Supreme Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the

Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the Supreme Court shall be reduced by the amount of that pension.

(2) Every Judge of the Supreme Court shall be entitled without payment of rent to the use of an official residence.

(3) Nothing in sub-paragraph (2) of this paragraph shall apply to a Judge who, immediately before the commencement of this Constitution,—

(a) was holding office as the Chief Justice of the Federal Court and has become on such commencement the Chief Justice of the Supreme Court under clause (1) of article 374, or

(b) was holding office as any other Judge of the Federal Court and has on such commencement become a Judge (other than the Chief Justice) of the Supreme Court under the said clause, during the period he holds office as such Chief Justice or other Judge, and every Judge who so becomes the Chief Justice or other Judge of the Supreme Court shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(4) Every Judge of the Supreme Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(5) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the Supreme Court shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the Federal Court.

10. (1) There shall be paid to the Judges of the High Court of each State specified in Part A of the First Schedule, in respect of time spent on actual service, salary at the following rates per mensem, that is to say :—

The Chief Justice	.. 4,000 rupees
Any other Judge	.. 3,500 rupees

(2) Every person who immediately before the commencement of this Constitution—

(a) was holding office as the Chief Justice of a High Court in any Province and has on such commencement become the Chief Justice of the High Court in the corresponding State under clause (1) of article 376, or



(b) was holding office as any other Judge of a High Court in any Province and has on such commencement become a Judge (other than the Chief Justice) of the High Court in the corresponding State under the said clause,

shall, if he was immediately before such commencement drawing a salary at a rate higher than that specified in sub-paragraph (1) of this paragraph, be entitled to receive in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, in addition to the salary specified in the said sub-paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(3) Every Judge of a High Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(4) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the High Court of any State shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the High Court in the corresponding Province.

11. In this Part, unless the context otherwise requires,—

(a) the expression “Chief Justice” includes an acting Chief Justice, and a “Judge” includes an *ad hoc* Judge ;

(b) “actual service” includes—

(i) time spent by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the President undertake to discharge ;

(ii) vacations, excluding any time during which the Judge is absent on leave ; and

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

## PART E

### PROVISIONS AS TO THE COMPTROLLER AND AUDITOR-GENERAL OF INDIA

12. (1) There shall be paid to the Comptroller and Auditor-General of India a salary at the rate of four thousand rupees per mensem.

(2) The person who was holding office immediately before the commencement of this Constitution as Auditor-General of India and has become on such commencement the Comptroller and Auditor-General of India under article 377 shall in addition to the salary specified in sub-paragraph (1) of this paragraph be entitled to receive as special pay an amount equivalent to the difference between the

salary so specified and the salary which he was drawing as Auditor-General of India immediately before such commencement.

(3) The rights in respect of leave of absence and pension and the other conditions of service of the Comptroller and Auditor-General of India shall be governed or shall continue to be governed as the case may be, by the provisions which were applicable to the Auditor-General of India immediately before the commencement of this Constitution and all references in those provisions to the Governor-General shall be construed as references to the President.

### THIRD SCHEDULE

[Articles 75 (4), 99, 124 (6), 148 (2), 164 (3), 188 and 219]

#### *Forms of Oaths or Affirmations*

##### I

Form of oath of office for a Minister for the Union :—

swear in the name of God

“ I, A.B., do \_\_\_\_\_ that I will bear true  
solemnly affirm

faith and allegiance to the Constitution of India as by law established, that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or illwill.”

##### II

Form of oath of secrecy for a Minister for the Union :—

swear in the name of God

“ I, A.B., do \_\_\_\_\_ that I will not directly  
solemnly affirm

or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister.”

##### III

Form of oath or affirmation to be made by a member of Parliament :—

“ I, A.B., having been elected (or nominated) a member of the  
swear in the name of God

Council of States (or the House of the People) do \_\_\_\_\_

solemnly affirm  
that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter.”

##### IV

Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India :—

“ I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do—————swear in the name of God  
 solemnly affirm  
 allegiance to the Constitution of India as by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws.”

## V

Form of oath of office for a Minister for a State :—

swear in the name of God  
 “ I, A.B., do—————that I will bear true  
 solemnly affirm  
 faith and allegiance to the Constitution of India as by law established, that I will faithfully and conscientiously discharge my duties as Minister for the State of . . . . . and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or illwill.”

## VI

Form of oath of secrecy for a Minister for a State :—

swear in the name of God  
 “ I, A.B., do—————that I will not directly  
 solemnly affirm  
 or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the State of . . . . . except as may be required for the due discharge of my duties as such Minister.”

## VII

Form of oath or affirmation to be made by a member of the Legislature of a State :—

“ I, A.B., having been elected (or nominated) a member of the  
 swear in the name of God  
 Legislative Assembly (or Legislative Council), do—————  
 solemnly affirm  
 that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter.”

## VIII

Form of oath or affirmation to be made by the Judges of ■ High Court :—



“ I, A.B., having been appointed Chief Justice (or a Judge) of the  
 High Court at (or of) . . . . . do \_\_\_\_\_  
 \_\_\_\_\_ solemnly affirm

that I will bear true faith and allegiance to the Constitution of India  
 as by law established, that I will duly and faithfully and to the best  
 of my ability, knowledge and judgment perform the duties of my  
 office without fear or favour, affection or illwill and that I will uphold  
 the Constitution and the laws.”

## FOURTH SCHEDULE

[Articles 4 (1), 80 (2) and 391]

### *Allocation of seats in the Council of States*

To each State or group of States specified in the first column  
 of the table of seats appended to this Schedule there shall be allotted  
 the number of seats specified in the second column of the said table  
 opposite to that State or group of States, as the case may be.

## TABLE OF SEATS

### THE COUNCIL OF STATES

#### *Representatives of States specified in Part A of the First Schedule*

1	2
States	Total Seats
1. Assam	6
2. Bihar	21
3. Bombay	17
4. Madhya Pradesh	12
5. Madras	27
6. Orissa	9
7. Punjab	8
8. Uttar Pradesh <sup>3</sup>	31
6. West Bengal	14
TOTAL . . 145	

(3) See p. 739 ante.

*Representatives of States specified in Part B of the First Schedule*

I	2
States	Total Seats
1. Hyderabad	11
2. Jammu and Kashmir	4
3. Madhya Bharat	6
4. Mysore	6
5. Patiala and East Punjab States Union	3
6. Rajasthan	9
7. Saurashtra	4
8. Travancore-Cochin	6
*                    *                    * 4	
TOTAL .. 49 <sup>4</sup>	

*Representatives of States specified in Part C of the First Schedule*

1	2
States and Groups of States	Total Seats.
1. Ajmer }	1
2. Coorg }	
3. Bhopal	1
4. Bilaspur	1
5. Himachal Pradesh }	
* * * 5	
6. Delhi	1
7. Kutch	1
8. Manipur }	1
9. Tripura }	
10. Vindhya Pradesh <sup>4</sup>	4 <sup>5</sup>
TOTAL .. 10 <sup>4</sup>	
TOTAL OF ALL SEATS .. 204	

(4) See p. 748 ante.

(5) See p. 751 ante.

## FIFTH SCHEDULE

[Article 244 (1)]

*Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes.*

*Scope of the Fifth Schedule.*—While the Sixth Schedule deals with the administration of the Tribal Areas in Assam (see Table A & B appended to paragraph 20 of that Schedule, *post*), the Fifth Schedule deals with the administration of *other* Scheduled Areas and Tribes (as enumerated under paragraph 6 of the Fifth Schedule).

Roughly speaking, the Fifth Schedule corresponds to the 'Excluded Areas and Partially Excluded Areas', as referred to in secs. 91-92 of the Government of India Act, 1935 and the Government of India (Excluded and Partially Excluded Areas) Order, 1936 (minus the Areas of Assam, which are included in the Sixth Schedule). The reasons why special provisions have been made for these Areas and Tribes are that they are culturally backward, and that their social and other customs are different from the rest of India.<sup>6</sup>

The special provision as regards the administration of all these Excluded and Partially Excluded Areas in the Government of India Act, 1935, were contained in S. 92 of that Act, which was as follows :

"(1) The executive authority of a Province extends to excluded and partially excluded areas therein; but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial legislature shall apply to an excluded area or partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make Regulations for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any Regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing Indian law, which is for the time being applicable to the area in question.

Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him in his discretion shall have no effect, and the provisions of this Part of this Act with respect to the power of His Majesty to disallow Acts shall apply in relation to any such Regulations assented to by the Governor-General as they apply in relation to Acts of a Provincial Legislature assented to by him.

(3) The Governor shall, as respects any area in a Province which is for the time being an excluded area exercise his functions in his discretion."

The system of Administration provided for the Scheduled Areas and Tribes as provided in Parts A and B of the Fifth Schedule may be summarised as follows :

The executive power of the Union shall extend to giving directives to the States regarding the administration of the Scheduled Areas.<sup>7</sup> Tribes Advisory Councils are to be constituted to give advice on such matters as welfare and advancement of the Scheduled Tribes in the States as may be referred to them by the Governor or Ruler<sup>8</sup>.

The Governor or Ruler is authorised to direct that any particular Act of Parliament or of the legislature of the State shall not apply to a Scheduled Area or shall apply, only subject to exceptions or modifications. The Governor or Ruler is also authorized to make regulations to prohibit or restrict the transfer of land by, or among members of, the Scheduled Tribes, regulate the allotment of land, and regulate the business of moneylending. All such regulations made by the Governor or Ruler must have the assent of the President<sup>9</sup>.

(6) See Constituent Assembly Debates, Vol. VII, Apps. C and D, pp. 108-9, 157.

(7) Para. 3.

C-96

(8) Para. 4.

(9) Para. 5.



## PART A

## GENERAL

1. *Interpretation.*—In this Schedule, unless the context otherwise requires, the expression “State” means a State specified in Part A or Part B of the First Schedule but does not include the State of Assam.

2. *Executive power of a State in Scheduled Areas.*—Subject to the provisions of this Schedule, the executive power of a State extends to the Scheduled Areas therein.

3. *Report by the Governor or Rajpramukh to the President regarding the administration of Scheduled Areas.*—The Governor or Rajpramukh of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the Administration of the said areas.

## PART B

## ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

4. *Tribes Advisory Council.*—(1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes, but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State :

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor or Rajpramukh, as the case may be.

(3) The Governor or Rajpramukh may make rules prescribing or regulating, as the case may be,—

(a) the number of members of the Council, the mode of their appointment and the appointment of the Chairman of the Council and of the officers and servants thereof ;

(b) the conduct of its meetings and its procedure in general ;  
and

(c) all other incidental matters.

5. *Law applicable to Scheduled Areas.*—(1) Notwithstanding anything in this Constitution, the Governor or Rajpramukh, as the case may be, may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor or Rajpramukh, as the case may be, may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area ;

(b) regulate the allotment of land to members of the Scheduled Tribes in such area ;

(c) regulate the carrying on of business as moneylender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor or Rajpramukh may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor or the Rajpramukh making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

*Para. 5, Cl. (1) : Scope of Governor's Power to make notifications.*—The power of making a notification under the present Clause is ■ legislative power, and, in making a modification, the Governor (or Rajpramukh) is competent to change the whole aspect of an Act or Section referred to in the notification.<sup>10</sup>

'So as to have retrospective effect.'—In *Jatindra v. Province of Bihar*<sup>11</sup>, the Federal Court held that under the corresponding provision in S. 92 (1) of the Act of 1935, Governor had no power by his Notification, to give retrospective effect to ■ Provincial statute, which itself was not retrospective, though, of course, the Governor might, by a subsequent notification, apply ■ Provincial statute to the Excluded Area with effect from the commencement of that statute. The above words have been engrafted in the Constitution, to counteract the effect of that decision. It expressly provides that in applying ■ Act of Parliament or of a State Legislature, the Governor

(10) ■■■■■ v. C■■■■ of I.T. (1947) F.L.J. 92.

(11) *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (238).

may make such application retrospective,—without any limitation on his power as to the point of time from which such effect was to commence.

‘Notwithstanding anything in the Constitution, the Governor may . . . . .’—These words make a departure from the corresponding provisions in S. 92 (1) of the Government of India Act, 1935. Under that Section,

“no Act of the Dominion Legislature or of the Provincial Legislature shall apply to an excluded . . . area, unless the Governor so directs.” . . .<sup>12</sup>

There is no such provision in the Constitution to the above effect. On the contrary, Art. 245 (1) (p. 536, *ante*) provides that an Act of Parliament shall, of its own force apply to the whole of the territory of India, unless any part is excepted, and similarly, an Act of the State Legislature shall apply to the whole of the territory of the State. The present Clause of Para 5 of the Fifth Schedule constitutes an exception to the generality of the above provision in Art. 245 (1), *viz.*, that the Governor may exclude the application of an Act of Parliament or a State Act in a Scheduled Area or may direct that it will be applicable subject to exceptions or modifications as may be specified in his Notification. But so long as and in so far as the Governor does not make any such notification, the general Acts of Parliament and of the State Legislature shall apply to the Areas referred to in the Fifth Schedule.

Cl. (2) : *Scope of Governor's power to make Regulations.*—While Cl. (1) gives the Governor the power or merely *applying* or modifying the application of Acts made by Parliament or the State Legislature, Cl. (2) confers powers of *independent* legislation of great width. He is given plenary power of legislation concerning these Areas, by framing regulations ‘for the peace and good Government’ of that Area. He is the sole judge to decide whether the Regulation is required for the peace and good Government of the Area in question.<sup>13</sup> There is no doubt that the Governor has under the present Clause the power of retrospective legislation just as the State Legislature possesses<sup>13</sup>. Again, the ambit of the present power of the Governor is *not restricted* to any particular Entry or Entries of the Legislative Lists in the 7th Schedule. The plenary nature and extent of this power is illustrated by Cl. (3) which says that in making any such Regulation, the Governor may override (repeal or amend) any Act of Parliament or of the State Legislature so far as its application to that Area is concerned. So, the power of the Governor to make Regulations, extends to all the three Lists of the 7th Schedule.<sup>14</sup>

The only limitations to the exercise of this plenary power are contained in Paras. 4 and 5, *viz.*, that they must be (i) made on previous consultation of the Tribes Advisory Council where there is such a Council ; and (ii) submitted to and assented to by the President.

## PART C

### SCHEDULED AREAS

6. *Scheduled Areas.*—(1) In this Constitution, the expression “Scheduled Areas” means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order—

(a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area ;

(b) alter, but only by way of rectification of boundaries, any Scheduled Area ;

(12) See *Jatindra v. Province of Bihar*, (1947) F.L.J. 225 (246).

(13) *Chatturam v. Province of Bihar*, (1947) F.L.J. 92.

(14) Cf. *Chatturam v. Province of Bihar*, (1949) F.L.J. 92. *Jatindra v. Province of Bihar*, (1947) F.L.J. 225 (238).



(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area ; and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

*Para. 6, Cl. (1).*—The President has made the Scheduled Areas (Part A States) Order, 1950, declaring what areas shall be 'Scheduled Areas' [Cf. Art. 244, *ante*] within the States in Part A of the First Schedule of the Constitution :

**The Scheduled Areas (Part A States) Order, 1950.<sup>15</sup>**

"In exercise of the powers conferred by sub-paragraph (1) of paragraph 6 of the Fifth Schedule to the Constitution of India, the President is pleased to make the following Order, namely :—

1. (1) This Order may be called THE SCHEDULED AREAS (PART A STATES) ORDER, 1950.
- (2) It shall come into force at once.
2. The areas specified below are hereby declared to be the Scheduled Areas within the States specified in Part A of the First Schedule to the Constitution :—

*Bihar*

- (1) Ranchi district.
- (2) Singhbhum district, excluding Dhalbhum sub-division.
- (3) Santal Parganas district, excluding Godda and Deoghar sub-divisions.
- (4) Latehar sub-division of Palamau district.

*Bombay*

- (1) Navapur Petha, Akrani Mahal, and the villages belonging to the Parvi of Kathi, the Parvi of Nal, the Parvi of Singpur, the Walvi of Gaohali, the Wassawa of Chikhli, and the Parvi of Navalpur in West Khandesh district.
- (2) The Satpura Hills reserved forest areas in East Khandesh district.
- (3) Surgana Mahal, Kalvan Taluka and Peint Petha, in Nasik district.
- (4) Jawhar, Dahanu and Shahapur Talukas and Mokhada and Umbergaon Pethas, in Thana district.
- (5) Dangs district.
- (6) Dharampur, Vijara, Bansda and Songadh Talukas and the villages in the Venkal Tappa and Nanchal areas of the Mangrol Taluka in Surat district.
- (7) Sagbara and Valia Mahals, and Dediapada, Nandol and Jhaghadia Talukas in Broach district.
- (8) Chhota Udepur Taluka and the villages of Gad-Boriad Estate of Naswai Taluka, in Baroda district.
- (9) Limkheda, Deogadh-Naria and Sant Talukas, and the villages in the old Sanejeli State included in Jhalod Taluka, in Panch Mahals district.
- (10) Khedbrahma, Bhiloda and Meghraj Talukas, and Vijayanagar Mahal, in Sabarkantha district.

*Madhya Pradesh*

- (1) Melghat taluq of Amravati district.
- (2) Baihar tahsil of Balaghat district.
- (3) Antagarh-Narainpur and Dantewara Tahsils, and Kutru and Bhopalpatnam Zamindaris of Bastar district.
- (4) Bhainsdehi tahsil of Betul district.
- (5) Kenda, Matin, Lapha, Uprora, Chhuri and Korba Zamindaris of Bilaspur district.
- (6) Ahiri Zamindari in the Sironcha tahsil and the Dhanora, Dudmala, Gewardna, Jharapapra, Khutgaon, Kotgal, Muramgaon, Palagarh, Rangi, Sirsundi, Sonsari, Chandals, Gilgaon, Pai-Muranda and Potegaon Zamindaris in the Gadchiroli tahsil of Chanda district.
- (7) Harrai, Gorakghat, Gorpani, Batkagarh, Bardagarh, Partapgarh (Pagara), and Sonpur Jagirs, and the portion of Pachmarhi Jagir, in Chhindwara district.
- (8) Ambagarh-Chauki, Aundhi, Koracha and Panabaras Zamindaris of Durg district.
- (9) Bazag, Samnapur and Karanjia Revenue Inspectors' Circles of Mandla district.
- (10) Khudia Zamindari in Jashpur Tahsil of Raigarh district.
- (11) Balrampur Revenue Inspectors' Circle in Pal Tahsil and Samri and Changbhakar Tahsils of Surguja district.

*Madras*

- (1) Laccadive Islands (including Minicoy) and Amindivi Islands.
- (2) East Godavari, West Godavari and Visakhapatnam Agencies.

*Orissa*

(1) Koraput, Mayurbhanj and Sundargarh districts.

(2) Ganjan Agency, including Khondamals, but excluding the Chokpad Khandam and the Pandakhol Mouitha of Suruda Muliahs.

*Punjab*

Spiti and Lahaul in Kangra district.

3. Any reference in the preceding paragraph to a territorial division by whatever ~~name~~ indicated shall be construed as a reference to the territorial division of that name as existing at the commencement of this Order.

## PART D

## AMENDMENT OF THE SCHEDULE

7. *Amendment of the Schedule.*—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368.

## SIXTH SCHEDULE

[Articles 244 (2) and 275 (1).]

*Provisions as to the Administration of Tribal Areas in Assam.*

*Scope of the Sixth Schedule.*—See under the Fifth Schedule, p. 761, *ante*. The provisions of the Sixth Schedule may be briefly summarised as follows :

There are two Parts in the Table appended to this Schedule. The Areas in Part A shall be an 'autonomous district' by virtue of the Constitution,<sup>16</sup> and the provisions in Paras. 1-17 relate to the administration of these Autonomous districts. The Areas included in Part B, on the other hand, shall, in the first instance, be governed by the Governor of Assam acting in his discretion, as the agent of the President.<sup>17</sup> But by notification issued [under Cl. (1) of Para. 18] by the Governor with the previous approval of the President, the provisions of Paras. 1—17 relating to autonomous districts may be applied in whole or in part to any Area included in Part B.<sup>18</sup>

The Areas included in Part A are not outside the *executive* authority of the Government of Assam but provision is made for the creation of District Councils and Regional Council. Again, barring such functions as law-making in certain specified fields, such as management of any forest, other than a reserved forest, inheritance of property, marriage and social customs<sup>19</sup> and certain judicial functions<sup>20</sup> which are to be exercised by the District or Regional Councils, the authority of Parliament as well as that of the Assam Legislature extends over these Areas, under the general provisions of Art. 245 (1). Unless the Governor, by notification, so directs.<sup>21</sup> All such laws made by these Councils, are to have no effect, unless assented to by the Governor.<sup>22</sup> The jurisdiction of the Supreme Court and High Court over such Regional Tribunals is not barred, but the High Court's power to entertain

(16) Para. 1 (1).

(17) Para. 18 (2)-(3).

(18) Para. 18 (1).

(19) Para. 3; Para. 12 (a). As regards the matters enumerated in Para. 3, Acts of Parliament or of the Assam Legislature shall not

apply to these Areas, unless the District Council, by notification, so directs.

(20) Para. 4.

(21) Para. 12 (b).

(22) Para. (3).

suits and cases as are mentioned in paragraph 4 (2), is subjected to regulation by Order of the Governor<sup>23</sup>.

1. *Autonomous districts and autonomous regions.*—(1) Subject to the provisions of this paragraph, the tribal areas in each item of Part A of the table appended to paragraph 20 of this Schedule shall be an autonomous district.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification.—

(a) include any area in Part A of the said table,

(b) exclude any area from Part A of the said table,

(c) create a new autonomous district,

(d) increase the area of any autonomous district,

(e) diminish the area of an autonomous district,

(f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,

(g) define the boundaries of any autonomous district :

Provided that no order shall be made by the Governor under clauses (c) (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule.

2. *Constitution of District Councils and Regional Councils.*—(1) There shall be a District Council for each autonomous district consisting of not more than twenty-four members, of whom not less than three-fourths shall be elected on the basis of adult suffrage.

(2) There shall be a separate Regional Council for each area constituted an autonomous region under sub-paragraph (2) of paragraph 1 of this Schedule.

(3) Each District Council and each Regional Council shall be a body corporate by the name respectively of “ the District Council of (*name of district*) ” and “ the Regional Council of (*name of region*) ”, shall have perpetual succession and a common seal and shall by the said name sue and be sued.

(4) Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in and Regional Council within such district, be vested in the District Council for such district and the administration of ■■ autonomous region shall be vested in the Regional Council for such region.

(5) In an autonomous district with Regional Councils, the District Council shall have only such powers with respect to the areas under the authority of the Regional Council ■ may be delegated to it by the Regional Council in addition to the powers conferred on it by this Schedule with respect to such areas.



(6) The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Council or other representative tribal organisations within the autonomous districts or regions concerned, and such rules shall provide for—

(a) the composition of the District Councils and Regional Councils and the allocation of seats therein ;

(b) the delimitation of territorial constituencies for the purpose of elections to those Councils ;

(c) the qualifications for voting at such elections and the preparation of electoral rolls therefor ;

(d) the qualifications for being elected at such elections as members of such Councils ;

(e) the term of office of members of such Councils ;

(f) any other matter relating to or connected with elections or nominations to such Councils ;

(g) the procedure and the conduct of business in the District and Regional Councils ;

(h) the appointment of officers and staff of the District and Regional Councils.

(7) The District or the Regional Council may after its first constitution make rules with regard to the matters specified in sub-paragraph (6) of this paragraph and may also make rules regulating—

(a) the formation of subordinate local Councils or Boards and their procedure and the conduct of their business ; and

(b) generally all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be :

Provided that until rules are made by the District or the Regional Council under this sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council ;

Provided further that the Deputy Commissioner or the Sub-Divisional Officer, as the case may be, of the North Cachar and Mikir Hills shall be the Chairman *ex-officio* of the District Council in respect of the territories included in items 5 and 6 respectively of Part A of the table appended to paragraph 20 of this Schedule and shall have power for a period of six years after the first constitution of the District Council, subject to the control of the Governor, to annul or modify any resolution or decision of the District Council or to issue such instructions to the District Council, as he may consider appropriate, and the District Council shall comply with every such instruction issued.

3. *Powers of the District Councils and Regional Councils to make laws.*—(1) The Regional Council for an autonomous region in

respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the district except those which are under the authority of Regional Councils, if any, within the district shall have power to make laws with respect to—

(a) the allotment, occupation or use, or the setting apart, of land, other than any land which is a reserved forest, for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town :

Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes by the Government of Assam in accordance with the law for the time being in force authorising such acquisition ;

(b) the management of any forest not being a reserved forest ;

(c) the use of any canal or water-course for the purpose of agriculture ;

(d) the regulation of the practice of *jhum* or other forms of shifting cultivation ;

(e) the establishment of village or town committees or councils and their powers ;

(f) any other matter relating to village or town administration, including village or town police and public health and sanitation ;

(g) the appointment or succession of Chiefs or Headmen ;

(h) the inheritance of property ;

(i) marriage ;

(j) social customs.

(2) In this paragraph, a "reserved forest" means any area which is a reserved forest under the Assam Forest Regulation, 1891, or under any other law for the time being in force in the area in question.

(3) All laws made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

4. *Administration of justice in autonomous districts and autonomous regions.*—(1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be members of such village Councils or presiding officers of such courts, and may also appoint such officers

as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any court constituted in that behalf by the Regional Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district, or any court constituted in that behalf by the District Council, shall exercise the powers of a court of appeal in respect of all suits and cases triable by a village council or court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, and no other court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

(3) The High Court of Assam shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of this paragraph apply as the Governor may from time to time by order specify.

(4) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating—

(a) the constitution of village councils and courts and the powers to be exercised by them under this paragraph ;

(b) the procedure to be followed by village councils or courts in the trial of suits and cases under sub-paragraph (1) of this paragraph ;

(c) the procedure to be followed by the Regional or District Council or any court constituted by such Council in appeals and other proceedings under sub-paragraph (2) of this paragraph ;

(d) the enforcement of decisions and orders of such Councils and courts ;

(e) all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1) and (2) of this paragraph.

5. *Conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences.*—(1) The Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate, and thereupon the said



Council, court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

(2) The Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, court or officer under sub-paragraph (1) of this paragraph.

(3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

6. *Powers of the District Council to establish primary schools, etc.*—The District Council for an autonomous district may establish, construct, or manage primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads and water-ways in the district and, in particular, may prescribe the language and the manner in which primary education shall be imparted in the primary schools in the district.

7. *District and Regional Funds.*—(1) There shall be constituted for each autonomous district, a District Fund and for each autonomous region, a Regional Fund to which shall be credited all moneys received respectively by the District Council for that district and the Regional Council for that region in the course of the administration of such district or region, as the case may be, in accordance with the provisions of this Constitution.

(2) Subject to the approval of the Governor, rules may be made by the District Council and by the Regional Council for the management of the District Fund or, as the case may be, the Regional Fund, and the rules so made may prescribe the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.

8. *Powers to assess and collect land revenue and to impose taxes.*—(1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being followed by the Government of Assam in assessing lands for the purpose of land revenue in the State of Assam generally.

(2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any, within the district, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within such areas.

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say—

- (a) taxes on professions, trades, callings and employments ;
- (b) taxes on animals, vehicles and boats ;
- (c) taxes on the entry of goods into a market for sale therein, and tolls on passengers and goods carried in ferries ; and
- (d) taxes for the maintenance of schools, dispensaries or roads.

(4) A Regional Council or District Council, as the case may be, may make regulations to provide for the levy and collection of any of the taxes specified in sub-paragraphs (2) and (3) of this paragraph.

9. *Licences or leases for the purpose of prospecting for, or extraction of, minerals.*—(1) Such share of the royalties accruing each year from licences or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of Assam in respect of any area within an autonomous district as may be agreed upon between the Government of Assam and the District Council of such district shall be made over to that District Council.

(2) If any dispute arises as to the share of such royalties to be made over to a District Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

10. *Power of District Council to make regulations for the control of money-lending and trading by non-tribals.*—(1) The District Council of an autonomous district may make regulations for the regulation and control of money-lending or trading within the district by persons other than Scheduled Tribes resident in the district.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prescribe that no one except the holder of a licence issued in that behalf shall carry on the business of money-lending ;

(b) prescribe the maximum rate of interest which may be charged or be recovered by a money-lender ;

(c) provide for the maintenance of accounts by money-lenders and for the inspection of such accounts by officers appointed in that behalf by the District Council ;

(d) prescribe that no person who is not a member of the Scheduled Tribes resident in the district shall carry on wholesale or retail business in any commodity except under a licence issued in that behalf by the District Council :

Provided that no regulations may be made under this paragraph unless they are passed by a majority of not less than three-fourths of the total membership of the District Council :

Provided further that it shall not be competent under any such regulations to refuse the grant of a licence to a money-lender or a trader who has been carrying on business within the district since before the time of the making of such regulations.

(3) All regulations made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

11. *Publication of laws, rules and regulations made under the Schedule.*—All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.

12. *Application of Acts of Parliament and of the Legislature of the State to autonomous districts and autonomous regions.*—(1) Notwithstanding anything in this Constitution—

(a) no Act of the Legislature of the State in respect of any of the matters specified in paragraph 3 of this Schedule as matters with respect to which a District Council or a Regional Council may make laws, and no Act of the Legislature of the State prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications as it thinks fit ;

(b) the Governor may, by public notification, direct that any Act of Parliament or of the Legislature of the State to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.

(2) Any direction given under sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

13. *Estimated receipts and expenditure pertaining to autonomous districts to be shown separately in the annual financial statement.*—The estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated Fund of the State of Assam shall be first placed before the District Council for discussion and then after such discussion be shown separately in the annual financial statement of the State to be laid before the Legislature of the State under Article 202.

*Adaptation.*—For a period of two years from 26th January, 1950, para. 13 of the 6th Schedule shall be subject to the following adaptations<sup>24</sup> :—

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(24) The Constitution (Removal of Difficulties Order), 1950 (C.O. ■ of 26-1-50).



“ Paragraph 13 of the Sixth Schedule shall be renumbered as sub-paragraph (1) of that paragraph, and the following sub-paragraph shall be added thereto, namely :—

‘ (2) The provisions of sub-paragraph (1) shall not apply in relation to the annual financial statement in respect of the financial year beginning on the first day of April, 1950, to be laid before the Legislature of Assam under article 202.’ ”

14. *Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions.*—(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

(a) the provision of educational and medical facilities and communications in such districts and regions ;

(b) the need for any new or special legislation in respect of such districts and regions ; and

(c) the administration of the laws, rules and regulations made by the District and Regional Councils ;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of autonomous districts and autonomous regions in the State.

15. *Annulment or suspension of acts and resolutions of District and Regional Councils.*—(1) If at any time the Governor is satisfied that an act or resolution of a District or a Regional Council is likely to endanger the safety of India, he may annul or suspend such act or resolution and take such steps as he may consider necessary (including the suspension of the Council and the assumption to himself of all or any of the powers vested in or exercisable by the Council) to prevent the commission or continuance of such act, or the giving of effect to such resolution.

(2) Any order made by the Governor under sub-paragraph (1) of this paragraph together with the reasons therefor shall be laid before the Legislature of the State as soon as possible and the order shall, unless revoked by the Legislature of the State, continue in force for a period of twelve months from the date on which it was so made :

Provided that if and so often as a resolution approving the continuance in force of such order is passed by the Legislature of the State, the order shall unless cancelled by the Governor continue in force for a further period of twelve months from the date on which under this paragraph it would otherwise have ceased to operate.

16. *Dissolution of a District or a Regional Council.*—The Governor may on the recommendation of a Commission appointed under paragraph 14 of this Schedule by public notification order the dissolution of a District or a Regional Council and—

(a) direct that a fresh general election shall be held immediately for the reconstitution of the Council, or

(b) subject to the previous approval of the Legislature of the State assume the administration of the area under the authority of such Council himself or place the administration of such area under the Commission appointed under the said paragraph or any other body considered suitable by him for a period not exceeding twelve months :

Provided that when an order under clause (a) of this paragraph has been made, the Governor may take the action referred to in clause (b) of this paragraph with regard to the administration of the area in question pending the reconstitution of the Council on fresh general election :

Provided further that no action shall be taken under clause (b) of this paragraph without giving the District or the Regional Council, as the case may be, an opportunity of placing its views before the Legislature of the State.

17. *Exclusion of areas from autonomous districts in forming constituencies in such districts.*—For the purposes of elections to the Legislative Assembly of Assam, the Governor may by order declare that any area within an autonomous district shall not form part of any constituency to fill ■ seat or seats in the Assembly reserved for any such district but shall form part of ■ constituency to fill ■ seat or seats in the Assembly not so reserved to be specified in the order.

18. *Application of the provisions of this Schedule to areas specified in Part B of the table appended to paragraph 20.*—(1) The Governor may—

(a) subject to the previous approval of the President, by public notification, apply all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to paragraph 20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provisions, and

(b) with like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.

(2) Until ■ notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in Part B

of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent and the provisions of Part IX shall apply thereto as if such area or part thereof were a territory specified in Part D of the First Schedule.

(3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion.

19. *Transitional provisions.*—(1) As soon as possible after the commencement of this Constitution the Governor shall take steps for the constitution of a District Council for each autonomous district in the State under this Schedule and, until a District Council is so constituted for an autonomous district, the administration of such district shall be vested in the Governor and the following provisions shall apply to the administration of the areas within such district instead of the foregoing provisions of this Schedule, namely :—

(a) no Act of Parliament or of the Legislature of the State shall apply to any such area unless the Governor by public notification so directs ; and the Governor in giving such a direction with respect to any Act may direct that the Act shall, in its application to the area or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit ;

(b) the Governor may make regulations for the peace and good Government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

(2) Any direction given by the Governor under clause (a) of sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

(3) All regulations made under clause (b) of sub-paragraph (1) of this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

20. *Tribal areas.*—(1) The areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem :

Provided that for the purposes of clauses (e) and (f) of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8, and clause (d) of sub-paragraph



(2) of paragraph 10 of this Schedule no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

(3) Any reference in the table below to any district (other than the United Khasi-Jaintia Hills District) or administrative area shall be construed as a reference to that district or area at the commencement of this Constitution :

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf.

### TABLE

#### PART A

1. The United Khasi-Jaintia Hills District.
2. The Baro Hills District.
3. The Lushai Hills District.
4. The Naga Hills District.
5. The North Cachar Hills.
6. The Mikir Hills.

#### PART B

1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

2. The Naga Tribal Area.

21. *Amendment of the Schedule.*—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368.

### SEVENTH SCHEDULE.<sup>25</sup>

[Article 246.]

#### List I—Union List

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

#### OTHER CONSTITUTIONS

U.S.A.—Art. 1, Sec. 8 (1) of the Constitution empowers Congress—  
'to provide for the Common defence.'

*Australia.*—Sec. 51 (vi) gives the Commonwealth Parliament the power to legislate with respect to—

(25) The reference to the existing Laws in the Commentary under each entry is by no means exhaustive, it is only illustrative.

"The naval and military defence of the Commonwealth and of the several States,"

*Canada*.—'Defence' is a matter within the exclusive competence of the Dominion Parliament, under Sec. 91 (7),

"Militia, military and naval service, and defence".

*Burma*.—The first part of item 1 of the Union List of the Burmese Constitution is identical with the present Entry of our Constitution.

#### INDIA

'*Defence*'.—The defence power of the Union is liberally construed in all countries (*see pp. 17-18, ante*). It would not, however, empower the Union to subvert the federal nature of the Constitution or to encroach upon fundamental rights. Provisions in that respect are contained in Part XVIII, *ante*. Entries 1 to 7 may be broadly classified under the head—'defence power of the Union.'

'*Preparation for defence*'.—This expression confers wide power, but the exercise of the power should be legitimate having regard to the purpose specified. Thus, a law that called up the whole of the civil population between the ages of 16 and 60 in times of peace would be a fantastic fraud of the power, but it would be a valid exercise if such military service is called upon during years of war, or when war is impending.<sup>1</sup>

'*Such acts as may be conducive.....effective demobilisation*'.—These words remind one of the American decisions to the following effect: The War power includes the power to wage war<sup>2</sup> and

"to prosecute it by all means and in any manner in which war may be legitimately prosecuted",<sup>3</sup>

not only to bring it to a successful conclusion but also the power, after the cessation of active military operations, to take measures against its renewal and also to remedy the evils which have arisen from the war and its progress.<sup>4</sup>

So far as the municipal Courts are concerned, they cannot question the validity of an Act of Congress, legitimately necessary for the successful prosecution of war, on the ground that it is opposed to the rules of international law or usage.<sup>5</sup>

The power no doubt remains with the Courts to determine whether the acts of Congress have any possible relation to the successful operation of war or whether the constitutional limitations imposed by the Bill of Rights have been violated, but once the relation is established, the Courts resolve all doubts in favour of the War power, and so it has been said—

"The complete and undenied character of the War power of the United States is not disputable."<sup>6</sup>

2. Naval, military and air forces ; any other armed forces of the Union.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. 1, Sec. 8 (12) gives Congress the executive power—

'to raise and support armies.'

This power has been held to include the power to raise forces by conscription,<sup>7</sup> to penalise resistance to recruitment.<sup>8</sup>

(1) Cf. *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116 (161).

(2) *Home Building Association v. Blaisdell*, (1933) 290 U.S. 398.

(3) *Miller v. United States*, 11 Wall. 268.

(4) *Stewart v. Khan*, 11 Wall. 493.

(5) *Littlejohn v. United States*, 270

U.S. 215.

(6) *Pacific Ry. Co. v. N. Dakota*, 250

U.S. 135.

(7) *Selective Draft Law Cases*, (1918)

245 U.S. 366.

(8) *Schenck v. U. S.*, (1919) 249 U.S.

47.

Art. 1, Sec. 10 (3), on the other hand, imposes a corresponding prohibition upon the States:

"No State shall, without the consent of Congress . . . keep troops or ships of war in time of peace, . . . or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Though the States are thus forbidden to maintain an Army or Navy, they do maintain 'National Guard' units, for suppression of internal disturbances within the State.

The other powers of Congress relating to the matter are—

"To provide and maintain a Navy" [Art. 1, Sec. 8 (13)].

"To make rules for the government and regulation of the land and naval forces" [Art. 1, Sec. 8 (14)].

*Canada.*—See Sec. 91 (7).

*Australia.*—Sec. (vi) of the Constitution Act relates to—

" . . . Control of the Forces to execute and maintain the laws of the Commonwealth."

*Burma.*—Item 1 (1) of the Union List is—

(1) the raising, training, maintenance and control of Naval, Military and Air Forces and employment thereof for the defence of the Union and the execution of the laws of the Union and the States.

*Government of India Act, 1935.*—See Entry 1 of List I of that Act.

'Other armed forces'—refers to the Assam Rifles, and the armed police forces maintained by the Centre for certain Indian States,—Armed Central Reserve Police Force.

*Existing Laws.*—Indian Army Act (VIII of 1911)<sup>9</sup> as amended by the Army Act (XLVI of 1950); Indian Air Force Act (XIV of 1932)<sup>9</sup> as amended by the Air Force Act (XLV of 1950); Indian Navy (Discipline) Act (XXXIV of 1934); Indian Reserve Forces Act, 1888; Indian Naval Reserve Forces (Discipline) Act, 1939; Central Reserve Police Force Act (LXVI of 1949);<sup>10</sup> Assam Rifles Act (V of 1941); National Cadet Corps Act (XXXI of 1948); Territorial Act (LVI of 1948);<sup>11</sup> Armed Forces (Emergency Duties) Act (XV of 1947).

*Laws made by Parliament.*—Army Act (XLVI of 1950); Air Force Act (XLV of 1950); Army and Air Force (Disposal of Private Property) Act (XL of 1950).

3. Delimitation of cantonment areas, local self-Government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 2 of List I included—

"local self-government in cantonment areas (not being cantonment areas of Indian State troops), the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas."

(9) Almost the whole of the Acts of 1911 and 1932 has been replaced by the Acts of 1950.

(10) The Central Reserve Police Force Act, 1949, provides for the constitution and regulation of an armed Central Reserve

Police Force.

(11) The territorial army will serve as a reinforcement of the regular army and assist in internal defence in cases of national emergency.



*Burma.*—Item 1 (4) of the Union List is—

“(4) Local self-government in cantonment areas, the constitution and powers within such areas of cantonment authorities, the regulation of house accommodation in such areas and the delimitation of such areas.”

#### INDIA

‘*Cantonments*’.—The specific enumeration of subjects in the Entry shows that the Union Parliament shall have exclusive jurisdiction over cantonment areas, only in respect of the specified subjects, such as—

(i) delimitation; (ii) local self-government, (iii) constitution and powers of cantonment authorities; (iv) regulation of house accommodation, including control of rents.<sup>12</sup>

*Administration of justice*, which is a State subject under entry 3 of List II, includes administration of justice in cantonments just as in other areas of the State.<sup>12</sup>

*Existing Laws.*—Cantonments Act (II of 1924); Cantonments (House Accommodation) Act (VI of 1923).

#### 4. Naval, military and air force works.

#### OTHER CONSTITUTIONS

*U.S.A.*—Congress exercises exclusive control over—

“places, purchased . . . . for the erection of forts, magazines, arsenals, dock-yards” [Art. 1, Sec. 8 (17)].

*Burma.*—Item 1 (3) of the Union List of the Burmese Constitution is identical with the present Entry of *our* Constitution.

*Government of India Act, 1935.*—The first part of item 2 of List I of that Act was identical with the present Entry.

#### INDIA.

‘*Naval, Military and Air Force Works*’—Military works, such as forts, air-fields, arsenals, naval docks, etc., are situated in different parts of the country. The Union Parliament shall have exclusive jurisdiction over these works and shall have power to establish other works as may be required from time to time.

*Analogous Provisions.*—Such works from property of the Union, and would accordingly be exempt from taxation by the States wherein they are situated, unless otherwise provided by Parliament itself (Art. 285). The power to acquire lands to erect such works, is conferred by entry 33 of List I.

*Existing Laws.*—Indian Works of Defence Act (VII of 1903).

#### 5. Arms, firearms, ammunition and explosives.

#### OTHER CONSTITUTIONS

*Burma.*—Item 1 (5) of the Union List of the Burma Constitution is identical with the present Entry of *our* Constitution.

*Government of India Act, 1935.*—Items 29 and 30 of List I of that Act covered the present Entry.

*Existing Laws.*—Indian Arms Act (XI of 1878); Indian Rifles Act (XXIII of 1920); Indian Explosives Act (IV of 1884); Explosive Substances Act (VI of 1908).

(12) Cf. *United Provinces v. Governor-General*, A.I.R. 1939 F.C. 58 (69).

## OTHER CONSTITUTIONS

## INDIA

8. Central Bureau of Intelligence and Investigation.

## INDIA.

## OTHER CONSTITUTIONS

1997

## INDIA

*'Preventive detention.*—See pp. 126-7, *ante*.

*'Connected with defence'.*—Effective prosecution of a War in which India is engaged, maintenance of relations with foreign powers, maintenance of peaceful conditions in tribal areas, etc., come within matters connected with the defence of India.<sup>14</sup>

*'Security of India'.*—The word 'security' occurs not only in the present entry but also in Entry 3 of List III. If the security only of a particular State is concerned, the power of preventive detention would be concurrent, but if the security of India itself is at stake, the Union Parliament shall have Exclusive power to make such legislation under the present Entry.

The question is, what is meant by the word 'security' which occurs in many other clauses of this Constitution, *e.g.*, Art. 19 (2) [see pp. 77-80, *ante*].

Art. 352 (1) says that the security of India or any part thereof may be threatened by "war or external aggression or internal disturbance." The question arises, however, what degree of internal disturbance would threaten the 'security' of India or any part thereof. The Supreme Court has just pronounced<sup>15</sup> that this expression must be distinguished from the analogous expressions 'public order', 'public safety' and the like. According to their Lordships—

"Public order is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of internal regulations enforced by the Government which they have instituted."

"Public Safety ordinarily means security of the public or their freedom from danger. In that sense anything which tends to prevent dangers to public health may also be regarded as securing public safety. The meaning of the expression, must, however, vary according to the context. Thus, rash driving or riding on a public way, rash navigation of a vessel, are, among others, offences against public safety."

In the opinion of their Lordships, a disturbance of public peace or tranquillity may threaten the security of the State, only when it assumes *grave proportions*, as waging war against the State or otherwise endangering the foundations of the State (apart from minor disturbances, such as unlawful assembly, affray, rioting and the like). Thus, mere exciting disaffection or bad feelings against the State would not *necessarily* threaten the security of the State.<sup>16</sup>

"The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, more or less roughly, the boundary between those *serious and aggravated* forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, *treating for this purpose differences in degree as if they were differences in kind.*"<sup>16</sup>

*Analogous Provision.*—Preventive detention for reasons other than those mentioned in the present Entry 3 of List III. [See p. 127, *ante*.] As to provision, see Art. 22 (3)-(7), pp. 126, *et seq.*

10. Foreign Affairs ; all matters which bring the Union into relation with any foreign country.

## OTHER CONSTITUTIONS

*Australia.*—Sec. 51 (xxix) of the Constitution Act deals with—

"External affairs."

(14) Cf. *Shibnath v. Porter*, A.I.R. 1943 Cal. 377 (383) S.B.

(15) *Romesh v. State of Madras*, (1950) D.L.R. (S.C.) 42 (46). (The comments made at pp. 79-80 must be read in the light of this decision).

(16) The observations made in this Commentary in para. 4 at p. 82, *ante*, are thus confirmed, by the above observations of the Supreme Court *Romesh v. State of Madras*, (1950) D.L.R. S.C. 42 (47).



This expression has been generically interpreted to include—(a) the external representation of the Commonwealth by accredited agents; (b) the conduct of the business and promotion of the interests of the Commonwealth in outside countries; (c) Extradition<sup>17</sup>; (d) and, generally, any matter affecting the Commonwealth ■ ■ whole in its relations with other countries<sup>18</sup>; e.g., rendition of fugitive offenders<sup>19</sup> legislation as to the overvance of treaties<sup>18</sup>; legislation for the Mandated Territories<sup>20</sup>; giving effect to the convention for the regulation of aerial navigation.<sup>21</sup>

*Burma.*—Item 2 of the Union List is the same as above.

*Government of India Act, 1935.*—Item 3 of List I included—

“External affairs. . . .”

## INDIA

*‘Foreign Affairs’.*—What are Foreign Affairs are practically enumerated in entries 11 to 21, just follows.<sup>22</sup> Anything that does not come within entries 1--21, but yet relates to the relation between the Union and any foreign country, will come under entry 10.

The present entry is the residuary entry as to Foreign Affairs.<sup>23</sup> This entry is not so much the grant of a specific power, but confers complete and exclusive authority upon the Union Parliament to deal with “all matters which bring the Union into relation with any foreign country.”<sup>24</sup> If a matter properly comes within this entry in ‘pith and substance’, the Union power would not be subject to any limitation by reason of any corresponding State power.

*Existing Law.*—Foreign Relations Act (XII of 1932); Reciprocity Act (IX) of 1943.<sup>25</sup>

## 11. Diplomatic, consular and trade representation.

### OTHER CONSTITUTIONS

*Burma.*—Item 2 (1) of the Burmese Constitution is identical with the present Entry of our Constitution.

## INDIA

*Diplomatic representation’.*—Diplomatic agents represent a State for conducting intercourse with foreign States. They are duly accredited by a ‘letter of credence’ issued by the State which they represent, the duties of diplomatic agents or Public Ministers, as they are also called, are as follows:

(17) Quick & Garran, Annotated Constitution, p. 632.

(18) Wynes, Legislative & Executive Powers, p. 206.

(19) *McKelvey v. Meagher*, (1906) 4 C.L.R. 265.

(20) *Jolly v. Mainka*, (1933) 49 C.L.R. 242.

(21) *R. v. Burgess*, (1936) 55 C.L.R. 608.

(22) *Vide* Rep. of Union Powers Com. Const. Assembly Debates, Vol. III, No. 1, p. 375.

(23) It is even wider and more explicit than the Australian Entry [S. 51 (xxix) of the Australian Constitution].

(24) These words are adopted from the

observations in the Australian case *I. R. v. Gurgess*, (1936) 55 C.L.R. 608 (684)] —“the expression ‘external affairs . . . is frequently used to denote the whole series of relationship which may exist between States in time of peace or war.”

(25) This Act, as amended by Act XXII of 1943, lays down that persons domiciled in ‘British Possessions’, including Dominions other than India, Protectorates, etc., shall be entitled only to such rights and privileges as regards entry, travel, residence, acquisition, holding and disposal of property and the like as are accorded by the law or ~~administration~~ of such Possession ■ persons of Indian origin.

(a) *Ceremonial*.—This included the presentation of the letter of credence, making calls, attending State marriages, funerals and other ceremonials of the State to which they are accredited. (b) *Negotiations*.—Informal understandings and agreements are negotiated by the diplomats to be followed by treaties, etc., if they mature. (c) *Observation*.—A diplomatic mission, with the help of its assistants and attaches, observes the foreign policy and conduct of the country to which they are accredited and supplies the home Government with reliable information. (d) *Guardianship of countrymen*.—The diplomatic agency looks after its countrymen while in the foreign State concerned, and makes proper representations to the foreign office of that State where necessary. (e) *Pleading the country's cause*.—Above all, it is the business of the diplomat to represent the policies and actions of his country in the most favourable light.

Diplomatic agents are classified as follows:

1. *Ambassadors, legates and nuncios*.—These form the highest rank. They alone have the representative character.

2. *Envoys, Ministers or other persons accredited to Sovereigns*.—While ambassadors have access to the foreign Sovereign, Ministers have access to the Secretary for Foreign Affairs of the country to which they are accredited. Special envoys are employed to conduct negotiations on specific matters.

3. *Ministers Resident, accredited to the various Courts*.—These are generally sent to the minor States.

4. *Charge d'Affaires, accredited to Ministers for foreign affairs*.—A charge d'affaires takes control of the mission during the temporary absence of the head of the mission. A charge d'affaires is entitled to have the audience of the Foreign Minister only.

5. *Attaches*.—Attaches do *not* hold diplomatic rank but their names are included in the diplomatic lists as members of the staff of a diplomatic mission. These officers are attached to a diplomatic mission for the purpose of supplementing the political and consular work, by specialised study and observation and to help the home Government with reports on matters of defence (military and naval attaches), economics and commerce (commercial attaches, trade commissioners, press attaches, information officers).

*Privileges and Immunities of diplomatic agents*.—As the representative of a sovereign State, and in order that he may exercise his functions in a foreign State, certain privileges are given by International Law to a diplomatic agent in the State to which he is accredited—

(i) *Immunity from criminal action*.—The diplomat, his family and suite are immune from criminal action and arrest in the accredited State. The only remedy for crimes committed by them is to apply to the State which they represent, for the recall of the diplomat. But if they conspire against the foreign State, they may be expelled.

(ii) *Exemption from civil jurisdiction*.—The Minister, his family and suite are also exempted from the civil jurisdiction of the State to which they are accredited, subject, of course, to any agreement between the two States concerned. Members of suite includes 'all persons associated in the performance of the duties of an embassy or legation', e.g., a charge D'affaires, a Secretary, an assistant military attache, and any person on the list of staff which is recognised by the State to which the embassy is accredited.<sup>25</sup>

Generally speaking, they cannot be sued for torts, breach of contract, or for recovery of debts; they cannot also be summoned to depose in Courts of the accredited State. But action lies against a person belonging to the suite of a diplomatic agent, if such person engages in *trade*.<sup>1</sup>

(iii) *Extra-territorial position*.—The diplomat is regarded as an extra-territorial person and so his official residence is immune from search or visit of the police, except when the privilege is abused, *e.g.*, when a foreign subject is illegally detained in the embassy.<sup>2</sup>

(iv) *Exemption from taxation*.—Diplomatic agents and their property are exempt from taxation and customs duty in the State to which they are accredited.

*Consular representation*.—While diplomatic agents are appointed to act as the medium of intercourse between the Government of one State with that of another, consuls are appointed to reside in foreign countries for the purpose of looking after the interests of the subjects of the State which they represent, as may reside in that foreign territory.<sup>3</sup> A consul, in short, is a guardian and friend of fellow subjects residing in the foreign country. When a commission appointing a consul to a foreign country is communicated to the Government of that country, the foreign office of that Government acknowledges the status and powers of the consul by means of a document called *exequatur*, and this document may be revoked by the foreign Government at any time.

The *duties* of consuls, generally, may be summarised as follows:<sup>3</sup>

"(a) Administration of the estates of subjects their own country when dying in the foreign country; (b) arbitration on matters brought before them by fellow-subjects; (c) care of fellow-subjects in distressed conditions; (d) celebration of foreign marriages; (e) grant of visa to passports to the home country; (f) collection of statistics and aid to collection of income-taxes from fellow subjects residing in the foreign country; (g) communication and report to own Government cases of injustice to fellow-subjects, condition of markets in the foreign country, and on many other matters."

Consuls are not entitled to all the *immunities* and *privileges* of diplomats. The consulate and its records are immune from invasion by the authorities of the State to which the consul is accredited. The consul himself is, however, subject to the jurisdiction of the civil and criminal Courts of the country in which he resides and is liable to arrest for serious crimes. He may be summoned as a witness but may not be compelled to bring official documents with him.

## 12. United Nations Organisation.

### OTHER CONSTITUTIONS

*Burma*.—Item 2 (2) of the Union List is identical with the present Entry of our Constitution.

### INDIA

'*United Nations*'.—The United Nations is an international organisation formed with the object of securing international peace and security, and development of friendly relation and co-operation between the nations. It came into being in 1945 under the Charter<sup>4</sup> of the United Nations, signed at San Francisco on 26th June, 1945, by the representatives of 50 States, in pursuance of the proposals made at Dumbarton Oaks in the autumn of 1944. In April, 1946, the United Nations has officially replaced

(1) Dicey, Conflict of Laws, 1949, p. 141. 339.

(2) Wheaton, i, 456.

(3) Keith, Constitutional Law, 1939, p. Review, Vol. I.

(4) See App. B to (1947) Indian Law



the League of Nations as an international organisation. India is a member of the United Nations, and a 'non-permanent' member of its Security Council.

*Obligations of members and the settlement of disputes.*—The obligations of the Members of the U.N. are as follows:—

(a) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

(b) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

(c) All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action. [Art. 2.]

(d) Whenever any dispute arises between States, the continuance of which is likely to endanger the maintenance of international peace and security, they are, in the first place, to seek a solution by any form of peaceful means according to their own choice, such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and the like (Art. 33). But Members are under no obligation to submit matters which are essentially within the *domestic* jurisdiction of any State, to peaceful settlement, nor shall the United Nations have jurisdiction to intervene in such matters [Art. 2 (7)].

(e) Any Member of the United Nations may draw the attention of the Security Council or the General Assembly to the existence of any dispute that may endanger international peace and security and the Security Council itself may investigate whether any such dispute or situation exists [Arts. 34-35].

(f) The Security Council, when it deems necessary, may call upon the parties to any dispute to settle it by peaceful means and the Council may recommend appropriate procedures or methods of adjustment (Arts. 33, 36). Parties themselves, may also request the Council to make such recommendations (Art. 38). If the parties fail to settle a dispute by peaceful means, they shall refer it to the Security Council, and then the Security Council may either recommend terms of settlement itself or suggest some new means of settlement (Art. 37). As a general rule, the Security Council shall refer all *legal* disputes to the International Court of Justice.<sup>5</sup>

*Existing Law.*—United Nations (Security Council) Act (XLIII) of 1947;<sup>6</sup>

United Nations (Privileges and Immunities) Act<sup>7</sup> (XLVI of 1947).

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

#### OTHER CONSTITUTIONS

*Burma.*—Item 2 (3) of the Union List is identical with present Entry of our Constitution.

(5) See (1947) Indian Law Review, Vol. IV, App. A.

(6) By this Act it has been provided that if, under Art. 41 of the Charter of the United Nations, the Security Council of the United Nations calls upon the Government of India to apply any measures, not

involving the use of armed forces, the Government of India may make such provisions as may be necessary for that purpose.

(7) This Act gives effect to the convention on the Privileges and Immunities of the United Nations.

## INDIA

*Existing Laws.*—The Carriage by Air Act (XX of 1934) was passed to implement the rules framed by the Warsaw Convention, 1929, relating to international carriage by air. The Carriage of Goods by Sea Act (XXVI of 1925) was passed to implement the decisions of the Brussels Conference, 1922, on Maritime Law. The Indian Dock Labourers Act (XIX of 1934) was passed to give effect to the Geneva Convention of 1932.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

## OTHER CONSTITUTIONS

*England.*—Treaty-making is the Prerogative of the English Crown and treaties are negotiated and concluded by the Executive without reference to the Legislature and for their international validity, no ratification by Parliament is necessary. But consent of Parliament has been necessary owing to the rule of common law that the private rights of a subject are not affected by a treaty unless its terms are embodied in an Act of Parliament.<sup>8</sup> The cases in which ratification by Parliament are necessary may be summarised as follows:

“(a) Treaties which alter or add to the existing law of Great Britain and require to be enforced by British Courts.<sup>9</sup> (b) Treaties imposing monetary liability on Great Britain, since under the English Constitution, no money may be raised or expended without legislation. (c) Treaties which attempt to increase the power of the Crown.<sup>10</sup> (d) Treaties involving the cession of British territory.<sup>11</sup> (e) Treaties made expressly subject to the approval of Parliament. Many modern treaties are now made in this form.”

The law of England as regards treaties was explained by the Judicial Committee thus:<sup>12</sup>

“Within the British Empire there is a well-established rule that the *making* of a treaty is an executive act, while the performance of its *obligations*, if they entail an alteration of the existing law, requires legislative action. Unlike some other countries (*e.g.* U.S.A.), the stipulations of a treaty duly ratified, do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of the law, they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification, seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it.”<sup>12</sup>

*U.S.A.*—Art. II. Sec. 2 (2) of the Constitution of the United States says—

“He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.”

In practice, it is the President who negotiates treaties and later obtains the ratification of the Senate. The Senate thus acts as a restraining body and has refused its assent to no less than over 60 treaties proposed by the President. It has been observed that this plan of giving the effective power of treaty-making to one of the branches of the Legislature and the ultimate power of control to its minority (since a 2/3 majority is required for assent), is *unique* in the world.<sup>13</sup> The object of excluding the House of Representatives from the plan was to secure secrecy and despatch and an extraordinary majority of the Senate was required for assent in order to prevent treaties from being made lightly. Minor agreements which are not termed treaties and are called “executive agreements” are

(8) *Walker v. Baird*, (1892) A.C. 491 (497).

(9) *The Parliament Belge*, (1879) 4 P.D. 129.

(10) *The Zamora*, (1916) A.C. 77.

(11) Keith, Constitutional Law, 1939, p.

343; Wade & Phillips, Constitutional Law (1946), p. 184.

(12) *A.-G. of Canada v. A.-G. of Ontario*, A.I.R. 1937 P.C. 82 (86).

(13) Ogg & Ray, Introduction to American Government, p. 646.

entered into by the President without the consent of the Senate, and the Courts uphold them as good.<sup>14</sup>

In the United States, the Constitution itself declares a treaty to be the 'supreme law of the land'. [Art. VI, Sec. 2]. It is consequently to be regarded in Courts of Justice as equivalent to an act of the Legislature and it operates without the aid of any legislative provision. A treaty will therefore be enforced by the Courts even though it overrides previously existing statute law, provided, of course, the treaty is not contrary to the Constitution of the United States.<sup>15-16</sup>

In no other State can it be said that a treaty is part of the law of the land.

While the power to make treaties is given to the Federal Executive with the consent of the Senate [Art. II, Sec. 2 (2)], the States are, on the other hand,—

"(a) absolutely forbidden—to enter into any Treaty, Alliance, or Confederation' [Art. I, Sec. 10 (1)]; and also (b) forbidden, 'without the consent of Congress'—

'to enter into any agreement or compact with another State or with a foreign power' [Art. I, Sec. 10 (3)].

This means that while a State is prohibited from entering into any international alliance or agreement of a political nature, it may be permitted by Congress to enter into agreements of a *non-political* nature.<sup>17</sup>

*Canada.*—Sec. 132 of the Br. North America Act confers upon the Dominion Parliament and Government, the powers for performing all obligations of

"Canada or any Province thereof as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."

A distinction has, however, been made between treaties between the British Empire and foreign countries which Canada has undertaken to implement as a part of the British Empire,<sup>18</sup> and conventions which Canada has agreed to implement *as an independent unit*. As regards the latter, it has been held that Sec. 132 is inapplicable and such legislation may be undertaken by the Dominion Legislature only with the consent of the Provinces concerned, if the subject-matter of the treaty is one assigned exclusively to the Provincial Legislature.<sup>19</sup> The Privy Council has observed:<sup>20</sup>

"In a Federal State where legislative authority is limited by a constitutional document or is divided up between different legislatures in accordance with the classes of subject-matter submitted for legislation . . . the obligation imposed by treaty may have to be performed, if at all, by several legislatures; and the executive have the task of obtaining the legislative assent not of the Parliament to whom they may be responsible but possibly of several Parliaments to whom they stand in no direct relation. The question is not how the obligation is formed, that is the function of the executive; but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures."<sup>20</sup>

Lord Atkin<sup>20</sup> put it nicely—

"While the ship of State sails on large ventures and into foreign waters she retains the water-tight compartments which are an essential part of the original structure."

Thus, it was held that the Dominion Parliament had no power to enact the Weekly Rest in Industrial Undertakings Act and the Minimum Wages Act, etc., in performance of the international convention agreed to by Canada as an independent member of the League of Nations, because the Acts relate to exclusively Provincial subjects,—“property and civil rights in the Province”, under Sec. 92 (13) of the Br. N. America Act.<sup>20</sup>

(14) *United States v. Belmont*, (1937) 301 U.S. 324.

(15) Pitt Cobbett, Vol. I, 6th Ed., p. 21.

(16) *Foster v. Nelson*, 2 Pet. 253.

(17) *Virginia v. Tennessee*, (1893) 148 U. S. 503.

(18) *Aeronautics Case*, (1932) A.C. 54.

(19) *A.-G. for Canada v. A.-G. for Ontario*, (1937) A.C. 326.

(20) *A.-G. for Canada v. A.-G. for Ontario*, A.I.R. 1937 P.C. 82 (86).



Outside the scope of Sec. 132, thus, legislation to perform a Canadian treaty is not an exclusively Dominion legislative power.

"For the purposes of Secs. 91 and 92, the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained."<sup>21</sup>

*Burma.*—Item 2 (5) of the Union List is similar to the present Entry of our Constitution.

*Government of India Act, 1935.*—See item 3 of List I.

#### INDIA

*'Treaties'.*—Broadly speaking, treaties are contracts between Sovereign States. But all international engagements are not treaties in the strict sense of the term which comprises only solemn agreements such as treaties of *peace, alliance, neutrality and arbitration*.

*'Agreements'.*—While treaties proper are formally concluded in the names of the heads of States, other agreements are less formally concluded by duly authorised agents of the Government and may be subject to ratification or confirmation by the head of the State. Examples of agreements are those between different parts of the British Empire, *e.g.*, the Ottawa Agreement of 1932. A most loose form of agreement was the Munich Agreement of 1938 between Hitler, Mussolini, Chamberlain and Daladier, which was in substance nothing more than the expression of opinion by these statesmen that their peoples desired a peaceful settlement.

*Conventions.*—Conventions are multi-lateral agreements or law-making treaties, such as the Slavery Convention (1926); Convention on international Exhibitions (1928).

*Declarations.*—Agreements declaratory of International Law are called declarations, *e.g.*, Declaration of London, 1909.

*Protocols.*—Protocols are supplementary treaties, either amending or supplementing other treaties.

*Pacts.*—The term Pact has been familiar since the Locarno (1925) and Kellogg (1928) Pacts. A most recent instance is the Nehru—Liakat Pact (1950) as to the treatment of minorities in India and Pakistan.

*Exchanges of notes.*—These are used for clearing moot points.

*Analogous Provision.*—The present power enables Parliament to invade the State List (*see pp. 556, 560, ante*).

*Existing Laws.*—Abducted Person (Recovery and Restoration) Act (LXV of 1949)<sup>22</sup>; Exchange of Prisoners Act (LVIII of 1948).<sup>23</sup> [*See also* under Entry 13]; Arbitration (Protocol and Convention) Act (VI of 1937).

### 15. War and peace.

#### OTHER CONSTITUTIONS

*U.S.A.*—The power "to declare War" is vested in the Federal Congress. [Art. I, Sec. ■ (11)]. No other authority can involve the United States in a

(21) *A.-G. of Canada v. A.-G. of Ontario*, A.I.R. 1937 P.C. 82.

(22) The Abducted Person (Recovery and Restoration) Act, 1950, provides for the recovery and restoration of abducted persons,

in pursuance of an agreement with Pakistan.

(23) To provide for the exchange of certain prisoners between India and Pakistan, in pursuance of an agreement.

war.<sup>24</sup> Usually the declaration is made by a joint resolution of the two Houses signed by the President.

*Burma.*—Item 2 (4) of the Union List is—

“The declaration of war and the conclusion of peace.”

## 16. Foreign jurisdiction.

### OTHER CONSTITUTIONS

*Burma.*—Item 2 (11) of the Union List is identical with the present Entry.

### INDIA

‘*Foreign Jurisdiction.*’—‘Foreign jurisdiction’ is founded on the doctrine of ‘Extra-territoriality’, recognised by International Law. Extra-territoriality is an exception to the territorial Sovereignty of a State over persons, things and places within its territorial limits. By the fiction of extra-territoriality, certain persons and things, etc., are deemed, for the purposes of jurisdiction and control, to be outside the territory of the State within which they are for the time being and are treated as within the jurisdiction of some Foreign State, the jurisdiction of which is to that extent enlarged.<sup>25-25-a</sup> In short, ‘foreign jurisdiction’ may be said to be the jurisdiction exercised by one State within the territory of another State, by virtue of the rules of International law, and sometimes by treaty or agreement as well.

Exemption from local jurisdiction may also be accorded to persons who have no such privilege under the rules of International law, by legislation, such as the Diplomatic Privileges (Extension) Acts of 1941, 1944, 1946, in England, under which, for example, members of international organisations and their staff have such privilege.

The present entry empowers the Indian Parliament to enact similar laws.

The principal cases of foreign or extra-territorial jurisdiction, recognised by International law, are—

“(i) Sovereigns, whilst travelling or residing in foreign countries. (ii) Ambassadors and other diplomatic agents, having a representative character, and their residences. (iii) Public vessels, whilst in foreign ports or territorial waters. (iv) The armed forces of a State when passing through foreign territory.”

I. *Sovereigns.*—The Head of a Foreign State, visiting another State, is immune from taxation and his person and residence are inviolable. He cannot be subjected to the jurisdiction of the local Criminal Courts nor is he subject to the jurisdiction or process of the local Civil Courts, unless he voluntarily submits to such jurisdiction.<sup>1</sup> The immunity from local jurisdiction extends to his family and suite when accompanying him and to property which belongs to him or is in his possession or under his control.<sup>2</sup>

But if a Sovereign of one State acquires property within the territory of another State, so far as that property is concerned, he is deemed to waive the privilege of immunity, and actions connected with that property are subject to jurisdiction of the local Courts.<sup>3</sup>

II. *Diplomatic Agents.*—See under Entry 11.

(24) Of course, the President as Commander-in-Chief, may act in such way that war becomes inevitable [Munro—Government of the United States, 454].

(25) Brierly, *Law of Nations* (1928), p. 110.

(25-a) For a fuller discussion, read Pitt

Cobbett's *Cases on International Law*, 6th Ed., 1947, Vol. I, p. 276ff.

(1) *Mighell v. Sultan of Johore*, (1894) 1 Q.B. 149.

(2) *The Parlemente Belge*, (1880) 5 P.D. (C.A.) 197.

(3) *The Charkieh*, (1873) 4 A. & E. 59.

It is to be noted that this immunity from local jurisdiction is confined to diplomatic agents who are duly accredited by a foreign State, and not to diplomatic agents of foreign countries who merely happen to be in another State as an ordinary foreigner<sup>4</sup>, unless diplomatic privileges are extended to them by local legislation.

III. *Public Vessels*.—Public property of one State, when within the territorial limits of another State, is exempt from the local jurisdiction.<sup>5</sup>

A special application of this rule is to be found in respect of 'Public Vessels'.

"A public vessel is one owned and commissioned by the Government of a . . . State . . . so long as it is recognised externally as a separate international person. In the category of public vessels are included not only ships of war, but also unarmed Government vessels, store ships, and transports."<sup>5</sup>

The public character of a vessel is primarily evidenced by her flag and pendant but the ultimate proof is to be found in the commission issued by the Government of the State to which she belongs or the declaration of that Government. The immunity has been extended even to vessels chartered or requisitioned by a foreign State, while in its control and possession.<sup>6</sup>

A public vessel, while merely passing through the territorial waters of a foreign State, in time of peace, is altogether exempt from territorial jurisdiction of that State. When she is at a foreign port or is stationery in foreign waters, she is entitled to a number of privileges, such as exemption from jurisdiction of local Courts, local dues and the exemption from local jurisdiction extends to her officers and crews. But the privilege may be waived, *e.g.*, when the chief officer of the ship takes the aid of the local police and takes part in the trial.<sup>7</sup> Again, if the crews offend on the shore, they may be arrested and punished and if they escape to the ship after offending on the shore, the territorial power may ask for their surrender.

IV. *Armed forces*.—The military forces of a friendly State, in time of peace or war, are entitled to privileges similar to those of public vessels, while in the territory of another State. The jurisdiction over the troops while in the foreign State, is retained by the State to which the forces belong, in the absence of agreement to the contrary. But where the forces of a belligerent State come upon a neutral territory, in time of War, it is the duty of the neutral State to intern and disarm them and until the conclusion of peace, the neutral State has jurisdiction over such belligerent forces.<sup>8</sup>

*Existing Law*.—The offences on Ships and Aircraft Act (IV of 1940) extends the operation of the criminal law of India to offences committed on ships and aircraft registered in India, wherever they may be.

## 17. Citizenship, naturalisation and aliens.

### OTHER CONSTITUTIONS

*U.S.A.*—Citizenship, in the U.S.A., is a dual concept (*see p. 30, ante*). Under the 14th Amendment, citizenship of the United States is acquired by birth within the territories of the United States, or by naturalisation. United States citizens automatically acquire citizenship of a State by residing within it. It is possible for a person to be a citizen of the United States without being a citizen

(4) Dicey, Conflict of Laws, 1949, p. 134.

(5) Pitt Cobbett, Cases on International Law, 6th Ed., Vol. I, p. 289.

(6) *Republic of Spain v. Arantzazu*,

(1939) A.C. 256.

(7) *Chung Chi Cheung v. The King*, (1939) A.C. 160.

(8) Hague Convention V, 1907, Art. 11.



of any State, *e.g.*, while a United States citizen is abroad. Federal and State citizenships have distinct rights and obligations.<sup>9</sup>

Sec. 1 of the 14th Amendment says—

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

Thus, citizenship of the United States may be *acquired* in one of two ways—(a) birth in the United States; (b) naturalisation therein.

(a) *Birth in the United States*.—(i) Any person, of whatever race or colour, born within the United States acquires citizenship of the United States, excepting (a) children of foreign sovereigns or their ministers; (b), children of enemies within and during a hostile occupation of part of the United States territory.<sup>10</sup> (ii) Birth within the United States includes the birth abroad of children of American citizens *temporarily* residing or travelling in other countries,<sup>11</sup> but not on foreign ships.<sup>12</sup> (iii) The condition of birth in the United States also includes full and complete allegiance to the Government of the United States and subjection to its jurisdiction.<sup>13</sup>

(b) *Naturalisation*.—There are three modes of naturalisation in the United States—(i) by judicial process; (ii) by treaty; (iii) by congressional statute.

(i) Naturalisation by judicial process means the granting of a petition for naturalisation by a Court, upon the merits of that application. The applicant first makes a declaration of his intention; and after residence for a specified number of years, he makes a petition for citizenship accompanied by affidavits from two citizens of the United States. The Bureau of Immigration and Naturalisation then investigates into the record and character of the applicant. The Court then makes a hearing and, if satisfied, grants the petition. The matter is left entirely to the discretion of the Judge. (ii) Naturalisation by treaty takes place when it is provided by a treaty made at the time of acquiring a territory. (iii) Naturalisation is also granted to groups of persons by statutes of Congress in cases of acquisition of territory.

American citizenship cannot be *lost* except under authority of law.<sup>14</sup> By statute, the following conditions have been laid down under which an American citizen may expatriate himself or herself:<sup>14</sup>

(a) *Desertion* from the military or naval service, or going abroad to avoid being lawfully drafted into such service, shall be deemed to be ■ voluntary relinquishment and forfeiture of the rights of American citizenship. (b) Any American citizen may expatriate himself, except when the United States is at war, by *naturalizing* himself in any foreign State or by taking an *oath of allegiance* to any foreign State. (c) A woman citizen of the United States shall not lose her citizenship by reason of her marriage, unless she makes a formal renunciation of her citizenship before a Court having jurisdiction over naturalization. (d) But any American woman citizen who marries an alien *ineligible* to American citizenship shall cease to be ■ citizen of the United States. (e) If *naturalized* citizens move permanently to a foreign country within 5 years after they have been naturalized, the Bureau of Immigration and Naturalization may ask the Courts to declare that the original grant is invalid. Fraud in obtaining naturalization is also a ground for judicial de-naturalization.

(9) *Butchers' Association v. Crescent Livestock Co.*, (1872) 16 Wallace 36.

(10) *United States v. Wong Kim*, 169 U.S. 649 (693).

(11) Cooley, Constitutional Law, p. 316.

(12) *United States v. Wong Kim*, 169 U. S. 649 (693).

(13) *Murray v. Schooner*, 2 Cranch 64.

(14) Cooley, Constitutional Law, p. 318.

A citizen of the United States has certain *special rights and privileges*,<sup>15</sup> e.g., to participate in the Government; to participate in foreign and inter-State commerce; to demand care and protection of the United States when abroad, and so on.

Under the 'equal protection clause', an alien is safeguarded in all criminal prosecutions against self-incrimination, double jeopardy and the like.<sup>16</sup> A right to trial by jury is conceded to an alien similarly as in the case of citizens, for any crime committed within the United States, or for punishment for illegal entry into the United States.<sup>17</sup> But for mere deportation, a hearing before an executive officer is sufficient.<sup>18</sup> As a sovereign State, the United States has an unlimited right to expel or deport unnaturalized and undesirable aliens.<sup>19</sup> They are also entitled to 'due process'.<sup>20</sup>

But an alien cannot be chosen or elected as the President, Vice-President, ■ member of the Senate or House of Representatives, or have a right to vote for the above elections.

*England.*—All persons in England, are either British subjects or aliens. A person may become ■ British subject—(a) by birth;<sup>21</sup> (b) by naturalisation or denization; (c) by British conquest or cession of territory to Great Britain; (d) by marriage; a woman marrying a British subject herself becomes a British subject, subject to certain statutory conditions. At Common Law, an alien was a subject of a foreign State who was not born within the allegiance of the Crown. But now an alien may become a British subject by naturalisation, and a British subject may become an alien by alienage or expatriation; so that "the expression 'alien' means a person who is not a British subject".

Aliens are either 'friendly aliens' or 'enemy aliens'.

An *alien enemy* is a person who voluntarily resides or carries on business in enemy territory.<sup>22</sup> The term includes not only subjects of a State at war with England but also British subjects voluntarily residing in or trading with an enemy country.<sup>23</sup> An alien enemy may be sued in England and if sued, has a right of appeal, but cannot sue unless he be within the realm under licence from the Crown.<sup>24</sup> Contracts made with an alien enemy are void,<sup>25</sup> while executory contracts made in times of peace with ■ person who afterwards becomes an alien enemy, are suspended during hostilities.<sup>26</sup> After the restoration of peace, however, action lies by an alien who was an enemy during war, in respect of a contract made before the commencement of the war.<sup>1</sup>

The Crown may claim any property of an enemy, found in England, under the prerogative; and any property captured at sea or abroad as prize of booty.<sup>2</sup>

An alien enemy has no right to *habeas corpus*, and he can be arrested and imprisoned under the Royal prerogative.<sup>3-6</sup>

(B) Aliens, other than 'alien enemies' are *alien friends*. By statute law, alien friends in England have been conferred full *civil* rights as opposed to

(15) Cooley, Constitutional Law, p. 322; *Crandall v. Nevada*, 6 Wall. 36.

(16) *Zian Sung v. United State*, 266 U. S. 1.

(17) *Davidson v. Orleans*, 96 U.S. 97.

(18) *United States v. Ju Toy*, (1905) 198 U.S. 253.

(19) *U. S. v. Williams*, 194 U.S. 279.

(20) See the British Nationality and Status of Aliens Act, 1914-48.

(21) *Soufracht v. Van Udens*, (1943) A.C. (H.L.) 203.

(22) *Vandyke v. Adams*, (1942) Ch. 155.

(23) *Porter v. Freudenberg*, (1915) 1 K. B. 857.

(24) *Bousmaker, Ex parte*, (1806) 13 Ves. 71.

(25) *Ertel Co. v. Rio Tinto*, (1918) A. C. 260.

(1) *Janson v. Driefontein Consolidated Mines, Ltd.*, (1902) A.C. 484.

(2) Stephen's Commentaries, 20th Ed., Vol. I, p. 538.

(3-6) *R. v. Schiever*, (1759) 2 Burr. 765; *R. v. Knockaloe Camp Commandant*, (1917) 87 L.J. (K.B.) 43.

*civic* or *political* rights. Thus, an alien friend can—(i) bring and defend actions and prosecutions like British subjects, including actions against the Crown and its officers<sup>7</sup>; (b) acquire property; (c) enjoy full personal liberty; (d) enter into contracts, trade or commerce.

But an alien cannot—(i) exercise parliamentary, municipal or other franchise; (ii) hold any office or place of trust, civil or military; (iii) sit as juror, if challenged; (iv) own a British ship or, with certain exceptions, act as the chief officer of a British ship.

As they owe local allegiance, they are entitled to the protection of the State where they reside, but they cannot complain if they suffer in common with the subjects of that State, *e.g.*, owing to Civil War or invasion.<sup>8</sup>

An alien, whether domiciled or not, owes ■ temporary *local* allegiance to the State where he is actually resident for the time being and so long as such residence continues.<sup>9</sup> Such allegiance is due from all aliens present (otherwise than as invading enemies) on British territory, and thus an alien whose country is at war with the Crown, but who is not a part of the enemy forces of invasion, is guilty of treason if he aids the enemy, as much as he is a subject. It is no defence that the British Crown had temporarily withdrawn its protection *de facto* owing to enemy occupation of the territory.<sup>10</sup> On the other hand, even if the alien is absent from England *for a time*, leaving his family and effects under the protection of the Crown, he may be charged with treason if he joins the enemies during such absence.<sup>11</sup> Again, though local allegiance is primarily dependent on residence within the territory to which such allegiance is due,—an alien who goes abroad with a British *passport*, he continues to have the protection of the Crown and the privileges of a British subject, by virtue of the passport, and is accordingly, liable in England for treason committed abroad, so long as he retains his passport.<sup>12</sup>

*Australia*.—Under Sec. 51 (xix) of the Constitution Act, the Commonwealth Parliament has the power to legislate with respect to—

“Naturalisation and aliens.”

The power is concurrent, by reason of Sec. 107. This entry includes the power—(a) to determine the conditions upon which aliens may be permitted to enter and remain in this country;<sup>13</sup> (b) to provide for their expulsion and deportation,<sup>14</sup> and (c) to impose any extra-territorial restraint which is necessary to make deportation effective.<sup>15</sup>

As to aliens, it has been held that the Dominion Parliament can, under the above power, require a foreign company to take out a Dominion license, even though the company desires to carry on its business only within the limits of a single province.<sup>16</sup> Provincial Legislatures cannot legislate against aliens *as such*, but may legislate as regards franchise, which is a Provincial power.<sup>17</sup>

*Canada*.—Sec. 91 (25) of the Br. N. America Act gives the Dominion Parliament exclusive authority in respect of—“Naturalisation and aliens”.

It has been held that by this entry, the Dominion Parliament is vested with authority in all matters which *directly* concern the rights, privileges and disabilities of aliens in Canada.<sup>17</sup> But this power enables the Dominion Parlia-

(7) *Johnstone v. Pedlar*, (1921) 1 A.C. 262.

(8) Pitt-Cobbett, 1947, Vol. I, p. 228.

(9) Pitt-Cobbett, Vol. I, p. 225.

(10) *De Jaeger v. Att.-General of Natal*, (1907) A.C. 326.

(11) *Yoster's Crown Cases*, 3rd Ed., p. 183.

(12) *Joyce v. Director of Public Prosecutions*, (1946) 1 A.E.R. 186 (H.L.).

(13) *Robtelmes v. Brennan*, (1906) 4 C.L.R. 395.

(14) *R. v. Macfarlane*, (1923) 32 C.L.R. 518.

(15) *A. G. for Canada v. A. G. for Alberta*, (1916) A.C. 597.

(16) *Cunningham v. Tomey Homma*, (1903) A.C. 151.

(17) *Union Colliery v. Bryden*, (1899) A.C. 580.



ment to determine what shall constitute alienage or naturalisation, and not the consequences thereof, such as the privileges resulting from naturalisation.<sup>18</sup>

*Burma.*—Item 2 (8) of the Union List is—

Citizens; aliens; acquisition and termination of citizenship.

*Government of India Act, 1935.*—Item 49 of List I of the Act was—

“Naturalisation and aliens”.

#### INDIA

‘*Citizenship*’: meaning of.—“Citizens are members of the political community to which they belong. They are the people who compose the state and who in their associated capacity have established or subjected themselves to the dominion of a Government for the promotion of their general welfare and for the protection of their individual as well as their collective rights.”<sup>19</sup>

The population of a State is divided into two classes—citizens and aliens. While citizens enjoy full civil and political rights, aliens do not enjoy all of them. On the other hand, though citizens and friendly aliens residing within the territory of a State are equally entitled to the protection of the State—While the relation of a citizen with the State is personal, and permanent, the relation between a State and its resident aliens is territorial and temporary.<sup>20</sup>

A citizen of India shall have the following special rights and obligations which aliens shall not have—

(i) Some of the Fundamental Rights belong to citizens alone—see Arts. 15; 16; 18 (2); 19; 29; 30 [pp. 43-44, *ante*].

(ii) Right to hold the offices of President (Art. 58 (1) (a)); Vice-President [Art. 66 (3) (a)]; Judge of the Supreme Court [Art. 124 (3)] or of a High Court [Art. 217 (2)]; Attorney-General [Art. 76 (1)]; Governor of a State (Art. 157); Advocate-General (Art. 165).

(iii) Right of suffrage for the election to the House of the People (of the Union) and the Legislative Assembly of every State (Art. 326); right to become a member of Parliament (Art. 84) and of the Legislature of a State [Art. 191 (d)].

*Legislative power with respect to citizenship.*—See p. 40; pp. 42-3, *ante*.

‘*Citizenship and Nationality*’.—While the term ‘citizenship’ refers to the relationship with a State from the internal aspect, ‘nationality’ refers to similar relationship from the international aspect. The one is a question of municipal law while the other falls within the province of International law.

Nationality is the status or quality of belonging to some particular nation or State. The ‘nationals’ of a State comprise all persons who are politically members of that State and owe allegiance to that State but all of them may not possess the full civic privileges which are conferred by ‘citizens.’ Again, nationality may or may not be accompanied by residence within the State. The status and privileges of nationality continue even when the national is outside the territorial limits of the State. Nationality may be acquired by (a) birth, (b) naturalisation, (c) marriage, (d) repatriation, or (e) cession or conquest of territory.

(18) *Cunningham v. Tomey Homma*,  
(1903) A.C. 151.

(19) *U. S. v. Cruikshank*, 92 U. S. 542.

(20) *Salmond's Jurisprudence*, 1948, p.  
132.

The incidents of nationality in International law may be summed up as follows—

(i) Every State has within certain limits a right to protect the persons of its nationals while they are outside its limits; and every State has a corresponding duty to protect the nationals of other States within its territory.

(ii) Every State may intervene for the protection of the property of its nationals abroad.

(iii) Every State is entitled to allegiance and obedience to certain of its laws, from its nationals even while they are residing within the jurisdiction of another State.<sup>21</sup>

*'Domicil'.*—Domicil has been defined to be 'the country which is taken to be a man's permanent home for the purpose of determining his civil status'. A person having domicil in a country acquires the *civil* rights of that country, even though he may not have political rights as belong to a citizen of that country.

While 'citizenship' has a political context and 'nationality' has an international context, 'domicil' has a *civil* context. Under the Constitution of India, the law of domicil has to be referred to, for the purpose of determining citizenship at the commencement of the Constitution, under Art. 5;<sup>22</sup> p. 39, *ante*.

A domicil once acquired is retained until it is changed for another domicil,—(a) in the case of an independent person, by his own act; or (b) in the case of a dependent person, by the act of some one on whom he is dependent.

Certain general rules relating to domicil are recognised by Private International Law in England and are embodied in the Indian Succession Act, 1925. These are—No man can ever be without a domicil. On the other hand, a person can have only *one* domicil at a time. Domicil may be acquired—(1) by birth; (2) by choice; and (3) by operation of law. (1) As soon as a person is born, he gets a domicil which is called the *domicil of origin*.

(1) The domicil of origin of a person is—

(i) in the case of a legitimate child, the domicil of the father at the time of the child's birth; (ii) in the case of an illegitimate, posthumous or legitimated child, the domicil of his mother at the time of his birth; (iii) in the case of a foundling, the country where he is found.<sup>23</sup>

(2) As soon as he attains majority, he can acquire a domicil of his own choice, by *animo et facto*, i.e., by (i) actually residing in another country with (ii) the intention of permanently residing there. This new domicil is called the *domicil of choice*. The domicil of origin, however, is not extinguished by the act of acquiring a domicil of choice, but only remains in abeyance; it revives as soon as the person abandons the domicil of his choice *animo et facto* (i.e., in mind as well as in fact.).

(3) Domicil may also be acquired by operation of law. Thus, by marriage, a woman acquires the domicil of her husband if she had not the same domicil before; and during continuance of the marriage, the wife's domicil follows that of her husband.

*Rights and disabilities of Aliens in India.*—Any person who is not a citizen of India is an alien. The rights and disabilities of aliens are left to legislation by Parliament under the present Entry. But the Constitution itself makes some

(21) Pitt-Cobbett, 6th Ed., Vol. I, 196; Schwarzenberger, International Law, 1945, Vol. I, p. 150.

(22) It does not appear that the word

'domicile' is used in any other Art. of the Constitution.

(23) Dicey, Conflict of Laws, 1949, p. 88.

provisions in that respect. We have seen, that some of the Fundamental Rights are expressly confined to 'citizens'. The rest of the provisions in Part III shall apply to aliens who are included within the word 'person' (p. 44, *ante*). But 'enemy aliens'<sup>24</sup> suffer from a special disability; they are not entitled to the benefit of the procedural provisions in cls. (1)-(2) of Art. 22 (*see* p. 126, *ante*). An alien has no right of suffrage nor can he hold any of the offices specially meant for citizens.

*'Naturalization'*.—Naturalization is the act by which rights of citizenship are conferred by a State upon a person who was before an alien to that State.

*Analogous Provisions*.—As to citizenship of India at the commencement of the Constitution, *see* Arts. 5-11, pp. 39-43, *ante*.

*Existing Laws*.—The Indian Naturalisation Act (VII of 1926), provides the law relating to naturalisation in India of aliens resident in India. A certificate of naturalisation may be granted by the Central Government, on being satisfied, upon the application and affidavit of the alien, and on further enquiry, if any, that he has the qualifications laid down in Sec. 3 of the Act. It also provides for 'declaration of alienage' by a naturalized person, under certain conditions (S. 10).

## 18. Extradition.

### OTHER CONSTITUTIONS.

*U.S.A.*—International extradition is an exclusively federal subject.<sup>25</sup>

*Burma*.—Item 2 (9) of the Union List is identical with the present Entry.

*Government of India Act, 1935*.—Item 3 of List I included—'Extradition'.

### INDIA.

*'Extradition'*.—Extradition is the delivery up of a person who has committed a crime in one country and taken refuge in another, by the authorities of the country where he has taken refuge to those of the country where the crime is committed. It is founded on the principle of international justice and is based on mutual treaties between States. Apart from treaties there is no legal *obligation* upon a State to surrender a fugitive to another State which claims him as an offender.<sup>1</sup> But there is nothing to prevent a State from granting extradition under municipal legislation, without a treaty.<sup>2</sup> The claim for extradition may be preferred only by a State within which the offence was committed,<sup>3</sup> the principle of international law being that criminal law and jurisdiction are primarily territorial.

"By the law of nations, each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilised method."

A person extradited for one offence cannot be tried for another, so long as he is not freed from the restraint involved in the extradition process.<sup>4-5</sup>

*Existing Law*.—The Indian Extradition Act<sup>6</sup> (XV of 1903), deals with the

(24) As to 'enemy aliens', *cf.* p. 793, *ante*.

(25) *United States v. Rauscher*, (1886) 119 U. S. 407.

(1) *United States v. Rauscher*, (1886) 119 U.S. 407.

(2) *Ram Babu Saksena v. The State*, (1950) S.C.J. 406 (409).

(3) *The Queen v. Ganz*, 9 Q.B.D. 93;

*Att.-Gen. of Hong Kong v. Kwok-a-Sing*, L.R. 5 P.C. 179.

(4) *United States v. Rauscher*, (1886) 119 U.S. 407.

(5) *Buck v. The King*, (1917) 55 S.C. R. 133.

(6) Under S. 7 of the Indian Extradition Act, there are two conditions for the issue



procedure relating to extradition and substantially follows the provisions of the English Extradition Acts (1870-1935).

19. Admission into, and emigration and expulsion from, India ; passports and visas.

#### OTHER CONSTITUTIONS.

*U.S.A.*—It is curious to note that Congress draws its power to control immigration of aliens from its 'Commerce power',—which has been interpreted to include any sort of intercourse [Art. I (8)]. Numerous laws have been passed to regulate the immigration of aliens. Those who are totally excluded are—(a) insane persons; (b) persons likely to become public burdens; (c) persons suffering from serious physical and mental ailments; (d) polygamists; (e) anarchists; (f) persons convicted of serious crimes. An alien who is admitted, must pass a literacy test, and pay a head tax.

The federal laws authorise the Commissioner of Immigration to deport—(a) any alien whose entry in the U.S.A. is found to have been unlawful; (b) any alien who tries to foment revolution, to spread subversive political doctrines [e.g. *communism*] or who is convicted of certain crimes, or who becomes a public charge within 5 years of entrance.

From the deportation orders, there is a right of appeal to the Courts, which may interfere only if the deported person proves that the order is not supported by substantial evidence. The English doctrine that an alien has a right to reside within the State only so long as the supreme power should think fit, has been followed in the U.S.A.<sup>7</sup> In 1933, as many as some 20,000 aliens were deported. In 1943, the number was 4,200.

*Australia.*—Sec. 51 (xxvii) of the Constitution Act empowers the Commonwealth to legislate with respect to—'Immigration and emigration'.

The following are not 'immigrants' within the meaning of the above entry, so as to enable Parliament to regulate their admission into Australia—

(i) A person born in Australia, who returns from abroad to Australia, as to his home.<sup>8</sup> But if he enters the country not with any intention of residence or settlement, he would be an immigrant.<sup>9</sup> (ii) Persons who, having immigrated to Australia, have made Australia their permanent homes and have become members of the Australian community.<sup>10</sup>

An alien may not only be excluded but also be expelled at the will of the Commonwealth.<sup>11</sup>

of an extradition warrant: (i) the offence must be an extradition offence, i.e., one given in the first schedule of the Act; (ii) the offence must have been committed or must be supposed to have been committed by the accused in the territories of the State which claims extradition. It is a valuable right of a citizen that he should not be sent out to a foreign jurisdiction without the law relating to extradition being strictly complied with. The Courts must, therefore, give a strict interpretation to the provisions of the Extradition Act. [*Ram Pargas v. Emp.*, A.I.R. 1948 All. 129 (130).]

Extradition does not lie for a 'political offence'. In order to constitute a 'political offence' there must be two or more parties in the State, each seeking to impose the Government of its choice upon the other; if an offence is committed by one party or the other

in pursuance of that object, it would be a 'political offence'. [*Re Meunier*, (1894) Q.B. 415.] Some offences, such as treason, political conspiracy, are manifestly political in character but ordinary crimes such as homicide may also be deemed to be political if it was committed in the course of some political movement and solely with the political end in view. [*Re Castioni*, (1891) 1 Q.B.D. 149].

(7) *Chae Chan Ping v. United States*, 130 U.S. 581.

(8) *Donohoe v. Wong San*, (1925) 36 C.L.R. 404.

(9) *R. v. Macfarlane*, (1923) 32 C.L.R. 518.

(10) *Ex parte Walsh*, (1925) 37 C.L.R. 36.

(11) *Robtelmes v. Brennan*, (1906) 4 C.L.R. 395.

"The power to make such laws as Parliament may think fit with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be *admitted* to the country, the conditions under which they may be permitted to *remain* in the country, and the conditions under which they may be deported from it."<sup>11-a</sup>

*England.*—Under the Aliens Order, 1920, no alien immigrating from abroad can land in the United Kingdom without the authority of an immigration officer; and such authority is only to be given where the alien can prove that he fulfils a number of conditions, *e.g.*, that he is in a position to support himself and his dependents, and he is not medically unfit. Aliens are only allowed to land at certain specified ports.<sup>12</sup> Persons who have been guilty of extradition offences, or against whom an expulsion order has been made, are excluded. There is also provision for the registration of resident aliens over the age of 16, with certain particulars.

Under the Aliens Act, 1905, the Home Secretary may deport aliens convicted of crime and recommended by the Court for deportation or reported to have been within 12 months of entry in receipt of parochial relief or to have been living in insanitary conditions or to have been convicted in a foreign country of an extradition offence or whose removal is considered conducive to the public good. Even apart from this statute, an alien friend may be expelled by the executive Government of the United Kingdom, without Parliamentary sanction, and an alien so expelled has *no right* to enter into British territory,—enforceable by action in a Court of law.<sup>13</sup>

*Burma.*—Item 2 (10) of the Union List is—

'Passports and visas'.

Item 2 (14) relates to—

'Admission into, and emigration and expulsion from the Union.'

*Government of India Act, 1935.*—Item 17 of List I was—

Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in the United Kingdom.

#### INDIA

'*Admission into, Expulsion.*'—One of the rights possessed by the supreme power in every State is to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good Government.<sup>14</sup> *Extra-territorial constraint* is incident to the exercise of the power of deportation. Once it is conceded that the State has the right to expel aliens, it follows that it has the power to do those things which must be done in the very act of expulsion, if the right is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by a State officer on the territories of its neighbour should thereby result.<sup>15</sup>

*Passport.*—A passport is an official document issued in the name of the head of a State, to a traveller for his safe passage to and protection in a foreign country.

"A passport is a license for the safe passage of anyone from one country to another."<sup>15</sup>

(11-a) *Robtelmes v. Brennan*, (1906) 4 C. L.R. 395.

(12) *Stephen's Commentaries*, 20th Ed. I, p. 538.

(13) *Musgrove v. Chung Teeong*, (1891) A.C. 272.

(14) *A. G. for Canada v. Cain*, (1906) A.C. 542.

(15) *Wharton's Law Lexicon*; *R. v. Brailsford*, (1905) 2 K.B. 730; *Joy v. Director of Pub. Prosecutions*, (1946) 1 All. E.R. 186 (H.L.).

*Visa.*—Visa means the authentication of a passport by a foreign authority.<sup>16</sup>

*Existing Laws.*—The Influx from Pakistan Control Act (XXIII of 1949); the Foreigners Act;<sup>17</sup> the Indian Emigration Act (VII of 1922); the Immigration into India Act (III of 1924);<sup>18</sup> the Reciprocity Act (IX of 1937); the Registration of Foreigners Act (XVI of 1939); the Immigrants (Expulsion from Assam) Act (X of 1950); the Indian Passport Act (XXXIV of 1920).

20. Pilgrimages to places outside India.

21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.

#### OTHER CONSTITUTIONS.

*U.S.A.*—Art. I, Sec. 8 (10) of the United States Constitution says—

“The Congress shall have power: To define and punish piracies and felonies committed on the high seas and offences against the law of nations.”

Under this power, Congress is competent to enact laws punishing pirates, although they may be foreigners and may have committed no particular offence against the United States, provided the piracy is committed on the high seas.<sup>19</sup>

*Burma.*—Item 2 (13) of the Union List is the same as the present Entry of our Constitution.

#### INDIA

*‘Piracy’.*—(i) *In International Law.*—Speaking generally, piracy is an act of robbery or depredation committed on the ‘high seas’. Actual robbery is not an essential element of the offence and a frustrated attempt to commit piracy is also treated as piracy in international law.<sup>20</sup> It is the right and duty of public vessels of every nation to suppress pirates and pirates may be captured on the sea or in territorial waters, or in territory unappropriated by any State. The pirate loses his nationality and the pirate vessel loses the protection of her national flag, by reason of the offence and thus becomes liable to seizure and punishment at the hands of any State.<sup>21</sup>

“Piracy is the commission of those acts of robbery and violence upon the sea, which if committed upon land would amount to felony. They are the common enemy of all and the law of nations gives to every one the right to pursue and exterminate them without any previous declaration of war.”<sup>22</sup>

(ii) *In Municipal Law.*—Piracy is also treated as an offence in municipal law. In *England*, however, by statute, the definition of piracy has been extended beyond that of simple robbery or depredation on the high seas,—so as to include acts of hostility committed on the high seas, against natural-born British subjects, under colour of commission from any foreign Power; adhering on the sea to the King’s enemies on the part of natural-born British subjects, and the like. But in so far as the meaning of piracy is extended by municipal law beyond the

(16) Wharton’s Law Lexicon.

(17) The Foreigners Act of 1946 provides for the imposition of restrictions on the entry of foreigners into India, their presence therein and their departure therefrom.

(18) The Immigration into India Act (III of 1924) was passed for regulating the entry and residence of persons domiciled in

British Possessions, on the basis of reciprocity.

(19) *United States v. Palmer*, 3 Wh. 630.

(20) *Re Piracy Jus Gentium*, (1934) A.C. 586.

(21) Pitt Cobbett, 1947, Vol. I, p. 518.

(22) Wharton’s Law Lexicon.



limits of international law, it is not justiciable except in the State to which the offender belongs, or in the State against which the offence was committed.<sup>23</sup>

Art. I, Sec. 8 (10) of the Constitution of the *United States* empowers the Congress not only to punish but also to *define* piracies and felonies on the high seas. Under this power, Congress has declared a number of acts to be piracy though they are not so according to international law, *e.g.*, slave trade.<sup>24</sup>

It was under this power that the United States Congress made it a crime to counterfeit the notes and securities of foreign Governments.<sup>25</sup>

"The law of nations requires every national Government to use 'due diligence' to prevent a wrong being done within its dominion to another Nation with which it is at peace, or to the people thereof; and because of this the obligation of one Nation to punish those who, within its jurisdiction, counterfeit the money of another nation, has long been recognized."<sup>25</sup>

Though the power to '*define*' piracies and offences against the law of nations is not expressly mentioned in the present Entry of our Constitution,—the generality of the Entry suggests that it would include the power of definition as well as punishment.

'*High seas*'.—The high seas means the waters of the sea beyond the three-mile limit of 'territorial waters' (*see* p. 33, *ante*).

## 22. Railways.

### OTHER CONSTITUTIONS

*Australia*.—Sec. 98 of the Constitution Act provides that

"the power of Parliament to make laws with respect to trade and commerce [Sec. 51 (i)] extends to . . . railways the property of any State."

Sec. 51 (xxxii) gives the Commonwealth power to legislate with respect to—

"The control of railways with respect to transport for the 'naval and military' purposes of the Commonwealth."

Sec. 51 (xxxiii), on the other hand, gives the Commonwealth the power to legislate for—

"The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State."

Sec. 51 (xxxiv), again gives the Commonwealth power over—

"Railway construction and extension in any State with the consent of that State."

*Burma*.—Item 3 (5) of the Union List is identical with the present Entry.

*Government of India Act, 1935*.—Item 20 of List I was—

"Federal railways; the regulation of all railways other than minor railways in respect of safety, ~~minimum~~ and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers."

### INDIA

'*Railways*'.—This Entry gives to the Union exclusive jurisdiction to legislate regarding all railways, regarding *all* matters,—irrespective of their ownership or whether they are major or minor railways,—in order to ensure uniformity between railways in the matter of rates, charges, responsibility and the like. (The present Entry thus *differs* from Item 20 of List I of the Act of 1935).

(23) Pitt Cobbett, 1947, Vol. I, p. 316.

(25) *United States v. Arjona*, 120 U. S.

(24) Willoughby, Constitutional Law (II), 479.

p. 1122.

*Analogous Provision.*—See Art. 366 (20); Art. 257 (3).

*Existing Law.*—The Indian Railways Act (IX of 1890),<sup>1</sup> the Indian Railways Board Act (IV of 1905).

23. Highways declared by or under law made by Parliament to be national highways.

#### OTHER CONSTITUTIONS

*U.S.A.*—The Federal Government exercises its power over national highways by virtue of the 'commerce clause' [Art. I (8)].<sup>2</sup>

*Burma.*—Item 3 (3) says—

"Highways and waterways declared by the Union to be Union highways and waterways."

*Government of India Act, 1935.*—There was ■ item in List I of that Act, corresponding to the present Entry. All roads came under Entry 18 of List II.

#### INDIA

*'National highways'.*—While roads form a State subject, under Entry 13, List II, such highways as would be declared to be national highways by the Union Parliament, would form an exception to the entry in the State List, and form a Union subject.

*'Highway'.*—A highway is a way along which the public generally has a right to pass.<sup>3</sup>

*Analogous Provision.*—See Proviso to Art. 257 (2).

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

#### OTHER CONSTITUTIONS

*U.S.A.*—(a) Art. III (2) of the Constitution says that the judicial power of the United States shall extend to all cases of . . . 'maritime jurisdiction.'

From this, it has been held that the Federal Government has jurisdiction over all voyages which are *maritime* in character and on navigable waters, even though the voyage is confined wholly within the limits of a single State.<sup>4</sup> All navigable waters have thus come under the federal control even though the provision of the Constitution, quoted above, refers to judicial power only.

Under the above power, together with the commerce power, the Federal Government controls the merchant marine and aids navigation by providing lighthouses, buoys, lifesaving patrols, etc. It has also provided for the safety and protection of seamen, by federal legislation.

(1) The Indian Railways Act, 1890, is a consolidating statute relating to Railways in India. It not only deals with the construction and maintenance of railway works, but also lays down provisions relating to the working of railways, responsibility of Railway as carriers and offences committed in connection with railways.

(2) Thus, the Motor Carrier Act, 1935, vests in the Interstate Commerce Commission the regulation of transportation of passengers and goods by motor carriers engaged in interstate or foreign commerce.

(3) Tomlin's Law Dictionary.

(4) *The Lottawanna*, (1874) 21 Wallace 558.

(b) Since 'commerce' has been interpreted to include navigation,<sup>5</sup> Congress draws its power over navigation also from the '*commerce clause*.'

But the nature of authority derived from the two clauses is different: Under the clause relating to admiralty and maritime jurisdiction, the authority is (though not exclusively), to fix the *law* governing transactions with reference to or upon navigable waters. Under the Commerce clause, the authority is to determine the conditions under which the waters shall be navigated and to protect or to increase their navigability.<sup>6</sup>

The power of Congress to determine what is obstruction to navigation is conclusive.<sup>7</sup>

*Australia*.—Sec. 98 of the Constitution Act says—

"The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping. . . ."

The power of Parliament over trade and commerce is confined to "trade and commerce" with other countries, and among the States [Sec. 51 (i)]. Hence, the combined effect of Sec. 51 (i) and Sec. 98 is to endow the Commonwealth Parliament, not with a substantive power to deal with navigation and shipping at large, but with power to deal with the subject *only in so far as it is relevant to inter-State and foreign trade and commerce*.<sup>8</sup>

Intra-State shipping is a State subject.<sup>9</sup>

*Canada*.—Sec. 91 (10) of the Br. N. A. Act gives the Dominion Parliament exclusive power in relation to—

"Navigation and shipping."

This power means the right to prescribe rules and regulations for vessels navigating the waters of the Dominion;<sup>10</sup> to prescribe the law of the road, the lights to be carried, evidence of ownership, transmission of interest; to declare what shall be deemed an interference with navigation.<sup>11</sup>

Sec. 92 (10) carves out an exception from the above exclusive power of the Dominion, in favour of the Provincial Legislature—

"Local works and undertakings other than . . . lines of steamships between the Province and any British or foreign country."

So, the Province is competent to incorporate Provincial navigation companies, the operations of which are limited to the Province.<sup>12</sup>

*Burma*.—Item 3 (4) of the Union List is the same as our Entry 24, with the addition of the words—

"Carriage of passengers and goods on such waterways,"

which forms part of Entry 30 of List I of *our* Constitution.

Again, Item 3 (6) of the Union List is the same as the first part of our Entry 25, i.e., up to 'tidal waters.'

*Government of India Act, 1935*.—Item 21 of List I was—

"Maritime shipping and navigation, including shipping and navigation on tidal waters. . . ."

(5) *Gibbons v. Ogden*, (1814) 9 Wh. 1.

(6) *Gilman v. Philadelphia*, 3 Wall. 713.

(7) *United States v. Chandler Water Power Co.*, 229 U. S. 53.

(8) *Newcastle Steamship Co. v. A.-G. for Commonwealth*, (1921) 29 C.L.R. 357.

(9) *Huddart Parker v. Moorehead*, (1908)

8 C.L.R. 330 (352).

(10) Lefroy, *Canadian Constitutional Law*, p. 106.

(11) *Fisheries Case*, (1898) A. C. 701 (717).

(12) *Macdougall v. Union Navigation Co.*, (1887) 21 L.C.L. 63.



## INDIA

*'Shipping and navigation in national waterways'.*—While Entry 24 of List I gives the Union Parliament exclusive jurisdiction in respect of shipping and navigation in those inland waterways *which* shall be declared by it to be 'national waterways', Entry 32 of List III makes shipping and navigation in other inland waterways a concurrent subject. Both these Entries, however, are confined to shipping and navigation by '*mechanically propelled vessels*'. Navigation in the inland waterways by means of any *other kind* of vessel, is a State subject under Entry 13 of List II.

Shipping and navigation in 'tidal waters', on the other hand, is an exclusive Union subject. (Entry 25, List I).

*'Ship'.*—A ship, as defined by Sec. 3 (51) of the General Clauses Act (X of 1897), includes—

"every description of vessel used in navigation not exclusively propelled by oars."

*'Shipping'* includes every kind of business relating to ships, and may include ship building.

*'Navigation'.*—Navigation is "the art of sailing at sea, also the manner of trading".<sup>13</sup>

*'Mercantile Marine'.*—This means the vessels of a country engaged in carrying *trade* with foreign countries as well as between different parts of its own territory.

*Existing Laws.*—The Indian Registration of Ships Act (X of 1841); Inland Steam Vessels Act (I of 1917); Control of Shipping Act (XXVI of 1947); the Indian Merchant Shipping Act (XXI of 1923).

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

## OTHER CONSTITUTIONS

*Australia.*—Under Sec. 51 (vii) of the Constitution Act, 1900, the Commonwealth Parliament has the power to legislate with respect to—

"Lighthouses, lightships, beacons and buoys."

This power includes the power of imposition and collection of dues to be paid by the owners or masters of ships which pass the lights, signals, etc., and which derive benefits therefrom.<sup>14</sup>

*Canada.*—Sec. 91 (9) of the Br. N. A. Act relates to—

"Beacons, buoys, lighthouses. . . ."

*Government of India Act, 1935.*—Item 25 of List I of that Act was the same as the present Entry.

*Burma.*—Item 3 (10) of the Union List is the same as the present Entry.

## INDIA

*'Lighthouse'.*—A lighthouse is usually a tower, containing signal-lights for the guidance for vessels at night, and to warn them off from dangerous coast, shoals, etc. Under the English Merchant Shipping Act, the term includes other similar beacons and signals—

(13) Tomlin's Law Dictionary.

(14) Quick and Garran, Annotated Consti-

tution, p. 565; Wynes, Legislative and Executive Powers, p. 134.

"any floating, and other light exhibited for the guidance of ships and also any sirens and another description of fog signals, and also any addition to a lighthouse of any improved light or any siren or any description of fog signal."

The present entry follows the above definition of the English Act.

*Existing Laws.*—Indian Lighthouse Act (XVII of 1927).

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

#### OTHER CONSTITUTIONS

*Burma.*—Item 3 (7) of the Union List is the same as the present Entry.

*Government of India Act, 1935.*—Item 22 of List I was substantially the same as the present Entry.

#### INDIA

'Major ports'.—This Entry gives to the Union only ■ limited power as regards ports—(a) It is confined to 'major ports' (*see* Art. 364); (b) It is restricted to the specified matters only, *viz.*, 'delimitation, constitution and powers of port authorities therein.'

Other ports will come within Entry 31 of List III (concurrent).

*Port.*—"A port is a harbour or place of shelter, where ships arrive with their freight, and customs for goods are taken."<sup>15</sup>

"A port is a Haven and somewhat more,—

1. It is ■ place for arriving and unloading of ships or vessels;
2. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege;
3. It hath Ville or City or Borough, that is the *capus portus* for the receipt of mariners and merchants, and the securing and vending of their goods, and victualling their shops."<sup>16</sup>

*Existing Laws.*—Indian Ports Act (XV of 1908); Calcutta Port (Pilotage) Act (XXXIII of 1948); Bombay, Calcutta and Madras Port Trusts (Constitution) Amendment Act (XXXVI of 1948).

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

#### OTHER CONSTITUTIONS

*U.S.A.*—Congress has no express power under the Constitution with respect to quarantine. Hence the States retain their power to legislate over this matter subject to federal legislation as may be made by Congress under its 'commerce power'.<sup>17</sup>

*Canada.*—The Dominion Parliament has exclusive power [Sec. 91 (11)] over—

"Quarantine and the establishment and maintenance of marine hospitals."

*Australia.*—Sec. 51 (ix) makes

"Quarantine"

■ federal subject of legislation.

(15) Tomlin's Law Dictionary.

(16) *Foreman v. Free Fishers*, L.R. 4 p. 135.

(17) Wynes, *Legis. & Executive Powers*,

H. L. 266.

*Burma.*—Item 3 (1) of the Union List is—

“(1) Port and inter-unit quarantine; seamen's and marine hospitals and hospitals connected with port quarantine.”

*Government of India Act, 1935.*—Item 18 of List I of that Act was the same as the present Entry.

#### INDIA

*'Quarantine'.*—The term is thus explained in *Webster's International Dictionary*:

“It is now comprehensive enough to cover any forced stopping of travel, or of transit, or of communication, as well as compulsion to remain at a distance or in a given place, without intercourse, on account of any malignant, contagious or dangerous disease on land as well as by sea.”

“The prevention of disease is the essence of quarantine law”.<sup>18</sup> It extends to the enactment of provisions for inspection, exclusion, detention, observation, segregation, isolation, protection, treatment, and regulation of vessels, persons, goods, things, animals, or plants, so far as any or all of these matters may be directed to the prevention of the introduction or spread of disease.<sup>19</sup>

*Analogous Provision.*—While the present Entry deals with quarantine at ports, Entry 81 of the same list deals with quarantine on State borders or inter-state quarantine.

29. Airways ; aircraft and air navigation ; provision of aerodromes ; regulation and organisation of air traffic and of aerodromes ; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

#### OTHER CONSTITUTIONS

*U.S.A.*—The Federal Government has derived power over transportation by air from the ‘commerce clause’ [Art. 1 (8)].

*Canada.*—The power to deal with aerial navigation throughout Canada has been held to belong to the Dominion Parliament, under Sec. 132 of the Br. N. America Act;<sup>20</sup> as well as Sec. 92 (10) (a) relating to—

“Other undertakings connecting the Provinces . . . and extending beyond the limits of the Province.”<sup>20</sup>

*Burma.*—Item 3 (2) of the Union List says—

“Airways.”

Item 3 (8), again, relates to—

“Aircraft . . . aerodromes.”

*Government of India Act, 1935.*—Item 24 of List I covered the first part of the present entry—

“Airways . . . aerodromes.”

#### INDIA

*'Airways'.*—This Entry makes legislation regarding air navigation, in land or foreign, an exclusive Union subject.

*'Aerodrome'.*—Sec. 2 (2) of the Indian Aircraft Act, 1934, says—

(18) *Smith v. St. Louis Ry.*, (1901) 181 U.S. 255. Powers, p. 136.  
(19) Wynes, Legislative and Executive A.C. 54.  
(20) *In re Control of Aeronautics*, (1932)



■ 'Aerodrome' means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircrafts, and including buildings, sheds, vessels, piers, and other structures thereon or appertaining thereto."

*Territorial air.*—In International law, a claim to sovereignty over 'territorial air', i.e., the air space over the territory of ■ State has come to be recently asserted by States, on the analogy of the principle relating to "territorial waters" (p. 33, *ante*). Thus, by the United Nations Interim Agreement on International Civil Aviation which became effective on 6th June, 1945, every State is stated to have complete and exclusive sovereignty in the air space above its territory, including the air space over its territorial waters (Art. 8).

*Existing laws.*—The Indian Aircraft Act (XXII of 1934) provides for the control of manufacture, possession, use, operation, sale, import and export of aircraft.

30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

#### OTHER CONSTITUTIONS

*Burma.*—Items 3 (9) and 3 (4) of the Union List cover the subject-matter of the present Entry.

*Government of India Act, 1935.*—Item 26 of List I was—

"Carriage of passengers and goods by ■ or by air."

#### INDIA

'Carriage by railway, sea or air'.—This Entry deals with carriage of passengers and goods by railway, sea or by air, or by national waterways by 'mechanically propelled vessels'.

Carriage of passengers and goods by roads come under the State List [Entry 19, List II]; while carriage by inland waterways come within the Concurrent list [Entry 32, List III].

'Mechanically propelled vessels' themselves come under Entry 35 of List III.

*Existing Laws.*—Indian Carriage by Air Act (XX of 1934); Indian Carriage of Goods by Sea Act (XXVI of 1925); the Carriers Act (III of 1865); Indian Railways Act (IX of 1890); Railways (Transport of Goods) Act (XII of 1947).

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. I, Sec. 8 (7) empowers Congress to establish—"Post-offices and Post-roads." This power has been most liberally interpreted to include the powers of—(a) organization of the Postal Department and appointment of its officers; (b) determination of the places and premises for post-offices, the routes over and the means by which the mails shall be carried; (c) manufacture of stamps; (d) punishment of crimes which endanger the security of the mails<sup>21</sup>; (e) establishment of Government monopoly in the carriage of mail<sup>22</sup>; (f) decision

(21) *U. S. v. Bullington*, 170 Fed. 121;  
*Illionis R. Co. v. Illionis*, 163 U.S. 142.

(22) *U. S. v. Kochersperger*, 9 Am. Law  
Reg. 145.

of what matters shall be carried in the mails and exclusion of indecent, injurious and fraudulent matters.<sup>23</sup>

The power of Congress over telegraph, telephone and wireless<sup>24</sup> has been deduced from the above power as well as from the 'commerce power.'

*Australia.*—Sec. 51 (v) of the Constitution Act gives the Commonwealth Parliament power with respect to—'Postal, telegraphic, telephonic and other like services'. It has been held that the above power covers wireless telegraph and broadcasting.<sup>25</sup>

*Canada.*—Sec. 92 (10) of the Br. N. America Act gives the Dominion Parliament power over—

"Telegraphs and other works and undertakings connecting the Province with other Provinces or extending beyond the limits of the Province. Sec. 91 (5), again, gives it power over the 'Postal services'.

It has been held that the above two clauses empower the Parliament to provide for or control the carrying of mails by air<sup>1</sup> or to control broadcasting by radio."<sup>2</sup>

*Burma.*—Item 3 (11) of the Union List is the same as the present Entry of our Constitution.

*Government of India Act, 1935.*—Item 7 of List I included the subject of the present Entry.

*Existing Laws.*—Indian Post Office Act (VI of 1898); Indian Telegraph Act (XIII of 1885).

32. Property of the Union and the revenue therefrom, but as regards property situated in a State specified in Part A or Part B of the First Schedule subject to legislation by the State, save in so far as Parliament by law otherwise provides.

'*Property of the Union*'.—See under Arts. 294; 285. The State Legislature shall have the power to legislate over property situate within the State, subject to legislation by Parliament.

33. Acquisition or requisitioning of property for the purposes of the Union.

#### OTHER CONSTITUTIONS

*Burma.*—Item 5 (4) of the Union List is—'Acquisition of property for the purposes of the Union.'

*Australia.*—Sec. 51 (xxxi) of the Constitution Act—see p. 152, ante.

*Government of India Act, 1935.*—Item 9 of List II was—'compulsory acquisition of land.'

#### INDIA

'*Acquisition and requisitioning*'.—Acquisition of property means the transference of the rights of *ownership* over a property,<sup>3</sup> while requisition is a *dominion* or *control* over a property, without acquiring rights of ownership.<sup>4</sup>

(23) Ex parte Jackson, 96 U.S. 727; In re Rapier, 143 U.S. 110.

(24) Pensacola v. W. U. Tel. Co., (1877) 96 U.S. 1.

(25) King v. Brislan, (1935) 54 C.L.R. 262.

(1) James v. Commonwealth, (1936) A. C. 587 (614).

(2) In re Radio Communication, (1932) A.C. 304.

(3) Lal Singh v. C. P. & Berar, A.I.R. 1944 F.C. 62.

(4) Tan Bug v. Collector of Bombay, A.I.R. 1946 Bom. 216 (247); Khetsidas v. Protapmull, A.I.R. 1946 Cal. 197 (201).

*Analogous Provisions.*—See Entries 36 of List II; 42 of List III [see also p. 156, *ante*].

### 34. Courts of Wards for the estates of Rulers of Indian States.

'*Courts of Wards for estates of Rulers*'.—This Entry forms an exception to the general provision in Entry 22 of List II.

### 35. Public debt of the Union.

#### OTHER CONSTITUTIONS

*Burma.*—Item 4 (1) of the Union List is—'The borrowing of money on the credit of the Union', while item 5 (11) is—'Public debt of the Union'.

*Australia.*—Sec. 51 (iv) of the Constitution Act gives the Commonwealth Parliament power to make laws with respect to—

'Borrowing money on the public credit of the Commonwealth.'

*Government of India Act, 1935.*—Under Entry 6 of List I,—

"Public debt of the Federation" was an exclusive federal subject.

#### INDIA

'*Public debt*'.—For the borrowing power of the Union and the States, see Arts. 292-3, pp. 619-20, *ante*.

*Analogous Provision.*—Entry 6 of List II makes 'Public debt of the State' State subject.

*Existing Law.*—The Public Debt (Central Government) Act (XVIII of 1944.<sup>5</sup>

### 36. Currency, coinage and legal tender ; foreign exchange.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. I, Sec. 8 (5) of the Constitution authorised the Congress to "coin money, regulate the value thereof", while Art. I, Sec. 10 (1), forbids the States to "coin money." The right to issue *paper money* has been held to follow from the power to 'borrow.'<sup>6</sup>

Under the present power, Congress may restrain the circulation, as money, of any notes not issued by its own authority.<sup>7</sup> *e.g.*, by laying a prohibitive tax on notes issued by banks chartered by States<sup>8</sup> It can compel citizens to hand over their gold in return for paper money<sup>9</sup>; abolish the 'gold clause' in private contracts;<sup>9</sup> pay interest on its bonds by devalued currency.<sup>10</sup>

As to legal tender, the Constitution makes no provision save in Art. I, Sec. 10 (1), forbidding States to

"make anything but gold and silver coin a tender in payment of debts."

*Australia.*—These subjects are within the jurisdiction of the Commonwealth Parliament, under Sec. 51 (xii) of the Commonwealth of Australia Act, which relates to—

"Currency, coinage and legal tender."

(5) Consolidates the land relating to Government securities issued by the Central Government and to the management of the public debt of the Central Government, by the Reserve Bank.

(6) The Legal Tender Cases, (1871) 12 Wall. 457.

(7) *Veasie Bank v. Fenno*, (1870) 8 Wall. 533.

(8) *Norts v. U. S.* (1935) 294 U.S. 317.

(9) *Norman v. Baltimore, R.R.*, (1935) 294 U.S. 240.

(10) *Perry v. U. S.*, (1935) 294 U.S. 330.



While item (xiii) of the same section confers similar power as regards—  
“The issue of paper money.”

The power is concurrent [Sec. 115], subject to Sec. 109.

*Canada*.—Under Sec. 91 (14) & (20) of the Br. North America Act, ‘currency, and coinage’ and ‘legal tender’ are within exclusive competence of the Dominion Legislature.

*Burma*.—Item 5 (2) of the Union List is—‘Currency, coinage and legal tender’.

*Government of India Act, 1935*.—Entry 5 of List I was—

“Currency, coinage and legal tender.”

#### INDIA

‘*Currency*’.—Currency, according to Quick & Garran<sup>11</sup> means—

“the acceptance, reception, passing or circulation from hand to hand, from person to person, of metallic money, or of Government or bank notes as substitutes for metallic money.”

‘*Coinage*’.—Coinage is ‘the act or process of converting metal into money for circulation’.<sup>11</sup>

‘*Legal Tender*’.—As to what coins and paper currency are legal tender in India, under existing enactments,—see Secs. 11-15 of the Indian Coinage Act (III of 1906) and Secs. 2 and 14 of the Indian Paper Currency Act (X of 1923).

The currency and legal tender powers would enable Parliament to deny the quality of legal tender to foreign coins, to punish the offence of counterfeiting not only Indian coins, but also foreign coins and notes.<sup>12</sup>

*Foreign Exchange*.—Foreign exchange has been defined in the Foreign Exchange Regulation Act (VII of 1947) as follows:

“‘Foreign exchange’ means foreign currency and includes all deposits, credits and balances payable in any foreign currency, and any drafts, traveller’s cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency.”

*Existing Laws*.—Indian Coinage Act (III of 1906); Bronze Coin (Legal Tender) Act (XXII of 1918); Indian Paper Currency Act (X of 1923); Foreign Exchange Regulation Act (VII of 1947).<sup>12-a</sup>

### 37. Foreign loans.

#### OTHER CONSTITUTIONS

*Burma*.—Item 2 (7) of the Union List of the Burmese Constitution is the same as the present entry of our Constitution.

#### INDIA

‘*Foreign loans*’.—See under Arts. 292-3, pp. 619-20, *ante*.

### 38. Reserve Bank of India.

#### OTHER CONSTITUTIONS

*Burma*.—Item 5 (1) of the Union List is—

“The Reserve Bank; banking including incorporation of banks, and the issue of paper money.”

(11) Quoted in Wynes, *Legislative & Executive Powers*, p. 140.

(12) Cf. Wynes, *Legislative & Executive Powers*, pp. 141-2.

(12-a) The Foreign Exchange Regulation

Act (VII of 1947), provides for the regulation of dealings in foreign exchange and securities and the import and export of currency and bullion.

## INDIA

*'Reserve Bank of India'.*—The Reserve Bank of India, established by the Reserve Bank of India Act (II of 1934), functions as the 'Central Bank' of India and has two separate Departments,—the Issue Department and the Banking Department. In its Issue Department, it has a complete monopoly of issue of the paper currency, and is under ■ obligation to convert the different forms of currency into notes of smaller denominations or coins. In its Banking Department, it controls the credit system of the country, by the purchase and sale of securities and sterling to maintain the sterling exchange rate as well as to maintain the internal rate of interest, by making loans and advances to banks and local authorities, and by controlling and inspecting books of account of other Banks under the Banking Companies Act. The Bank shall also buy or sell foreign exchange of a value exceeding two lakhs of rupees. It is however prohibited from competing with other banks by engaging in trade or having a direct interest in any commercial or industrial undertaking, from allowing interest on deposits, and in some other specified ways. By the Reserve Bank (Transfer to Public Ownership) Act (LXII of 1948), the Reserve Bank has been transformed from a private shareholders' Bank into a State-owned bank.

## 39. Post Office Savings Bank.

*Burma.*—Item 4 (11) of the Union List is—'Savings Bank'.

*Government of India Act, 1935.*—The present subject was included in Item 7 of List I.

*Existing Laws.*—Government Savings Bank Act (V of 1873); Post Office Cash Certificates Act (XVIII of 1947).

## 40. Lotteries organised by the Government of India or the Government of a State.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 48 of List I was—

"State lotteries."

## INDIA

*'Lottery'.*—A lottery is a distribution of prizes by lot or chance.<sup>13</sup> It embraces the elements of procuring through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value.<sup>14</sup>

## 41. Trade and commerce with foreign countries ; import and export across customs frontiers ; definition of customs frontiers.

## OTHER CONSTITUTIONS

*U.S.A.*—Under Art. I, Sec. 8 (3) of the Constitution, the power

"to regulate commerce with foreign nations,"

is a federal subject of legislation.

The control of Congress over foreign commerce is in effect wider than that over inter-State commerce though both powers are conferred by the same clause inasmuch as it has plenary authority over foreign relations and is, accordingly

(13) *Taylor v. Smethen*, (1883) 11 Q.B. D. 207.

(14) *U. S. v. Wallis*, 58 Fed. 942.

entitled to grant special commercial privileges to a country by treaty or to lay a total or partial embargo upon a foreign commerce directly, or indirectly, by tariff legislation. Again, it has been held that the power over foreign commerce includes the responsibility and duty of—

"providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce."<sup>15</sup>

On the other hand, as regards inter-State commerce, Congress cannot prohibit the right of passage of persons and property from one State to another. But as a Sovereign State it has the right to exclude foreigners or their manufactures.<sup>16</sup> The United States are considered as a unit in all regulations of foreign commerce, but Congressional regulations of commerce among the several States must be equal and general in their provisions. It cannot impose an embargo upon one or some of them.<sup>17</sup>

*Australia.*—Under Sec. 51 (i) of the Australian Constitution Act, 1900, "trade and commerce with other countries. . . ." is a federal subject of legislation.

*Canada.*—Sec. 91 (2) of the Br. N. America Act gives the Dominion Parliament to legislate in relation to—

"The regulation of trade and commerce."

This clause thus covers both foreign and inter-State commerce.<sup>18-19</sup>

Under this clause together with cl. (25) ['naturalisation and aliens'] the Dominion Parliament has power to require a foreign company to take out a license from the Dominion Minister, even though the company desires to carry on its business only within the limits of a single Province.<sup>20</sup>

*Burma.*—Item 2 (6) of the Union List is—

"Regulation of trade and Commerce with foreign countries."

Item 2 (16), again, is—

"Important and export across customs frontiers as defined by the Union Government."

*Government of India Act, 1935.*—Item 19 of List I was—

"Import and export across customs frontiers as defined by the Union Government."

## INDIA

*'Customs Frontiers'.*—By a Notification of 1st April, 1937, Government of India defined 'customs frontier' as—

"the frontier, whether one or more than one, whether sea or land, whether exterior or interior, of (British) India."<sup>21</sup>

Under the present Entry, this power of definition belongs to Parliament.

*Existing Law.*—The Land Customs Act (XIX of 1924) and the Sea Customs Act (VIII of 1878) are permanent consolidating Acts laying down the law relating to the import and export of goods from or to territories outside India, by land and sea, respectively. The Indian Tea Control Act (XXIV of 1933), provides for the control of the export of tea from India.

## 42. Inter-State trade and commerce.

(15) *Crutcher v. Kentucky*, 141 U.S. 47.

(16) *Slaughter House Cases*, 16 Wall.

36.

(17) *Groves v. Slaughter*, 15 Pet. 449.

(18-19) *Lefroy*, Canadian Constitutional

Law, p. 103.

(20) *A. G. for Canada v. A. G. for Alberta*, (1916) A.C. 588 (597).

(21) *Cf. Emp. v. Dantes*, A.I.R. 1940 Bom. 307 (310).



## OTHER CONSTITUTIONS

*U.S.A.*—Art. I, Sec. 8 (3) lays down—

"The Congress shall have power to regulate commerce and among the several States."

This clause is known as the 'Commerce clause'.

Since the Constitution expressly confers upon Congress the power to regulate 'commerce among the States' it has been held, that by implication Congress is denied any power to interfere with the *internal* trade and business of the separate States, except as a necessary and proper means for carrying into execution some other power expressly granted or vested.<sup>22</sup> As to the exclusiveness of the federal power to legislate with respect to *inter-State* trade, has been held—

(i) The Congressional 'commerce' power is necessarily exclusive whenever the subjects of it are national in character or admit only of one *uniform* system or plan of regulation; (b) where the power of Congress is exclusive, the failure of Congress to make express regulations is deemed an indication of its will that the subject shall be left free from any restrictions or impositions.<sup>23</sup> (c) State laws can only be justified if within State police powers; or in matters of a local nature, auxiliary to commerce, rather than a part of it.<sup>23</sup>

Again, by the application of the doctrine of 'Implied and Ancillary powers,' the Supreme Court of the United States has used the *inter-State* commerce power of Congress [Art. 1, Sec. 8 (3)] as a most potent means of expansion of the federal power.<sup>24</sup>

Thus, the power to regulate *inter-State* Commerce includes—the power to control all necessary *incidents* thereto<sup>25</sup> such as bills of lading,<sup>1</sup> contracts of sale and lease of property connected with *inter-State* commerce.<sup>2</sup> Again,

"The power of Congress to regulate commerce carries with it the power over all ~~instruments~~ and instrumentalities by which commerce is carried on."<sup>3</sup>

So, regulation of *inter-State* commerce means—(i) regulation of the instruments of transport, (ii) regulation of the goods that are in transit, (iii) regulation of the persons carrying on that commerce.

Formerly, the Supreme Court took the view that the commerce power enabled the Congress to regulate only transactions of 'Commerce' but not activities other than commerce even though they might have substantial *effect* on *inter-State* commerce, *e.g.*, a monopoly.<sup>4</sup> But, in recent years, the liberal interpretation of 'regulate,' as well as 'Commerce' has led to the result that anything which has a *substantial effect* on *inter-State* commerce may be regulated,<sup>5</sup> *e.g.*, labour relations, that might affect such commerce<sup>6</sup>; an electric power plant which supplied its output to customers within the State but some of such customers were themselves engaged in *inter-State* commerce<sup>7</sup>; child labour.<sup>8</sup> It has also been held that even *inter-State* commerce may be regulated, if necessary, in order

(22) *U. S. v. De Witt*, (1824) 9 Wall. 41.

(23) *Robbins v. Shelby County Taxing District*, (1887) 120 U.S. 489.

(24) *Leisy v. Hardin*, (1890) 135 U.S. 100.

(25) *Milling Co. v. Bondurant*, (1904) 196 U.S. 1.

(1) *Almy v. California*, (1860) 24 How. 169.

(2) *Caldwell v. N. Carolina*, (1903) 187 U.S. 622.

(3) *Monongahela Bridge Co. v. U.S.*, 148 U.S. 312.

(4) *U. S. v. Knight Co.*, (1895) 156 U.S. 1.

(5) On this point, see the article "The Indian Constitution through American eyes," (1949) F.L.J. at pp. 177-178 (Jour.).

(6) *National Labour Relations Board v. Jones*, (1937) 301 U.S. 1.

(7) *Consolidated Edison Co. v. National Labour Relations Board*, (1938) 305 U.S. 197.

(8) *U. S. v. Darby Lumber Co.*, (1941) 312 U.S. 100.

to make *effective* regulation of inter-State rates to ensure a fair return,<sup>9</sup> and for this end rates may be reduced in some States and increased in others,<sup>10</sup> or some companies earning extra return may be compelled to contribute for advance loans to companies running below fair return.<sup>11</sup>

"Such regulation is not a forbidden invasion of State power merely because either its motives or its consequence is to restrict the use of articles of commerce within the States of destination. . . . It is no objection to the assertion of the power to regulate inter-State commerce that its exercise is attended by the same *incidents* which attend the exercise of the police power of the States."<sup>12</sup>

*Australia.*—Under Sec. 51 (i) of the Australian Constitution Act, 1900, the Commonwealth Parliament is competent to make laws with respect to—

"Trade and commerce with other countries, and among the States."

The words 'among the States' has been interpreted to mean 'intermingled with. . . .'<sup>13</sup>

It has been held that, subject to Sec. 92, a State has *concurrent* power to legislate with respect to *inter-State* trade and commerce,<sup>14</sup> by reason of Sec. 109. The American doctrine of exclusiveness of the federal power over inter-State commerce has not been imported into Australia.<sup>15</sup> The reason is that in the Australian Constitution, there is a specific guarantee of freedom of inter-State trade and commerce (Sec. 92).

*Intra-State* trade and commerce, on the other hand, is reserved exclusively to the States, by Sec. 107. Hence, Parliament cannot affect carriers engaged in intra-State trade through its power over navigation<sup>16</sup> or air navigation.<sup>17</sup>

*Canada.*—Sec. 91 (2) of the British North America Act confers upon the Dominion Parliament exclusive legislative authority over—

"The regulation of trade and commerce."

This does not mean however, that the Dominion Parliament has power to regulate the intra-State or internal trade of a Province. Practically, therefore, the above clause is confined to 'inter-provincial' trade and commerce only. Thus,—

"It includes political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and may, perhaps, include general regulations of trade affecting the whole Dominion, but it does not comprehend the power to regulate by legislation the contracts of a *particular* business or trade, such as the business of insurance, in a single Province."

Nor does the *importance* of the particular trade or business affect the matter; when the British N. America Act has taken such forms of business out of Provincial jurisdiction [Sec. 92 (13) and (16)], as in the case of 'banking' [Sec. 91 (15)], it has done so by express words.

#### WHEN DOES COMMERCE BECOME 'INTER-STATE'.

(A) *U.S.A.*—In the U.S.A. it has been held that commerce which crosses the territorial limits of a State is regarded as inter-State from the point of departure from within one State down to its destination within another State.<sup>18</sup>

(9) *Wisconsin v. Chicago*, (1922) 257 U.S. 563.

(10) *New York v. U. S.*, (1947) 91 L. Ed. 1083.

(11) *Dayson-Goose R. R. v. U. S.*, (1924) 263 U.S. 456.

(12) *U. S. v. Darby Lumber Co.*, (1941) 312 U.S. 100.

(13) *Huddart Parker, Ltd. v. Moorehead*, (1908) 8 C.L.R. 330.

(14) *James v. Commonwealth*, (1936) A.C. 578.

(15) *Kerr*, Australian Constitution, p. 112; *Victoria v. Commonwealth*, (1942) 66 C.L.R. 488.

(16) *New Castle Steamship Co. v. A.G. for Commonwealth*, (1921) 29 C.L.R. 357.

(17) *R. v. Burgess*, (1936) 55 C.L.R. 609.

(18) *Gibbons v. Ogden*, (1824) 9 Wh. 1.

The journey *begins* when the goods are turned over to the *Inter-State carriers*, such as the railway.<sup>19</sup> When the goods are to be carried by some natural course, for example, by floating logs down a river, the journey does not begin until the goods begin to move.<sup>20</sup> There is no interruption of the journey so as to lose its inter-State character, if the goods are stopped in the course of the journey only for the sake of convenience of transportation or safe delivery.<sup>21</sup> A carrier, though wholly operating within a State, may yet be engaged in inter-State commerce, if it accepts goods for transportation to other States.<sup>22</sup> Since the inter-State journey commences from the point of entrusting to a common carrier, for transportation into another State, the journey of the goods to the depot or terminus of the carrier is no part of the inter-State journey.<sup>23</sup>

The journey *ends* when the goods are "commingled" with the goods of the State of destination. This takes place in various ways:

(a) For example, when the original packages in which the goods were packed have been broken. This doctrine is known as the *Original Package Doctrine*.<sup>24</sup> The doctrine, however, does not mean that even where small packages are resorted to for the purpose of evading State taxation, the inter-State character would not terminate until that package is broken by the ultimate consumer.<sup>25</sup>

The doctrine of *original package* was thus explained in *Brown v. Maryland*<sup>1</sup>:

"When the importer has ■ acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character ■ an import, and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

(b) Similarly does the journey end when the goods come to rest in the State destination, say in ■ warehouse.<sup>2</sup>

The power of State taxation depends upon the termination of the inter-State journey. Thus, it has been held that:

(a) When goods have become part of the general mass of property in the State, they are liable to be taxed in the usual manner. (b) Such taxation must not be conditioned upon the fact that they have come from another State.<sup>3</sup> (c) No tax may be imposed by the State before the goods terminate their inter-State journey in the foregoing sense. Thus:

(i) A Statute of Missouri requiring a license for sale by travelling dealers of certain articles which were not the produce of that State was held void, being a regulation of inter-State commerce and not ■ mere tax upon the business of selling goods.<sup>4</sup>

(ii) More radical was the case of *Robbins v. Shelby County*,<sup>5</sup> where a State Act requiring a licence for sale of goods by sample (without saying anything about the origin of such goods) was held to be void in so far as it purported to apply to inter-State sales. The whole transaction goes out of the States' jurisdiction and becomes inter-State commerce, subject to federal regulation, from the point of its start.<sup>6</sup>

(19) *Pennsylvania R. R. Co. v. Knight*, (1904) 192 U.S. 21.

(20) *Goe v. Errol*, (1886) 116 U.S. 517.

(21) *Champion v. Brattleboro*, (1922) 260 U.S. 366.

(22) *Daniel Ball*, (1870) 10 Wall. 557.

(23) *Goe v. Errol*, (1886) 116 U.S. 517.

(24) *Leisy v. Hardin*, (1890) 135 U.S. 100.

(25) *Austin v. Tennessee*, (1900) 179 U.S. 343.

(1) (1827) 12 Wh. 419.

(2) *Woodruff v. Parham*, (1868) 8 Wall. 123.

(3) *Brown v. Houston*, (1885) 114 U.S. 622.

(4) *Welton v. Missouri*, (1876) 91 U.S. 275.

(5) (1887) 120 U.S. 489.

(6) *Pennsylvania R. R. Co. v. Knight*, (1904) ■ U.S. 21.



On the other hand '*intra-State*' means commerce that begins and ends within the bounds of a single State.<sup>7</sup> It is only that State which can deal with such commerce. But if at *any* point between its start and destination, the traffic passes *outside* the boundaries of the particular State though it is the crossing of State borders that determines whether a commerce is inter-State or not, once it is held that commerce is 'inter-State' Congressional regulation will not stop at the external boundary of a State but may enter its interior so as to be capable of authorising the disposition of the articles of inter-State trade until they become mingled with the common mass of property within that State.<sup>8</sup> The federal power of regulation of inter-State commerce covers the entire course of that commerce from the point of its origin to that of its destination; and even though the destination lies within the territory of a State, the State laws must give way to federal regulation relating to such commerce.<sup>7</sup>

(B) *Australia*.—In Australia, the doctrine of 'original package' has not been accepted as an 'inflexible rule.'<sup>9-10</sup>

"In some case it is either impossible of application from the *nature* of the commodity or is attended with added circumstances which render it of little or no value. The one relevant question always is—are the given transactions in the circumstances *part of trade and commerce among the States?*"<sup>10</sup>

In *McArthur v. Queensland*,<sup>11</sup> it was observed,—

"Commercial transactions are multiform and each transaction that is said to be inter-State must be judged of by its *substantial nature* in order to ascertain whether and how far it is or is not of the character predicated. A given transaction which taken by itself would be domestic, as for instance, transport between two points within a State, may in a particular instance be of an inter-State nature by reason of its *association* as part of a larger integer, having as a whole the distinctive character of commerce between States; on the other hand, a transaction which is inherently of an inter-State character, as passage of goods between two States, is nonetheless inter-State because the contract out of which it arises is itself a domestic contract. The mode of fulfilment of the contract may be optional, one mode being intra-State and the other (the one assumedly adopted) being inter-State movement, and in that case the inter-State movement remains inter-State whatever the impelling motive may be."

So, it is incompetent for a State legislature to impose a tax upon or to require a licence from, the *first seller*, of goods after entry thereof into the State, on the ground that the first sale is a part of the inter-State trade, even though the sale by itself is a purely domestic act.<sup>10</sup>

(C) *India*.—Our Constitution tries to avoid the intricacies of American case-law relating to the limits of *inter-State* and *intra-State* trade, by adopting the words '*within the State*' in Entry 26 of List II. In view of the residuary Entry 97 of List I, whatever is not trade within the State, must necessarily be 'inter-State trade' within the scope of List I, for there is no scope for any third category. Perhaps the framers of our Constitution have been influenced by the observations of the Australian High Court in *McArthur v. Queensland*,<sup>11</sup> quoted *ante*. The application of the doctrine of *original package* will not, therefore, be called for in India. It is the substantial character of the trade or commerce which will determine its character, *viz.*, whether it is a matter of domestic trade or trade within the State, or an 'inter-State trade.' If it falls within the category of 'inter-State trade,' there will be no question of *terminii*, inasmuch as the power of Parliament will extend over the entire course of such trade.

It may also be expected that the words 'with respect to' inter-State trade and commerce would be liberally interpreted to include all ancillary matters within

(7) *Gibbons v. Ogden*, (1824) 9 Wh. 1.

(8) *Leisy v. Hardin*, (1890) 135 U.S.

100.

(9) Wynes, Legislative and Executive Powers, p. 270.

(10) *Commonwealth Oil Refineries v. South Australia*, (1926) 38 C.L.R. 408 (428).

(11) (1928) 28 C.L.R. 530 (549).

the exclusive power of Parliament, following American precedents as far as possible without violation to the other considerations indicated above.

It is also be noted that all the three Entries of *our* Constitution differ from the American and Canadian provisions quoted above, and follows the Canadian, by omitting the word 'regulation' which has been held in *Canada*<sup>12</sup> and the *United States*,<sup>13</sup> and *Australia*<sup>14</sup> to preclude prohibition. But under *our* Constitution the legislative power of both the Union and State Legislature includes the power to prohibit any particular act of trade or commerce, subject, of course, to Arts. 301-5, *ante*. There is no expression confining the power of the Legislature to mere 'regulation.'

#### INDIA

*Distribution of legislative power with respect of Trade and Commerce in India.*—While foreign trade and commerce is dealt with in Entry 41 of List I, the legislative power as regards trade and commerce within a State or between different States of India, are dealt with in 3 other Entries of the 7th Schedule.

Entry 42 of List I, is—"Inter-State trade and commerce."

Entry 26 of List II, is—"Trade and commerce within the State subject to the provisions of Entry 33 of List III."

Entry 33 of List III, is—"Trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union is declared by Parliament by law to be expedient in the public interest."

Since the three entries are to be read together, and under Art. 246, the State and Concurrent powers are to be read subject to the exclusive power of Parliament with respect to any matter of List I, it follows that when a matter is *with respect to* 'inter-State trade and commerce,' the jurisdiction of Parliament is exclusive, irrespective of any other question [subject, of course, to Art. 304, already noted] so, the State Legislature shall have no power in connection with inter-State trade or commerce, outside the scope of Art. 304.

But when the matter is with respect to 'trade and commerce' *within* the State, the State Legislature has exclusive power, subject, however, to the power of Parliament with respect to inter-State trade and commerce [*vide* Art. 246 (3)]. But even when the matter is with respect to trade and commerce within the State, but the trade and commerce relates to the products of industries the control of which by the Union has been declared by Parliament to be expedient in the public interest, the legislative power shall be *concurrent*. The power of Parliament to declare industries to be of the above nature is conferred by Entry 52 of List I.

In short, the power of the State Legislature under Entry 26 of List II, is subject to the powers conferred by Entry 42 of List I and 33 of List III.

Leaving aside Entry 33 of List III, the question before us is what is 'inter-State trade' and what is 'trade within the State.'

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects nor confined to one State, but not including universities.

(12) *Re Board of Commerce Act*, (1922) U.S. 420.

1 A.C. 191.

(13) *United States v. Hill*, (1918) 248

(14) *Australia v. Bank of N.S.W.*, (1949)

2 All E.R. 755 (771) P.C.).

## OTHER CONSTITUTIONS

*U.S.A.*—There is no express grant in the Constitution relating to incorporation, but it has been held that Congress is competent to incorporate companies as a means of execution of any of its expressly granted powers.<sup>15</sup>

*Australia.*—Under Sec. 51 (xx) of the Constitution Act, the Commonwealth Parliament has exclusive jurisdiction over—

“Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.”

This placitum does not confer on the Commonwealth Parliament the power to *create* corporations; it is limited to legislation as to foreign Corporation and trading and financial corporations *created by State law*.<sup>16</sup> [See also Sec. 51 (xiii) under next Entry],—to regulate their transactions affecting the public.<sup>17</sup>

*Canada.*—There is no express grant in favour of the Dominion Parliament, but section 92 (11) gives exclusive power to the Provinces over—

“the incorporation of companies with Provincial subjects”,  
and the residuary powers of incorporation accordingly belongs to the Dominion.

On the other hand, a Province has exclusive right of legislation as regards ‘property and civil rights in the Province’.

From the above provisions, it has been held, on the one hand, that—

(a) The power of Provincial Legislatures to make laws relating to incorporation of companies with Provincial objects does not extend to the passing of legislation which strikes ‘at capacities which are the natural and logical consequences’ of the incorporation by the Dominion Government of companies ‘with other than Provincial objects’.<sup>18</sup>

(b) A Provincial Legislature may pass laws applying to companies without distinction and thereby requiring companies not incorporated in the Province to register for limited purposes, *e.g.*, furnishing information; or laws of general application regulating *procedure*, *e.g.*, directing security of costs, but not laws which interfere with the status of Dominion companies as such or which prevent them from exercising powers conferred upon them by Dominion statute.<sup>19</sup> Thus—

(i) A Provincial statute which prevented Dominion companies as such from carrying on business in the Provinces unless registered or licensed and subjected them to penalties, was declared *ultra vires*.<sup>20</sup>

(ii) Provincial Acts which prohibited Dominion Companies from selling their shares in the Province without the consent of the Provincial Commissioner was declared *ultra vires* on the ground that it ‘sterilized’ the Dominion Company in all its functions and activities ‘from the moment of its incorporation’.<sup>21</sup>

(iii) A Provincial legislation which was really intended at preventing the operation of Dominion Banking Companies, and was only nominally a taxing measure, was held void.<sup>22</sup>

On the other hand,—the power to regulate ‘trade and commerce’ enables the Canadian Parliament to prescribe the extent of powers of companies, the objects of which extend to the whole Dominion. But such power cannot be exercised in such a way as to trench on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general. Even when a company is incorporated

(15) *McCulloch v. Maryland*, (1814) 4 Wheat 316.

(16) *Huddart Parker v. Moorehead*, (1909) 8 C.L.R. 330.

(17) *Appleton v. Moorehead*, (1909) 8 C.L.R. 330.

(18) *John Deere Plow Co. v. Wharton*, (1915) A.C. 330.

(19) *G. W. Saddlery Co. v. The King*, (1921) 2 A.C. 91.

(20) *A. G. v. Alberta*, A.I.R. 1939 P.C. 53.



by the Dominion Government, it is not the less subject to provincial laws of general application enacted under powers conferred under section 92.<sup>21</sup> Thus—

"A Provincial Law which prohibited *any* person from trading in securities, unless registered with the approval of the Attorney-General, was held to be valid, to affect Dominion Companies. It was observed that a Dominion company constitutes with powers to carry on a particular business, is—

"subject to the competent legislation of the Province as to that business and may find its special activities completely penalised as by legislation against drink traffic or by the laws as to hold land. If it is found to trade in securities there appears no reason why it should not be subject to competent laws of the province as to the business of all persons who trade in securities. . . . "22

*Government of India Act, 1935.*—Item 33 of List I was—

"Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by an Acceding State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit, but not including universities."

### INDIA

**CHARACTERISTICS OF A CORPORATION.**—A Corporation is an artificial person established for preserving in perpetual succession certain rights, which being conferred on natural persons only would fail in process of time.<sup>23</sup>

A corporation is an artificial person, existing only in contemplation of law and possessing only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.<sup>24</sup> A corporation *sole* consists of only one member at a time. A corporation *aggregate* consists of a number of persons, having in the aggregate an existence, rights and duties distinct from those of the individual members who compose it at any time. It has a perpetual succession, a name and a common seal.

The present Entries relates to corporations aggregate, such as ■ incorporated company, *i.e.*, a corporation formed for the purpose of carrying on a business for profit and incorporated by an act of the Legislature.

In English law, a corporation aggregate has certain general characteristics:

(i) It has power to make bye-laws for its own government and transacts its business under the authority of a common seal. Such bye-laws are binding, unless (a) contrary to law, (b) unreasonable or (c) against the common benefit.<sup>25</sup>

(ii) It has no soul nor tangible form, but enjoys a legal entity, sues and is sued by its corporate name and holds and enjoys property by such name.

(iii) The several members of a corporation and their successors constitute but one person in law. The law knows only the body corporate and not the individuals constituting it.<sup>1</sup>

### INDIA

*"Incorporation of trading and inter-State corporations".*—Entries 43-4 have to be read together. They confer exclusive jurisdiction upon Parliament not over all corporations; the only corporations that come within the scope of these the Entries are (a) 'trading corporations', including banking, insurance and financial corporations (excluding co-operative societies) whether their business

(21) *John Deere Plow Co. v. Wharton*, (1915) A.C. 330.

(22) *Lymburn v. Maryland*, (1932) A.C. 318.

(23) Wharton's Law Lexicon.

(24) *Dartmouth College Case*, (1819) 17 U.S. 518.

(25) *Kruse v. Johnson*, (1898) 2 Q.B. 91.

(1) Wharton's Law Lexicon.

is confined within one state or not; (b) inter-State corporations, whether trading or not (excluding universities).

These two Entries of List I, again, are to be read with Entry 32 of List II, which gives the State Legislature exclusive jurisdiction in respect of all corporations other than those specified in Entries 43-4 of List I; Universities other than those specified in Entry 63 of List I; co-operative societies.

*"Incorporation."*—This means the statutory recognition of the formation of a corporation. At the time of incorporation by statute, the Legislature may ratify and confirm agreements made by the promoters of a company prior to incorporation. The effect of such ratification or confirmation is that the agreement would be as obligatory and binding on the parties as if these provisions had been enacted in the form of a statute.<sup>2</sup>

*"Winding up"*.—The specific enumeration of this power improves upon the Australian placita, where it has been doubted whether 'corporation' would include the power of 'winding-up'.<sup>3</sup>

*Existing Laws.*—Indian Companies Act<sup>4</sup> (VII of 1913); Companies (Foreign Interests) Act<sup>5</sup> (XX of 1918); Public Companies (Limitation of Dividends) Act<sup>6</sup> (XXX of 1949); Industrial Finance Corporation Act<sup>7</sup> (XV of 1948); Damodar Valley Corporation Act<sup>8</sup> (XIV of 1948); Road Transport Corporation Act<sup>9</sup> (XXXII of 1948); Banking Companies Act (X of 1949).

#### 45. Banking.

##### OTHER CONSTITUTIONS

*U. S. A.*—The United States Constitution is altogether silent on the subject of banking, and since the Federal Legislature has only enumerated powers, it was originally supposed that it was a subject for State regulation. But the doctrine of 'Implied powers' was strikingly applied to extend the power "to coin money and regulate the value thereof" [Art. I, Sec. 8 (5)], to include the power to regulate paper money and banking in general,<sup>10</sup> and since then Congress has controlled the entire national banking system by enacting the Federal Reserve Act, 1913 and a series of other banking Acts.

*Australia.*—Under Sec. 51 (xiii) of the Constitution Act, 1900, the Commonwealth Parliament has the power to legislate with respect to—

"Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money."

The power to legislate with respect to banking includes a power to legislate with respect to customs of a bank in their capacity as customers of the bank.<sup>11</sup>

(2) *Caledonian Ry. v. Greenock*, (1874) 2 H.L. 347; *International Ry. v. Niagara Parks*, A.I.R. 1937 P.C. 214.

(3) Wynes, *Legislative & Executive Powers*, p. 148.

(4) Lays down the law relating to the constitution, incorporation and administration of companies.

(5) Prohibits the alteration of articles of association which restrict foreign interests in certain companies.

(6) Limits the dividends which may be paid by public companies.

(7) Provides for the establishment of an Industrial Finance Corporation for the purpose of making credit more readily available to industrial concerns in India, particularly where normal banking accommodation is inappropriate or impracticable.

(8) Sets up a Corporation called the Damodar Valley Corporation which will be an autonomous body within the framework of the Act. The objects and functions of the Corporation will be—(a) to control flood in the Damodar river; (b) to utilise its water for irrigation, generation of electrical energy, navigation; (c) to promote sanitation and economic and social welfare of the Damodar valley, and the like.

(9) Provides for the incorporation of Road Transport Corporations in which the Central and Provincial Governments shall be properly represented, for the purpose of improving road transport facilities.

(10) *McCulloch v. Maryland*, (1819) 4 Wheaton 316.

(11) *Melbourne Corporation v. Commonwealth*, (1947) 74 C.L.R. 31 (51).

But under the present power, the Commonwealth cannot totally prohibit private banking or provide for the extinction of private banks, for that would mean a restriction of 'inter-State trade, commerce and inter-course', in contravention of Sec. 92 of the Constitution Act.<sup>12</sup>

*Canada.*—Banking is an exclusive subject for the Dominion Parliament, under Sec. 91 (15) of the British North America Act, 1867:

"Banking, incorporation of banks, and the issue of paper money."

"Banking" is an expression "wide enough to embrace every transaction coming within the legitimate business of a banker".<sup>13</sup> A banker has been defined as "a dealer in credit".<sup>14</sup> The business of "banking" is so wide that it could not be operated without interfering with and modifying "property and civil rights" which is a topic allotted to the Provincial Legislatures under Sec. 92 (13).<sup>15, 16</sup> Thus, bank deposits are in a sense "property", but the transaction of receiving and repaying deposits is a legitimate business of a banker.<sup>15</sup> Similarly, the Dominion Parliament can legislate in respect of warehouse receipts taken by a bank in the due course of its business, though it thereby modifies civil rights in the Province and though it may conflict with Provincial statutes relating to warehouse receipts as a negotiable document.<sup>16</sup>

On the other hand,—if the 'pith and substance' of a Provincial Act is 'banking',—to make loans which involve the expansion of credit, the Provincial Act is *ultra vires* by reason of Sec. 91 (15) of the Br. N. America Act, and it is immaterial that such business was not being done by the Banks in Canada in 1867.<sup>17</sup> Similarly, if the object of a Provincial legislation is not in a true sense "Taxation in order to the raising of a revenue for Provincial purposes" [Sec. 92 (2)], but to prevent the operation within the Province of those banking institutions which have been called into existence by the Dominion Parliament, the Provincial legislation is *ultra vires*.<sup>18</sup> Again, a Provincial statute which sought to confiscate all deposits in 'credit institutions' whenever they have not been the subject of any operation within 30 years, was held to be 'in pith and substance' a legislation relating to banking (being aimed at bank deposits); even though the word 'bank' was avoided in the statute and a bank deposit is in a sense a matter of 'property'. Hence, the Provincial statute was *ultra vires*.<sup>19</sup>

*Government of India Act, 1935.*—Item 38 of List I of the Act was—

"Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State."

#### INDIA

*'Banking'.*—This Entry must be limited to laws which affect the conduct of the business of banks *qua banks*. A law of limitation or a law relating to the compulsory acquisition of land may affect the rights of a bank just as they may affect other property owners. It would be too much to say that every law, which in its operation might affect the property or interests of a bank just as it affects

(12) *Australia v. Bank of N. S. W.*, (1949) 2 All E.R. 755 (P.C.) affirming *Bank of N. S. W. v. Commonwealth*, (1948) 76 C.L.R. 1.

(13) *Tennant v. Union Bank of Canada*, (1894) A.C. 31.

(14) *Alberta Legislation Reference*, (1938) S.C.R. 100 (116), approved in *A. G. of Alberta v. A. G. of Canada*, (1947) 52 C.W.N. 236 (P.C.).

(15) *A. G. for Canada v. A. G. for Quebec*, A.I.R. 1947 P.C. 44.

(16) *Tennant v. Union Bank*, (1894) A.C. 31.

(17) *A. G. of Alberta v. A. C. of Canada*, (1947) 52 C.W.N. 236 (243) (P.C.).

(18) *A. G. of Alberta v. A. G. of Canada*, A.I.R. 1939 P.C. 53 (58).

(19) *A. G. of Canada v. A. G. of Quebec*, (1946) 51 C.W.N. 427 (P.C.).



the property or the interests of other persons, would constitute an encroachment on this Entry.<sup>20</sup>

Our Constitution, however, assigns to the Union Parliament exclusive jurisdiction in respect of banking as a whole. There is no exception in respect of State Banking as in Australia.

*The business of banks.*—"A bank is a corporation, partnership or individual carrying on the business of banking. The business of banking, strictly speaking, is the receipt of money from or on account of a customer, to be repaid on demand or when drawn by cheque. The judicial recognition of the banker's lien implies the inclusion in banking business of the making of advances or the granting of overdrafts to customers"<sup>21</sup>

*Existing Laws.*—Banking Companies Act (X of 1949); Imperial Bank of India Act (XLVII of 1920).

46. Bills of exchange, cheques, promissory notes and other like instruments.

#### OTHER CONSTITUTIONS

*Australia.*—Sec. 51 (xvi) of the Constitution Act, 1900, gives the Commonwealth Parliament power to legislate with respect to—

"Bills of exchange and promissory notes."

*Canada.*—Sec. 91 (18) of the Br. N. America Act gives the Dominion Parliament exclusive power to legislate as regards—

"Bills of exchange and promissory notes."

*Government of India Act, 1935.*—Item 28 of List I of that Act was the same as the present Entry.

#### INDIA

*Negotiable instruments.*—A negotiable instrument is an instrument which is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it *pro tempore*.<sup>22</sup>

In India, the law relating to negotiable instruments is codified in the Negotiable Instruments Act (XXVI of 1881). Sec. 13 of this Act enumerates the instruments which are 'negotiable instruments' under the Act:

"A negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer."

Sec. 14 says—

"When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated."

The definitions of promissory note, bill of exchange and cheque are as follows:<sup>23</sup>

A "promissory note" is an instrument in writing (not being a banknote or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

(20) *Bank of Commerce v. Nripendra*, A.I.R. 1945 F.C. 7 (8).

(21) *Halsbury's Laws of England*, (1907), Art. 1148.

(22) *Crouch v. Credit Foncier*, (1873) 8

Q.B. 374.

(23) In this connection, the definitions in the English Bills of Exchange Act, 1882, may be referred to.

*Reason behind the Entry.*—The reason why these instruments are assigned to the Union Legislature is that uniformity of practice regarding these instruments for the whole of India is necessary. As they can be freely negotiated, they can circulate from Province to Province, and after successive endorsements can even be sued upon in Provinces other than those in which they were executed.<sup>24</sup>

#### 47. Insurance.

##### OTHER CONSTITUTIONS

*U.S.A.*—Though the Supreme Court allowed federal legislation regarding banking<sup>25</sup> as early as 1819, it refused to recognise insurance as 'inter-State commerce',<sup>1</sup> as a result of which insurance was subject to State control and, as a result, the business as well as the insurants suffer owing to diverse conflicting laws. The Supreme Court has recently reversed its earlier decisions and opened the way for federal legislation.<sup>2</sup>

*Australia.*—Sec. 51 (xiv) of the Constitution Act, 1900, gives the Commonwealth Parliament exclusive power with respect to—

"Insurance, other than State Insurance; also State insurance extending beyond the limits of the State concerned."

*Burma.*—Item 5 (24) of the Union List is—'Insurance'.

*Government of India Act, 1935.*—Item 37 of List I of the Act was—

"The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province."

##### INDIA

*'Insurance'.*—"Insurance is the act of providing against a possible loss, by entering into a contract with one who is willing to give assurance, that is, binds himself to make good such loss should it occur. In this contract, the chances of benefit are equal to the insured and the insurer. The first actually pays a certain sum and the latter undertakes to pay a larger, if an accident should happen."<sup>3</sup>

The present Entry is wider than the entry in Sec. 51 (xiv) of the Australian Constitution inasmuch as State insurance is not excluded from the Union list.

Insurance is the act of providing against loss or damage which may be caused by a contingent event such as fire, marine, accident, death and the like. But worker's compensation is not insurance.<sup>4</sup> Legislation under this head would extend to provisions relating to dividends, publication of accounts, value of policies, standard of policies, prescribing investment, requiring deposits in money or in bonds, preventing rate discrimination, limitation of risks and the like.<sup>5</sup>

*Existing Law.*—Insurance Act (IV of 1938).

#### 48. Stock exchanges and futures markets.

#### 49. Patents, inventions and designs ; copyright ; trade-marks and merchandise marks.

(24) *Subrahmanyam v. Muttuswami*, (1940) 45 C.W.N. (F.R.) 1 (11).

(25) *McCulloch v. Maryland*, (1819) 4 Wh. 316.

(1) *Paul v. Virginia*, (1869) 1 Wall. 168.

(2) *U. S. v. S. E. Underwriters' Asso-*

*ciation*, (1944) 322 U.S. 533.

(3) Wharton's Law Lexicon.

(4) *Australian Steamships v. Malcolm*, (1915) 19 C.L.R. 298 (327).

(5) Wynes, *Legislative & Executive Powers*, p. 144.

## OTHER CONSTITUTIONS

*U.S.A.*—Art. I, Sec. 8 (8) of the Constitution gives Congress the power—

“to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

The above clause gives Congress the power over patents and copyrights. Congress has no express grant as to ‘*trade-mark*.’ But it has been held that it may grant exclusive right of trade-mark under its ‘commerce’ power but only as regards trade-marks used in foreign or inter-State commerce.<sup>6</sup> The States may nevertheless (in the exercise of their police power) place restrictions upon the use of such trade-marks, such as do not directly interfere with the privileges acquired from the Federal grant.<sup>7</sup>

*Australia.*—Sec. 51 (xviii) of the Constitution Act, gives the Commonwealth Parliament power to legislate with respect to—

“Copyrights, patents of inventions and designs, and trade-marks.”

*Canada.*—Cl. (22) of Sec. 91 of the Br. N. America Act gives exclusive power to the Dominion to deal with—

“Patents of invention and discovery”, while cl. (23) relates to—

“Copyrights.”

There is no specific entry relating to trade-marks. But it has been held<sup>8</sup> that the power to legislate with respect to trade-marks is an exclusive power of the Dominion Legislature under Cl. (2) of Sec. 91 relating to—“regulation of trade and commerce”. It has been further held in that case<sup>9</sup> that a power to regulate trade-marks includes the power to create a ‘*national mark*’ which is now a usual feature of international commerce.

*Burma.*—Item 5 (27) of the Union List includes the present subject.

*Government of India Act, 1935.*—Item 27 of List I was—

‘Copyright, inventions, designs, trade-marks and merchandise marks.’

## INDIA

‘*Patent*’.—A patent is an exclusive right or privilege of making, using and selling an invention (which means any manner of new manufacture and includes an improvement), granted under the law of patents to the ‘true and first inventor’ thereof [*cf.* Indian Patents & Designs Act (II of 1911)]. In order to be patentable, an invention—(a) should relate to a manner of manufacture; (b) should be novel; (c) should be the outcome of inventive ingenuity; (d) should have utility; (e) should not be contrary to law or morality.

*Copyright.*—Copyright, in short, is the exclusive right or privilege of printing, re-printing, selling and publishing of the original work of an author. It is defined in Sec. 1 (2) of the English Copyright Act, 1911, as follows [this definition is extended to India by Sec. 2 (2) of the Indian Copyright Act (III of 1914)]:

“Copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material for, whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public;.....”<sup>10</sup>

‘Copyright’ also applies to designs, and S. 2 (4) of the Indian Patents and Designs Act (II of 1911) defines copyright as—

(6) *Trade Mark Cases*, 100 U.S. 82.

(7) *Patterson v. Kentucky*, 97 U. S. 501.

(8) *A. G. of Ontario v. A. G. of Canada*, A.I.R. 1937 P.C. 99 (100).

(9) *A. G. of Ontario v. A. G. of Canada*, A.I.R. 1937 P.C. 99 (100).

(10) It includes such exclusive right as regards dramatic and musical works.



"the exclusive right to apply a design to any article in any class in which the design is registered."

*Design.*—The definition given in Sec. 2 (5) of the Patents and Designs Act, 1911, is as follows—

"'design' means any design applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining or any other means whatever, manual, mechanical, or chemical, separate or combined, but does not include any trade or property mark as defined in sections 478 and 479 of the Indian Penal Code."

*Invention.*—In Sec. 2 (8) of the Patents and Designs Act, 1911, an invention is defined as—

"any manner of new manufacture, and includes an improvement and an alleged invention."

*'Trade-mark'.*—The definition given in Sec. 2 (1) of the Trade Marks Act (V of 1940) is—

"'trade mark' means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to the mark whether with or without any indication of the identity of that person."

*Existing Laws.*—Patents and Designs Act (II of 1911); Copyright Act (III of 1914); Trade Marks Act (V of 1940); Indian Merchandise Marks Act (IV of 1889).

## 50. Establishment of standards of weight and measure.

### OTHER CONSTITUTIONS

*U.S.A.*—Congress has, under Art. 1, Sec. 8 (5), the power—

"to fix the standard of weights and measures."

Under this power Congress has by law established certain standards of length, mass and capacity. The enforcement of these standards, however, is left to the States. There is a National Bureau of standards which is the custodian of the national standards and which supplies to the States replicas of all sorts of standards kept by it, including even technical and scientific units and measures, meters, containers and the like. On the other hand, the States have undertaken inspection and prevention of fraud in respect of weights and measures, under their 'police-power.'<sup>11</sup>

*Australia.*—Sec. 51 (xv) of the Constitution Act, 1900, makes—"Weights and measures", a subject for Commonwealth legislation.

*Canada.*—Sec. 91 (17) of the Br. N. America Act gives the Dominion Parliament exclusive power in relation to—"Weights and measures".

*Burma.*—Item 5 (31) of the Union List is—"Standard weights and measures."

*Government of India Act, 1935.*—Item 51 of List I of the Act was—

'Establishment of standards of weight.'

### INDIA

*Existing Laws.*—Indian weights and Measures of Capacity Act (XXXI) of 1871; the Standards of weight Act (IX of 1939); Measures of Length Act (II of 1889).

(11) *Armour & Co. v. N. Dakota*, (1916) 240 U.S. 510.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

*Government of India Act, 1935.*—Item 34 of List I of the Act was—

“Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.”

*Burma.*—Item 5 (34) of the Union List is similar to the above item of the Government of India Act, 1935.

*Existing Laws.*—Indian Power Alcohol Act (XXII of 1948); Electricity Supply Act (LIV of 1948); Silk Board Act (LXI of 1948); Central Tea Board Act (XIII of 1949); Indian Tea Control Act (VIII of 1938); Coffee Market Expansion Act (VII of 1942); Rubber (Production and Marketing) Act (XXIV of 1947).

53. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 32 of List I was—

“Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.”

*Existing Laws.*—Petroleum Act (XXX of 1934).

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 36 of List I of that Act was similar to the present Entry.

*Existing Law.*—Mines and Minerals (Regulation and Development) Act (LIII of 1948); Indian Mines Act (IV of 1923).

55. Regulation of labour and safety in mines and oil fields.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 35 of List I was identical.

*Existing Law.*—Coal Mines Safety (Stowing) Act (XIX of 1939).

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

*Analogous Provision.*—See Art. 262, p. 575, *ante*.

*Existing Law.*—Damodar Valley Corporation Act (XIV of 1948).

### 57. Fishing and fisheries beyond territorial waters.

#### OTHER CONSTITUTIONS

*Australia.*—Sec. 51 (x) of the Constitution Act is—'Fisheries in Australia beyond territorial waters.'

*Burma.*—Item 2 (15) of the Union List is identical with the present Entry.

*Government of India Act, 1935.*—Item 23 of List I was identical.

#### INDIA

*Analogous Provisions.*—"Fisheries" is an exclusive State subject under entry 21 of List II, while "fisheries beyond territorial waters" is an exclusive Union subject under Entry 57 of List I. The State Legislature has thus exclusive competence over fisheries situated within the territory of its State, including the 3 miles adjoining the coast [*see p. 33, ante*].

58. Manufacture, supply and distribution of salt by Union agencies ; regulation and control of manufacture, supply and distribution of salt by other agencies.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 47 of List I was—'Salt'.

#### INDIA

'*Manufacture . . . of salt . . .*'—This Entry is an improvement upon Item 47 of List I of the Government of India Act, 1935. In the Government of India Act, 1935, Salt was an exclusive Federal subject without any qualification. The present Entry gives the Union Parliament exclusive and complete jurisdiction over the manufacture and distribution of salt only by *Union* agencies. As to the manufacture and distribution of salt by *other* agencies, the Union Parliament has only the power of regulation and control.

### 59. Cultivation, manufacture, and sale for export, of opium.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—The present Entry reproduces Item 31 of List I of the Act of 1935.

#### INDIA

*Analogous Provision.*—While the present entry gives the Union exclusive control over only cultivation, manufacture and sale for export,—duties of excise on the production of opium is a State subject under Entry 51 of List II.

*Existing Laws.*—The Opium Acts (XIII of 1857 and I of 1878), as extended by the Opium and Revenue Laws (Extension of Application) Act (XXXIII of 1950).

### 60. Sanctioning of cinematograph films for exhibition.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—The present subject was concurrent,—being Item 33 of List III.



## INDIA

*'Sanctioning of Films. . .'*—Departing from the Act of 1935, the Constitution makes sanctioning of films an exclusively Union subject, while other matters relating to cinemas is included in Entry 33 of List II.

*Existing Law.*—*Cinematograph Act* (II of 1918).

61. Industrial disputes concerning Union employees.

*'Industrial disputes concerning union employees'*.—The present Entry forms an exception to Entry 22 of List III which includes industrial disputes in general.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 11 of List I was—

"The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation."

*Burma.*—Item 5 (5) of the Union List is—

"Any Museum, Library or other institutions declared by Union law to be of national importance."

*Existing Laws.*—*Victoria Memorial Act* (X of 1903); *Imperial Library (Change of Name) Act*<sup>12</sup> (LI of 1948).

*Analogous Provision.*—See Entry 12 of List II.

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

*Government of India Act, 1935.*—Item 13 of List I was—

"The Benares Hindu University and the Aligarh Muslim University."

*Existing Law.*—*Aligarh Muslim University Act* (XL of 1920).

*Analogous Provisions.*—Universities other than those mentioned in the present Entry, are included in Entry 11 of List II.

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65. Union agencies and institutions for—

(a) professional, vocational or technical training, including the training of police officers ; or

(b) the promotion of special studies or research ; or

(c) scientific or technical assistance in the investigation or detection of crime.

(12) Changes the name of imperial Library to National Library.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 12 of List I was—

"Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies."

*Burma.*—Item 5 (6) of the Union List is the same as the above item of the Act of 1935.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

'Co-ordination. . . .'.—While 'education' is a State subject (Entry 11, List II), Entries 65 and 66 give the Union power to secure that the standard of research, etc., is not lowered at the hands of any particular State or States, to the detriment of national progress.

67. Ancient and historical monuments and records, and archaeological sites and remains, declared by Parliament by law to be of national importance.

*Government of India Act, 1935.*—Item 15 of List I was—

"Ancient and historical monuments; archaeological sites and remains."

## INDIA

*Analogous Provision.*—Archaeological sites, other than those declared by Parliament to be of national importance, are included in Entry 40 of List III.

*Existing Laws.*—Ancient Monuments Preservation Act (VII of 1904).

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India ; Meteorological organisations.

## OTHER CONSTITUTIONS

*Australia.*—Sec. 51 (viii) of the Constitution Act, 1900, gives the Commonwealth Parliament the power to legislate with respect to—

"Astronomical and meteorological observations."

*Government of India Act, 1935.*—Item 14 of List I was the same as the present Entry.

69. Census.

## OTHER CONSTITUTIONS

*Australia.*—'Census' is subject for Commonwealth legislation, under Sec. 51 (xi) of the Constitution Act, 1900.

*Canada.*—The Dominion Parliament has [Sec. 91 (6)] exclusive power in relation to—"The census and statistics."

*Burma.*—Item 5 (7) of the Union List is the same as the present Entry of our Constitution.

*Government of India Act, 1935.*—'Census' formed Item 16 of List I.

## INDIA

*Census.*—A census is "the official numbering of population with various statistics" (Concise Oxford Dictionary). The power to legislate with respect

to census includes the power to set up complete establishment of necessary departments, to prescribe at what times and in what manner the census shall be taken, and what information shall be supplied by what persons for the purpose.<sup>13</sup>

*Existing Law.*—Census Act (XXXVII of 1948).

70. Union public services ; all-India services ; Union Public Service Commission.

#### OTHER CONSTITUTIONS

*Australia.*—Sec. 52 (ii) of the Constitution Act confers upon the Commonwealth Parliament 'exclusive' power to make laws with respect to—

"Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth."

Under Sec. 69 of the Constitution Act, the following Departments have so far been transferred to the Commonwealth: Posts, telegraphs, telephones; Naval and military defence.

*Canada.*—Sec. 91 (8) of the Br. N. A. Act gives the Dominion Parliament power in relation to—

'The fixing and providing for the salaries and allowances of civil and other officers of the Government of Canada.'

*Burma.*—Item 5 (8) of the Union List is—'Union Services.'

*Government of India Act, 1935.*—Item 8 of List I exactly corresponded to the present Entry.

71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

*Government India Act, 1935.*—The present Entry corresponds to Item 9 of List I of the Act of 1935.

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President ; the Election Commission.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 40 of List I was as follows:

"Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder."

*Burma.*—Item 5 (9) of the Union List is—'Elections to the Union Parliament subject to the provisions of this Constitution'.

*Laws made by Parliament.*—Representation of the People Act (XLIII of 1950);<sup>14</sup> Parliament (Prevention of Disqualification) Act (XIX of 1950).<sup>15</sup>

73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House ; enforce-

(13) Wynes, *Legislative and Executive Powers*, p. 135.

(14) See pp. 285-286, *ante*.  
(15) See p. 314, *ante*.



ment of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

#### OTHER CONSTITUTIONS

*U.S.A.*—Each House of Congress has the power to punish for contempt any person (member or outsider) for refusing to give evidence before any of its Committees, unless, of course, there is any legal privilege.<sup>16</sup>

*England.*—See p. 323, ante.

*Government of India Act, 1935.*—Item 41 of List I was—

“The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature; and, to such extent as is expressly authorised by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.”

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

#### OTHER CONSTITUTIONS

*Burma.*—Item 5 (10) of the Union List Confines Entries 73 and 75 of our List I.

76. Audit of the accounts of the Union and of the States.

*Analogous Provision.*—See Arts. 149-151, pp. 432-5, ante.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court) and the fees taken therein; persons entitled to practise before the Supreme Court.

*Analogous Provisions.*—The jurisdiction and powers of Courts is dealt with by several Entries:

Entry 77, List I: Of the Supreme Court, relating to any matter.

Entry 95, List I: Of all Courts other than Supreme Court, relating to any matter in List I.

Entry 65, List II: Of all Courts other than Supreme Court, relating to any matter in List II.

Entry 46, List III: Of all Courts, except Supreme Court, relating to any matter in List III.

Constitution of Courts, again, is dealt with in the following Entries—

Entry 77, List I: Of the Supreme Court.

Entry 78, List I: Of the High Courts.

Entry 3, List II: Of all Courts, except the Supreme Court and the High Courts.

78. Constitution and organisation of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.

(16) *The Grain v. Daugherty*, (1927) 273 U.S. 135.

*Union's Control over High Courts.*—By the present Entry, the Union is given exclusive power over the constitution and organisation of the High Courts. Already, by Arts. 216-7, the power of appointment of the High Court Judges has been vested in the President. The power over constitution of the High Courts is given to Parliament for the sake of uniformity.

Again, legal profession is a concurrent subject [Entry 26, List III]. But, for the sake of uniformity, the Union is given, by the present Entry, the exclusive power of prescribing the qualifications for practising before the High Courts.

*Existing Law.*—Indian Bar Councils Act (XXXVIII of 1926).—Under the existing law, each High Court has its own rules regulating the right to practise before it. This has created anomaly between province and province. Thus, an Advocate who has argued a case before the Supreme Court, may not have the right to conduct it in some High Court where it may be sent on remand. The present Entry seeks to remove this anomaly, by enabling the Union Parliament to lay down uniform rules as regards enrolment of Advocates, and right of practice.

79. Extension of the jurisdiction of a High Court having its principal seat in any State to, and exclusion of the jurisdiction of any such High Court from, any area outside that State.

*'Extension of jurisdiction of High Court'.*—This Entry is explained by Art. 230, p. 498, *ante*.

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

*'Extension of powers of State police'.*—This entry is taken from Item 39 of List I of the Government of India Act, with verbal changes.

81. Inter-State migration ; inter-State quarantine.

#### OTHER CONSTITUTIONS

*Australia.*—Sec. 51 (ix) of the Constitution Act relates to—'Quarantine.' This is a concurrent power.

*Government of India Act, 1935.*—Item 50 of List I was—'Migration within India from or into a Governor's Province or a Chief Commissioner's Province.'

*Burma.*—Item 5 (37) of the Union List is—'Migration within the Union,' and item 3 (1) includes—'Port and inter-Unit quarantine.'

#### INDIA

*'Inter-State migration'.*—This is the legislative power referred to in Art. 19 (5), p. 68, *ante*. In making a law relating to the right of free movement from one State to another, Parliament must not impose any restrictions beyond those prescribed by Art. 19 (5).<sup>17</sup>

## 82. Taxes on income other than agricultural income.

## OTHER CONSTITUTIONS

*Australia.*—There being no limits to the objects of the Commonwealth taxing power [Sec. 51 (ii)], the Commonwealth has imposed income-tax [Income-Tax Act, 1915], on all taxable income from property or personal exertion, save those incomes which are exempted by the Act. The States having concurrent power of taxation [Sec. 109], may tax pensions paid by the Commonwealth,<sup>18</sup> or wages fixed by an Arbitration award.<sup>19</sup> But neither the Commonwealth nor a State can tax property belonging to each other [Sec. 114].

*Burma.*—Item 4 (6) of the Union List is—‘Taxes on income’, while item 4 (10) is—‘Excess Profits Tax’.

*Government of India Act, 1935.*—The present Entry reproduces item 54 of List I of the Act of 1935.

## INDIA

‘*Taxes on income*’.—Income-tax includes ‘excess profits tax’ by virtue of Art., 366 (29).

The power to tax income includes the power to tax foreign income of persons resident in India.<sup>20</sup>

*Income.*—The word ‘income’ is not defined in the Indian Income-tax Act, 1922. It connotes “a periodical monetary return ‘coming in’ with some sort of regularity or expected regularity from definite source. The source is not necessarily ■■■ which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall.”<sup>21</sup> It includes ‘world income’ and not merely income originating in India.

‘*Agricultural income*’.—See Art. 366 (1).

*Existing laws.*—Indian Income-tax Act<sup>22</sup> (XI of 1922); Government Trading Taxation Act (III of 1926); Excess Profits Tax Act<sup>23</sup> (XV of 1940); Business Profits Tax Act<sup>24</sup> (XXI of 1947); Taxation of Income (Investigation Commission) Act (XXX of 1947).

(18) *West v. Commissioner of Taxation*, (1937) 56 C.L.R. 657.

(19) *Tasmanian Steamers v. Lang*, (1938) 60 C.L.R. 111.

(20) *Wallace Bros. & Co., Ltd. v. Commissioners of Income-tax*, (1948) 52 C.W.N. 620 P.C.

(21) *Income-tax Commissioner v. Shaw Wallace*, (1932) 59 Cal. 1343 P.C.

(22) The Indian Income Tax Act, 1922 governs the assessment and levy of income-tax. The rates of income-tax and super-tax to be in force during each financial year are declared by the annual Finance Act. Both the Income-tax and the Super-tax are graduated according to rising slabs of income.

(23) The Business Profits Tax Act, 1947 has levied ■ special tax ■ business profits, a particular kind of income which also comes under the Income-tax Act. The scheme of the Business Profits Act, however, is that in computing income-tax or super-tax payable

under the Income-tax Act, the amount of business profits tax payable by any person shall be deducted. ‘Business’ is defined in S. 2 (3) of this Act as including “any trade, commerce or manufacture, or any adventure, in the nature of trade, commerce or manufacture, or any profession or vocation the profits of which ■ chargeable according to the provisions of s. 10 of the Indian Income-tax Act, 1922”. The rules for computation of the profits of a business are laid down in Sch. I of the Act, and certain kinds of business profits are exempted from the tax by S. 4. There is also provision for relief ■ account of ‘deficiency of profits’.

(24) In 1940, the Excess Profits Tax Act was enacted in order to impose ■ tax on “excess profits arising out of certain businesses in the conditions prevailing during the present hostilities”. This Act, as amended by Act XXII of 1947, is still in force.



## 83. Duties of customs including export duties.

## OTHER CONSTITUTIONS

*U.S.A.*—(1) The imposition of *import* duties is a federal power, following for the power of Congress 'to regulate commerce with foreign nations [Art. I, (8)]. Import duty or tariff' is levied in America both for purposes of revenue and of protection. There is a Tariff Commission, to advise the President and the Congress on tariff, and, generally, on the import trade. It classifies imported articles, and ascertains the imported cost and the production cost of these commodities in the U. S. A. and recommends that the tariff rate should be such as to place the American industry on the same footing as the foreign industry, so far as cost of production is concerned.

(2) But Congress is expressly prohibited from levying *export* duties. Art. I, Sec. 9 (5) says—

"No tax or duty shall be laid on articles exported from any State."

This clause has been interpreted to include not only exports from one State to another within the Union, but also exports from one State to a foreign country.<sup>25</sup> In the result, the American Legislature has no power to impose export duties, or to impose any tax burden on exports. Thus, a *general* sales tax on sporting goods was held not applicable to goods sold to a commission house for export.<sup>1</sup>

The States cannot impose either import or export duties without the consent of Congress [Art. I, Sec. 10 (2)].

*Australia.*—Under Sec. 90 of the Constitution Act, the Commonwealth Parliament has *exclusive* power over—'duties of customs'; the State being prohibited from imposing customs duties.

*Canada.*—The imposition of customs is a matter within the exclusive competence of the Dominion Parliament as appears from Sec. 122 of the British North America Act.<sup>2</sup>

*Burma.*—Item 4 (2) of the Union List is the same as the present Entry of our Constitution.

*Government of India Act, 1935.*—The present Entry reproduces item 44 of List I of the Act of 1935.

## INDIA

'*Customs*'.—Customs duties are levied upon commodities imported into this country from other countries or exported out of this country.<sup>3</sup>

"Customs duty is a duty on the importation or exportation whether by land or sea."<sup>4</sup>

The reason for making it a federal subject of legislation is that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied.<sup>5</sup>

A duty of customs being a tax on the *act* of importation or exportation, in order to be an 'export duty', the duty must be levied (i) either as a condition or by reason of the exportation of the goods, or (ii) a direct tax or duty on goods which are intended for exportation. So, where a *general* tax is levied on all goods alike, it cannot be construed as a duty on exports when falling on goods not then intended for exportation though they may happen to be exported afterwards.<sup>6</sup> On the other hand, ■ Provincial tax on all timber cut within the Pro-

(25) *American Steel Co. v. Speed*, (1904) 192 U.S. 500.

(1) *Spalding v. Edwards*, (1923) 262 U.S. 66.

(2) *Att.-Gen. v. Murphy Lumber Co.*, A. I.R. 1930 P.C. 173 (175).

(3) Cf. Wharton's Law Lexicon.

(4) *Commonwealth Oil Refineries, Ltd. v. S. Australia*, (1926) 38 C.L.R. 408.

(5) *Att.-Gen. v. Murphy Lumber Co.*, A. I.R. 1930 P.C. 173 (175).

(6) *Brown v. Houston*, 114 U.S. 622.

vince with a large rebate in cases where the timber was *used* in the Province was held to be an export tax.<sup>7</sup>

Customs duty is essentially imposed upon commercial dealings and is concerned more with the business of importation or exportation than with the person or the goods.<sup>8</sup> Hence, charges relating to *transport* of goods is not a duty of customs.<sup>9</sup>

*Existing laws.*—Land Customs Act (XIX of 1924); Sea Customs Act (VIII of 1878); Indian Tariff Act (XXXII of 1934); Protective Duties Act (XVII of 1946).

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

- (a) alcoholic liquors for human consumption ;
- (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

#### OTHER CONSTITUTIONS

*Australia.*—Under Sec. 90 of the Australian Constitution Act, the Commonwealth Parliament has *exclusive* power as regards—'duties of excise'.

*Burma.*—See item 4 (3) of the Union List.

*Government of India Act, 1935.*—Excise duties were divided between the Federation and the Provinces, by the Government of India Act, 1935.

Item 45 of the Federal List was—

"Duties of excise on tobacco and other goods manufactured or produced in India except—

- (a) alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics, non-narcotic drugs;
- (c) medicinal and toilet preparation containing alcohol, or any substance included in sub-paragraph (b) of this entry."

Item 40 of the Provincial List thus included the duties which are excluded from the Federal item—

"Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

- (a) alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics, non-narcotic drugs;
- (c) medicinal and toilet preparations containing alcohol or any other substance included in sub-paragraph (b) of this Entry."

The present Entry of the Constitution differs from item 45, quoted above, in so far as the present entry includes medicinal and toilet preparations including alcohol, etc. Entry 51 of List II also makes corresponding change.

*'Excise duty': What it means.*—A duty of excise is primarily levied upon ■ manufacturer or producer in respect of the commodity *manufactured or produced*. It is a tax upon *goods*, not upon sales or the proceeds of sale of goods.<sup>10</sup> A

(7) *A.-G. of Br. Columbia v. Macdonald*, C.L.R. 189.  
(1930) A.C. 357.

(8) *A.-G. for Br. Columbia v. Kingcome*,  
(1934) A.C. 45 (59).

(9) *Gilpin v. Commissioner*, (1934) 52

(10) *Governor-General v. Province of Madras*, (1945) 49 C.W.N. 381 (P.C.); affirming *Province of Madras v. Boddu Paidanna*, A.I.R. 1942 F.C. 33.

mere licence to sell or carry on business, unconnected with production imposed merely with respect to sale of goods as existing articles of trade and commerce independently of local production, is not a duty of excise. Nor is such a licence, though indirectly connected with production or manufacture an excise duty if it be *regulative* and not a form of taxation.<sup>11</sup>

"To be an excise, the tax must be levied 'upon goods'. . . The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods and must be of such a nature as to affect them as subjects of manufacture or production or as articles of commerce."<sup>12</sup>

Excise is analogous to customs duty, being an indirect tax, as distinguished from a direct or personal tax.<sup>13</sup>

"Customs and excise duties . . . are duties which are imposed in respect of commercial dealings in commodities and are concerned more with the commodity *than with the person*."<sup>14</sup>

Excise differs from customs in that excise is a tax on articles produced or manufactured in the taxing country and intended for *home consumption*,<sup>15</sup> while customs is a tax on consumption outside the taxing states or home consumption of goods imported from abroad.

*Excise duty and sales tax distinguished.*—See under Entry 54, List II, *post*.

*Existing Laws.*—Motor spirit (Duties) Act (II of 1917; XII of 1922); Silver (Excise Duty) Act (XVIII of 1930); Sugar (Excise Duty) Act (XVI of 1934); Mechanical Lighters (Excise Duty) Act (XXIII of 1934); Iron and Steel Duties Act (XXXI of 1934); Tyres (Excise Duty) Act (X of 1941); Central Excises and Salt Act (I of 1944).

## 85. Corporation tax.

### OTHER CONSTITUTIONS

*Canada.*—Corporation tax is a federal tax.

*Burma.*—Item 4 (5) of the Union List is—'Taxes on companies'.

*Government of India Act, 1935.*—Item 46 of List I was the same as the present Entry.

### INDIA

'*Corporation Tax*'.—For definition of this term, see Art. 366 (6).

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

### OTHER CONSTITUTIONS

*Burma.*—Item 4 (7)-(8) of the Union List cover the present Entry of our Constitution.

*Government of India Act, 1935.*—Item 55 of List I was the same as the present Entry.

87. Estate duty in respect of property other than agricultural land.

(11) Wynes, *Legislative & Executive Powers*, p. 316; *Peterswald v. Bartley*, (1904) 1 C.L.R. 497.

(12) *Mathews v. Chicory Marketing Board*, (1938) 60 C.L.R. 263 (304).

(13) *Peterswald v. Bartley*, (1904) 1 C.

L.R. 497.

(14) *A.-G. for Br. Columbia v. Kingcome Co.*, (1934) A.C. 45 (59).

(15) *In re C. P. Motor Spirit Act*, A.I. R. 1939 F.C. 1.



## OTHER CONSTITUTIONS

*Burma.*—Item 4 (9) of the Union List covers Entries 87 and 88 of our Constitution.

*Government of India Act, 1935.*—There was Entry on the present subject and it was held that an Estate Duty could not be levied under item 56 of List I relating to Succession Duty.<sup>16</sup>

*England.*—The English Estate Duty is an *ad valorem* graduated tax imposed on the principal value of the whole aggregated estate which passes on the death of a person,—the rate of the duty increasing with the size of the estate. It is payable in respect of all property, real or personal, subject to certain exceptions. The net principal value of the estate is arrived at by taking the total of the principal values of all the items of property, and making deductions for reasonable funeral expenses and for debts and incumbrances of the deceased.

## INDIA

*Estate Duty distinguished from Succession Duty.*—There are real and substantial differences between Succession Duty and Estate Duty. There is one feature common to both taxes, viz., that the occasion for the levy is the death of a person; but while Succession Duty has reference to the acquisition of the property by the successor and generally takes into account the extent of the benefit derived by him and other considerations relevant from that point of view,—the Estate Duty has reference to the value of the property constituting the estate of the deceased and is independent of the question as to who takes it.<sup>17</sup>

The Estate Tax is levied on the inheritance as a whole, while the Succession duty is levied on the separate portions going to the different beneficiaries. The Estate Duty is thus a more productive and efficient source of revenue while the Succession Duty may be said to be the more equitable.<sup>18</sup> Shortly speaking, while a succession duty is an excise upon the privilege of inheriting property, an estate tax is an excise upon the privilege of bequeathing. See definition of 'Estate Duty' in Art. 366 (9).

*'Property other than agricultural land'.*—Property here means both movable and immovable property and property of any kind passing on the death of a person, other than agricultural land, in respect of which the State is authorised to impose an Estate Duty, by Entry 49 of List II.

*'Agricultural land'.*—See under Entry 18, List II, *post*.

88. Duties in respect of succession to property other than agricultural land.

## OTHER CONSTITUTIONS

*England.*—In England, there are three Duties which are payable in connection with the death of an individual: the Estate Duty, the Succession Duty and the Legacy Duty. The following points of difference between these three Duties should be noted:

(i) Succession Duty and Legacy Duty are taxes upon the interest to which a person succeeds by reason of the death of another. An Estate Duty, on the other hand, is expressed to be a tax upon the property which passes upon the death. 'Passing' no doubt implies a change of ownership, but for the pur-

(16) *In re Ref. on Duty on non-Agricultural Property*, A.I.R. 1944 F.C. 73.

(17) *In the matter of Duty on non-Agricultural Property*, (1944) 49 C.W.N. (F.

R.) 9 (14).

(18) Findlay Shirras, *Science of Public Finance*, p. 524.

poses of the Estate Duty, a property may pass to another otherwise than by succession, *e.g.*, when money payable on a life insurance policy is payable upon the death to a person who is not related to the deceased. In short, while the basis of the Succession and Legacy Duty is the interest to which a person *succeeds*, the basis of the Estate Duty is the property in respect of which the interest of the deceased *ceases* by reason of the death in question.<sup>19</sup>

(ii) An Estate Duty is payable in respect of all kinds of property,—real and personal. Succession duty is payable in respect of interests in land, including leaseholds and previously settled personalty. Legacy Duty, on the other hand, is payable on all beneficial acquisitions of personal property other than leaseholds by reason of Will, intestacy or *donatio mortis causa*. It follows that the Succession duty and Legacy duty are mutually exclusive, so that if one is payable in respect of a particular property, the other cannot be levied in respect of the same.

*U. S. A.*—Inheritance taxes are levied by many States in the U.S.A. The tax is regarded not as a tax upon the property inherited, but upon the right to inherit.<sup>20</sup>

*Burma.*—See under Entry 87, *ante*.

*Government of India Act, 1935.*—Item 56 of List I was the same as the present Entry.

#### INDIA

'*Succession Duty*'.—See under Entry 87.

'*Succession*'.—Succession in this Entry includes both testamentary and intestate succession, in other words, the transmission, by law or by the will of man, to one or more persons, of the property of a deceased person.<sup>21</sup> The word 'succession' is used in this Entry in the same sense as in the Indian Succession Act.<sup>21</sup>

'*Agricultural land*'.—See under Entry 18, List II, *post*.

89. Terminal taxes on goods or passengers, carried by railway, sea or air ; taxes on railway fares and freights.

#### OTHER CONSTITUTIONS

*Burma.*—Items 4 (13)-(14) cover the present Entry of *our* Constitution.

*Government of India Act, 1935.*—The present Entry reproduces item 58 of List I with the addition of the word 'sea'.

#### INDIA

*Analogous Provisions.*—The terminal tax in the present entry is a tax on the entry of goods ; the tax in Entry 52 of List II is also a tax on the entry of goods.

'But the terminal tax in List I must be—(a) terminal ; (b) confined to goods and passengers carried by railway, sea or air. They must be chargeable at a rail or air terminus and be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation. [See further under Entry 52, List II.]

The terminal taxes on goods or passengers, carried by railway, sea or air shall be levied and collected by the Union but assigned to the States [Art. 269 (1) (c).]

(19) Stephen's Commentaries, Vol. I, p. 170 U.S. 283.

(21) *In re Ref. on Duty on non-Agricultural Property*, A.I.R. 1944 F.C. 73.

(20) *Magoun v. Illinois T. & S. Bank*,

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.

*Government of India Act, 1935.*—There was no item in that Act, corresponding to the present Entry.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—The present Entry reproduces Item 57 of List I of the Government of India Act, 1935, with the addition of—'transfer of shares, debentures'.

#### INDIA

'*Rates of stamp duty*'.—'Stamp duties' is a concurrent subject under Entry 44 of List III; but 'rates' are excluded from that Entry, and included in the present Entry as regards certain specified documents, while the rest are included in Entry 63, List II. [See also Art. 268 (1).]

*Existing law.*—Indian Stamp Act (II of 1899).

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

#### OTHER CONSTITUTIONS

*U.S.A.*—Though newspaper owners are not exempt from the ordinary taxation of the country, a heavy tax on newspaper advertisements has been invalidated on the ground that it was an excessive burden on the freedom of the press.<sup>22</sup>

#### INDIA

'*Taxes on sale or purchase of newspapers. . .*'.—There was no specific item in the Act of 1935 relating to the present subject. Item 48 of List II included taxes on the sale of all goods and on advertisements.

Under the *Constitution*, taxes on sale of goods and on advertisements are included in Entries 54-5 of List II, but taxes on sale of newspapers and on newspaper advertisements are excluded from those entries and included in the present Entry.

93. Offences against laws with respect to any of the matters in this List.

#### OTHER CONSTITUTIONS

*Burma and Government of India Act, 1935.*—The present Entry is the same as Item 5 (39) of the Union List of the Burmese Constitution and Item 42 of List I of the Government of India Act, 1935.

*Analogous Provision.*—This entry is to be read with Entry 64 of List II. The Union and the State Legislatures have the power to legislate as regards offences relating to the matters included in List I and List II respectively (*vide* excepting portion of Entry 1 of List III), and to direct the destination of the fines imposed.<sup>23</sup>

(22) *Grosjean v. American Press Co.*,  
(1936) 297 U.S. 233.

(23) *United Provinces v. Governor-General*,  
A.I.R. 1939 F.C. 58 (61).



*Some examples of offences relating to matters in List I, as contained in the Indian Penal Code.*—(a) Offences relating to coins, (Entry 36) such as counterfeiting [Secs. 230-254, I. P. Code] and currency [Secs. 489-A-489-D.]

(b) Offences relating to trade and property marks (Entry 49). [Secs. 481-489.]

94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

#### OTHER CONSTITUTIONS

*Australia.*—'Statistics' is a Commonwealth subject under Sec. 51 (xi) of the Constitution Act, 1900. But every State is free to keep statistics for its own purposes.<sup>24</sup>

*Burma.*—Item 5 (3) of the Union List corresponds to the present Entry of our Constitution.

*Government of India Act, 1935.*—Item 43 of List I was the same.

*Analogous Provision.*—See Entry 45 of List III, *post*.

95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

#### OTHER CONSTITUTIONS

*England.*—Admiralty means a tribunal for the trial and decision of maritime questions and offences according to maritime law. By virtue of the Admiralty Courts Acts 1840 and 1861 and the Judicature Acts, 1873 and 1925, the Admiralty Division of the High Court of Justice in England has got jurisdiction over the following matters, broadly:

*Bottomry.*—Bottomry is the hypothecation of the keel or bottom of a ship whereby in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same with interest if the ship terminates her voyage successfully, while the debt is lost if the ship is lost in course of the voyage.<sup>25</sup>

*Respondentia.*—Respondentia is the hypothecation of the cargo on board a ship on terms similar to bottomry.

*Necessaries supplied to foreign ships.*—This jurisdiction extends over claims for necessaries supplied to any foreign ship at a time when such ship was in certain ports or on the high seas.

*Claims for seamen's wages, Master's wages and disbursements.*

*Claims for damage on the high seas.*—The Admiralty has jurisdiction over all wrongs committed by or to British subjects on the high seas. It includes damage due to collision between ships and vessels, and other damage done by a ship.

*Damage to Cargo.*—This jurisdiction relates to claims for damage to cargo, including short delivery, against British or foreign ships, in respect of goods carried or to be carried into a port in England or Wales.

*Salvage.*—Salvage means compensation allowed to persons by whose assistance a ship or cargo or the lives of persons belonging to her are saved from danger or loss at sea.

*Droits of admiralty.*—When a state of war exists, enemy goods seized in English ports go to the Crown as *droits of Admiralty*. The Court of Admiralty

(24) Weynes, Legislative and Executive Powers, p. 135.

(25) *Vide* Halsbury's Laws of England, Vol. I.

has also the jurisdiction to condemn as droits of Admiralty unclaimed wreck, flotsam, jetsam, ligan and derelict found in the shores of the sea or on the high seas.

*Forfeiture.*—The Admiralty Court has jurisdiction to condemn as forfeited ships for improper use of British national flag and dangerous goods carried or attempted to be carried on board any vessel, in certain circumstances.

*Booty of War and all matters relating thereto. Mortgage of British ships disputed between co-owners of ships.*—In England, the Admiralty Court had also a criminal jurisdiction, prior to 1861, of trying treason, felony, robbery, murder and like offences committed on the sea. But the Admiralty Court Act of 1861, transferred this criminal jurisdiction to the ordinary Courts and now these offences are treated as though committed in England or Ireland. Nevertheless, the jurisdiction to take cognizance of crimes committed on the high seas is still known in England as 'admiralty jurisdiction.'

Shortly speaking, admiralty jurisdiction extends over—(i) Offences committed on British ships on the high seas; (ii) Offences committed on foreign ships in British territorial waters; (iii) Piracies;—Committed by—(a) a British subject, (b) a person of any nationality, provided the offence was committed on ■ ship subject to British jurisdiction when the offence was committed.

(a) Offences committed by British ships on the high seas—Admiralty jurisdiction extends only to acts committed on the sea, i.e., crimes which become complete at sea. Thus, the admiral would have no jurisdiction over murder, where the wounding took place on sea but the death happened on sea.<sup>1</sup> Conversely, where a wrongful act done on shore produces ■ criminal result at sea, the offence is cognizable by the Admiralty.<sup>2</sup>

Admiralty jurisdiction begins where the tide touches the shore, whether at low or high-water mark, and extends all over the world,—to the coast of every country and up every bay, ■■■ of the sea and river, so far as great ships go. It is not necessary to show that the tide reaches the spot, if it is accessible to *ocean-going vessels*.<sup>3</sup> 'High seas' thus includes rivers below the bridges, where great ships go.<sup>4</sup>

(b) Offences committed on foreign ships in British territorial waters.—England has admiralty jurisdiction over a foreigner only—(i) if he commits an offence on an English ship, while on the high seas and whether he was permanently or merely casually on board that ship at the time of commission of the offence; (ii) if he commits the offence on a foreign ship, while in British territorial waters.

The principle underlying the first case is that ■ ship on the high seas is a floating territory of the State whose flag it flies and therefore, that State has the duty to protect persons upon such floating territory and is accordingly entitled to enforce obedience to its laws upon such persons. The principle underlying the second case is that 'territorial waters' are ■ part of the territory of the State which it adjoins and not ■ part of the high seas.

But English Courts have no jurisdiction over a foreigner in respect of crimes committed elsewhere than in the above two cases, e.g., in respect of homicide due to ■ blow inflicted by the foreigner ■■ board a foreign vessel on the high seas, even though the injured person lands in England and dies there.<sup>5</sup>

In times of war, cases relating to prize vessels captured at sea come within the admiralty jurisdiction.

(1) Hale, P.C. 17.

(2) Combe's Case, 1 Leach C.C. 388.

(3) Mayne, Criminal Law, p. 294.

(4) Reg. v. Anderson, L.R. 1 C.C. 161.

(5) Reg. v. Lewis, (1857) 26 L.J. (M.C.) 104.

*U.S.A.*—Under Art. III, Sec. 2 of the United States, “admiralty and maritime jurisdiction” is included in the judicial power of the Supreme Court. The admiralty jurisdiction in the United States is, however, much wider than in England. In the United States, it applies to any waters that are *navigable*,—whether connected with the sea or not.<sup>6</sup> The test of navigability, again, is satisfied when the waters, whether tidal or not, or whether natural or artificial<sup>7</sup> are navigable *in fact*, or are susceptible of being so used in themselves or as connecting *links*, as highways over which trade and travel may be conducted between the States or with foreign nations.<sup>8-9</sup>

Though the grant of jurisdiction over admiralty and maritime matters is to the *judicial* power of the Federal Government, it has been construed to confer co-extensive powers to the Federal Legislature to legislate upon those matters.<sup>10</sup> Again this power of Congress relating to maritime matters, is *independent* of its power over ‘inter-State and foreign commerce’<sup>10</sup>. Thus, the jurisdiction of Congress to legislate in respect of admiralty and maritime matters is plenary,—Extending to all matters and places to which maritime law extends;<sup>11</sup>—and even though the navigable waters be wholly within the confines of a particular State, provided they constitute connecting links in chains of commercial communication between States.<sup>12</sup>

*Burma.*—Item 2 (12) of the Union List is—‘Admiralty jurisdiction.’

*Government of India Act, 1935.*—‘Admiralty jurisdiction’ was included in Item 21 of List I. As to jurisdiction and powers of Courts, see Item 53 of List I of that Act.

#### INDIA

*‘Jurisdiction of a Court’.*—Jurisdiction means the authority or power of a Court to hear and determine a cause or complaint presented in a formal way for its decision.<sup>13</sup> The limits of this authority are imposed by the statute under which the Court is constituted. A Court’s jurisdiction may be limited—(a) as to the nature of the subject-matter; (b) as to person; (c) as to the pecuniary value of the subject-matter; (d) as to the area over which the jurisdiction shall extend.

According to the United States Supreme Court—‘Jurisdiction’ of a particular Court is that portion of the judicial power which it has been authorized to exercise, by the Constitution or by valid statutes.<sup>14</sup> ‘Judicial power’, on the other hand, is the power of a Court to decide and pronounce a judgment and to carry it into effect between persons and parties who bring a case before it for its decision.<sup>15</sup>

*Analogous Provisions.*—See under Entry 77 of List I.

*Laws made by Parliament.*—Special Criminal Courts (Jurisdiction) Act (XVIII of 1950).<sup>16</sup>

96. Fees in respect of any of the matters in this List, but not including fees taken in any court.

(6) *Propeller Genesee Chief v. Fitzhugh*, (1851) 12 Howard, 443.

(7) *Ex parte Boyer*, 109 U.S. 629.

(8) Willoughby, Constitutional Law, II, p. 950.

(9) *Daniel Ball*, 10 Wall. 557.

(10) *Ex parte Garnett*, 141 U.S. 1.

(11) Willoughby, Constitutional Law, II, p. 950.

(12) *The Daniel Ball*, 10 Wall. 430.

(13) Halsbury.

(14) *Binderup v. Pathe Exch.*, 263 U.S. 291.

(15) *Muskral v. United States*, 219 U.S. 346.

(16) The Special Criminal Courts (Jurisdiction) Act, 1950, confers upon special criminal Courts constituted under certain State laws. Jurisdiction to try offences against laws with respect to any of the matters enumerated in the Union List.



## OTHER CONSTITUTIONS

*Burma.*—Item 4 (15) of the Union List is—

“Fees in respect of any of the matters in this list but not including fees taken in any Court subordinate to the High Court.”

*Government of India Act, 1935.*—Item 59 of List I of that Act was the same as the present Entry.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

## OTHER CONSTITUTIONS

*Canada.*—It has been held that the distribution of legislative powers in the Br. North America Act is *exhaustive*. Whatever belongs to self-Government in Canada must belong either to the Dominion or to the Provinces within the limits of the Act.<sup>17</sup> Hence, whatever is not thereby given to the Provincial Legislature, rests with the Dominion Parliament.<sup>18</sup>

*Burma.*—Item 5 (40) of the Union List is—‘Any other matter not enumerated in List II (i.e., State List).’

## INDIA

‘Any other matter.’—The present Entry simply embodies the provisions of Art. 248, p. 552, *ante*, in the form of a legislative Entry. The Entry embodies the Canadian principle (*see* above) that if a subject of legislation is not enumerated, it must belong to Parliament. But, as has been pointed out [p. 553], this Entry can be relied upon only as a matter of last resort and also subject to the doctrine of ‘ancillary powers.’ Thus, in the Patna case,<sup>19</sup> it was contended that inasmuch there is no Entry relating to offences in the Concurrent List, as there are in Lists I (Entry 93) and II (Entry 64), the right to create offences relating to matters in the Concurrent List should belong to Parliament under the present residuary Entry. This contention was rejected on the ground that Entries 93 and 64 of Lists I and II, respectively, were inserted *ex abundanti cautela*, and that a State Legislature, while enacting a law under the Concurrent List was entitled to create offences for violation of such law, in the exercise of an ‘ancillary’ power [*see* p. 525, *ante*].

*Articles of the Constitution, conferring legislative power upon Parliament.*—Apart from the Entries in List I, various articles of the Constitution confer legislative power upon Parliament. There is no doubt that Parliament shall be competent to make laws relating to those subjects whether or not such subjects readily come within any of the Entries of List I. These articles, for example are:

2, 3, 10, 11, 16 (3), 22 (7), 32 (3), 35, 53 (2), 70, 73 (2), 81 (2)-(3), 82, 83, 84 (c), 98 (2), 101 (1), 102 (1) (e), 105 (3), 106, 112 (3) (g), 119, 120 (2), 124 (1), 134 (2), 135, 137, 138 (2), 139, 140, 142 (2), 145 (1), 146 (2), 148 (3), (5); 149, 169 (1), 173 (c), 230, 240 (1), 241 (1), 242 (1), 247, 253, 262, 267 (1), 271, 275 (1), 276 (2), Prov., 280 (2), 283 (1), 285 (1), 286 (2), 287, 289 (2), 293 (2), 300 (1), 302, 307, 315 (2), 321, 324 (2), 327, 341 (2), 342 (2), 343 (3), 348 (1), 367 (3), Prov., 369, 371, Para. 7 of the 5th Schedule, Para. 21 of the 6th Schedule.

(17) *Re References*, (1912) A.C. 571.

(19) *Ratan Roy v. State of Bihar*, A.I.

(18) *Bank of Toronto v. Lambe*, (1887) 12 App. Cas. 175.

R. 1950 S.C. 332 (339).

*List II—State List.*

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power).

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 1 of List I was—

"Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power) . . . . ."

*Burma.*—Item 3 (1) of the State List is the same as the present Entry of our Constitution.

## INDIA

'Public Order'.—'Public Order' is a most comprehensive term and subject to the exception mentioned, *viz.*, use of the armed forces in aid of the civil power,<sup>20</sup> the State Legislature is given plenary authority to legislate on all matters which relate to or are necessary for the maintenance of public order.<sup>21</sup> [See also under Entry 9, List I; also pp. 79-80, *ante*].

Public order implies absence of violence and an orderly state of affairs in which citizens can peacefully pursue their normal avocation of life.<sup>22</sup> Anything which disturbs public tranquillity disturbs 'public order.'<sup>23</sup> This entry also includes 'public safety' in its relation to the maintenance of public order.<sup>24-25</sup> The expression of 'public safety' may have one meaning in one context and another in a different context. One aspect of it has reference to danger from external aggression. Another aspect of it has reference to internal dangers, such as adulteration of foodstuffs and other goods, prevention of epidemics, regulation of motor traffic and the like.<sup>24-1</sup> 'Public safety' means the safety of the lives and liberties as well as the property of the members of the community as a whole, but it cannot mean the safety of the goods of the individual members of the community, without more.<sup>2</sup>

Strikes promoted solely for the sake of causing unrest among workmen lead directly or indirectly to a subversion of public order.<sup>3</sup> Prevention of communal disturbances is a matter falling within 'public order'<sup>4</sup> and the State Legislature may create new offences directly related to communal disturbances, and the trial and punishment thereof.<sup>5</sup> The Provincial Legislature, in making laws for the maintenance of public order by prevention of communal disturbances, is entitled to curtail the use and possession of arms, even though 'arms' is a Federal subject [Entry 8, List I], provided the 'pith and substance' of the Act is maintenance of 'public order' [Entry 1 of List II].<sup>6</sup>

While mere belief in or acceptance of any political ideology may not have any relation to the maintenance of public order, affiliation to a party which is alleged to be spreading a doctrine of violence rendering life and property insecure and

(20) Nor would it include 'defence' which forms Entry 1, List I.

(21) *Lakhinarayan v. Province of Bihar*, (1949) 5 D.L.R. 17 (22) F.C.

(22) *Basudev v. Rex*, (1949) D.L.R. 186 All. (F.B.).

(23) *Ramesh Thappar v. State of Madras*, (1950) S.C.J. 418 (423).

(24) *Nek Mohammad v. Prov. of Bihar*, A.I.R. 1949 Pat. 1 (F.B.).

(25) *Emp. v. Sibnath*, A.I.R. 1943 F.C. 1.

(1950) S.C.J. 418 (423); *R. v. Basudev*, (1950) D.L.R. 56 (58) F.C.

(2) *Lalu Gope v. King*, (1948) 4 D.L.R. 48 (Pat.).

(3) *Om Prakash v. King-Emperor*, A.I.R. 1948 Nag. 199.

(4) *Noor Md. v. Rex*, A.I.R. 1949 All. 120.

(5) *Rex v. Itwari*, (1949) 4 D.L.R. 11 (All.).

(6) *Rex v. Itwari*, (1949) 4 D. L. R. (All.) 11.

(1) *Ramesh Thappar v. State of Madras*,

trying to seize power by violence may, in certain circumstances, lead to ■ inference that the person concerned is likely to act in a manner prejudicial to public order.<sup>7</sup>

2. Police, including railway and village police.

OTHER CONSTITUTIONS

*Burma.*—Item 3 (2) of the Burmese Constitution is—‘Police including village Police.’

*Government of India Act, 1935.*—Item 3 of List II was the same as the present Entry of our Constitution.

INDIA

*Existing (Central) Law.*—Police Act (V of 1861); Police Act (III of 1888).

3. Administration of justice ; constitution and organisation of all courts, except the Supreme Court and the High Court ; officers and servants of the High Court ; procedure in rent and revenue courts ; fees taken in all courts except the Supreme Court.

OTHER CONSTITUTIONS

*U.S.A.*—In the U.S.A., there is a dual system of Courts—Federal and State [p. 30, *ante*]. The Constitution itself provided for the creation of the Supreme Court, but left the constitution of all other Courts to the Congress [Art. III (1)]. Congress decided<sup>8</sup> to have a separate set of Federal Courts, apart from the State Courts, to determine all the powers enumerated in Art. III (2) (1) (as amended by the 11th amendment), which concern questions of national importance and matters in which uniformity of decisions was necessary.

Thus, the Federal Courts of the United States have exclusive jurisdiction to determine cases relating to the following matters—(i) Cases under the Federal Constitution, federal laws and treaties. (ii) Cases affecting ambassadors, public ministers and consuls. (iii) Cases of admiralty and maritime jurisdiction. (iv) Cases to which the United States or a State is a party. (v) Cases between foreigners and American citizens and between citizens of different States.

State Courts, on the other hand, deal with all cases other than the above, between citizens of the same State. Notwithstanding the above division of powers, the question of jurisdiction as between Federal State Courts, in particular cases, is often bewildering to the suitor.<sup>9</sup>

A separate system of Federal Courts was established upon the supposition that State Courts might be partial towards their own citizens or Governments in matters concerning national interests, and in the enforcement of national laws and treaties.

*Australia.*—The judicial system of Australia resembles that of the U.S.A. State Courts are left to be governed by the State Constitutions. Sec. 71 of the Commonwealth Constitution follows Art. III, Sec. 1 of the United States Constitution in vesting the ‘judicial power of the Commonwealth in ■ Federal Supreme Court called the High Court’ [see p. 392, *ante*], and ‘in such other Federal Court as the Parliament creates, and in such other courts as it invests with federal jurisdiction’. The Commonwealth Parliament has passed the Judiciary Act, 1903, under the above power. Parliament has also created several Federal Courts under different Acts, such ■ the Court of Bankruptcy; the Court of conciliation and Arbitration; the Court of claims.

(7) *Machindar v. The King*, A. I. R. 1950 F.C. 129.

(8) Judiciary Act, 1789.

(9) *Vide* Munro, Government of the United States, 1944, p. 514; Willoughby, Constitutional Law, Vol. II, p. 1276.



*Canada.*—Sec. 91 (27) of the British North America Act, allots to the Dominion Legislature—

"The Criminal Law, except the constitution of Courts of Criminal jurisdiction, but including the Procedure in Criminal matters."

Sec. 92 (14) on the other hand gives to the Provincial Legislature—

"The administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and of Criminal jurisdiction, and including procedure in Civil matters in those Courts."

Canada does not follow the example of the U.S.A. by setting up a dual system of Courts. There is no division of the judicial power and the Federation has no separate set of Courts for itself. Thus, though criminal law and procedure is a matter for Dominion legislation, the establishment of Criminal Courts is outside its jurisdiction [Sec. 91 (27)].

The same set of Courts, i.e., the Provincial Courts, administer both Federal and Provincial laws.

*Government of India Act, 1935.*—Item 1 of List II included—

"the administration of justice; constitution and organisation of all courts, except the Federal Court, and fees taken therein."

*Burma.*—The first part of item 3 (3) of the State List is similar to the above item of the Government of India Act, 1935.

### INDIA

'*Constitution of Courts*'.—Barring the Supreme Court and High Courts [see Entries 77-8, List I], the constitution of all Courts is a Provincial subject. The Indian Constitution thus follows the Canadian example and differs from that of the American system by avoiding a dual hierarchy of Courts—Federal and State. It is the State Courts which are to administer both Federal and State laws; and administration of justice as a whole [subject to Entries 77-9 of List I and 46 of List III] is made a State subject. Of course Parliament has the power to create additional Courts for the better administration of particular Union Laws [Art. 247].

'*Court*'.—See pp. 181, 206, *ante*.

The following characteristics of a 'Court' are laid down in Halsbury's Laws of England—

(i) A Court must exercise jurisdiction over persons by reason of the sanction of law, and not merely by the *voluntary* submission to its jurisdiction, *e.g.*, arbitrators.

(ii) It must be recognised by the law as a Court, mere exercise of functions in a judicial manner is not enough, *e.g.*, the General Medical Council, the Inns of Court.

(iii) A Court must be open to the public,<sup>11</sup> even though it has an inherent jurisdiction to hear any particular matter *in camera*.<sup>12</sup> But this does not mean that a Judge has any personal discretion to sit *in camera* in any case. The principal cases where *in camera* hearing is allowed are.<sup>13</sup>

(a) The decision of questions affecting wards and lunatics, which is a 'parental' rather than contentious jurisdiction. (b) Litigation as to a secret process. (c) Under statutory provisions, *e.g.*, in nullity suits where evidence of sexual capacity is given. (d) Any other case where presence of the public would make the administration of justice *impracticable*.

To be a Court, the person or persons who constitute it must be entrusted with 'judicial' functions, i.e., of deciding litigated questions according to law, and

(11) *Scott v. Scott*, (1913) A.C. 427.

(12) *D. v. D.*, (1903) p. 144.

(13) Stephen's Commentaries, Vol. I, p. 58.

such powers must be derived from the State <sup>14</sup>(as distinguished from the agreement of parties as in the case of arbitration).

*'Procedure in rent and revenue Courts'*.—This Entry, together with Entry 18 of List II gives the State Legislature the power to legislate as regards the procedure for realisation of decree for arrears of rent.<sup>15</sup>

*Analogous Provisions*.—See Entries 95 of List I, 65 of List II, 46 of List III.

*Existing (Central) Laws*.—Provincial Small Cause Courts Act [IX of 1887]; Presidency Small Cause Courts Act (XV of 1882); Bengal, Agra and Assam Civil Courts Act (VI of 1886); Court-fee Act (VII of 1870).

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

#### OTHER CONSTITUTIONS

*U.S.A.*—The correction and custody of criminals is a State function under its 'police power'. The institutions are of various types,—security prisons for the more serious offenders; prison farms for the less dangerous; reformatories for women, boys and girls; hospitals for the criminal insane.

*Canada*.—Under Sec. 91 (28).

"The establishment, maintenance, and management of penitentiaries",

is a Dominion subject;

while the Province has the power in respect of—

"The establishment, maintenance, and the management of public and reformatory prisons in and for the Province."

while the Province has the power in respect of—

*Burma*.—Item 3 (4) of the State List is—

"Prisons; persons detained therein; arrangements with other units for the use of prisons and other institutions."

*Government of India Act, 1935*.—Item 4 of List II was the same as the present Entry of our Constitution.

*Existing (Central) Laws*.—The Prisoners' Act (III of 1900) consolidates the law relating to prisoners confined by order of a Court, including persons detained in Reformatory Schools. The Prisons Act (IX of 1894) regulates prisons, provides for the discipline, health, etc., for prisoners, prison-offences, etc. The Reformatory Schools Act (VIII of 1897) makes provision for dealing with youthful offenders and maintenance of Reformatory Schools by the Provinces.

5. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

*Canada*.—Sec. 92 (8) of the Br. N. A. Act gives the Provincial Legislature exclusive power in relation to—

"Municipal institutions in the Province."

This entry gives the Provincial Legislature to create a legal body for the management of municipal affairs to which it can give any powers which come

(14) *Bharat Bank v. Employees of Bharat Bank*, A.I.R. 1950 S.C. 188 (195).

(15) *Udaychand v. Samarendra*, (1947) C.L.J. 1 (F.C.).

within the competence of the Provincial Legislature and all incidental powers necessary to carry on and work such municipal institution.<sup>16</sup>

*Burma.*—Item 7 (1) of the State List is—

“Municipalities and other local authorities for the purpose of local self-government or village administration.”

*Government of India Act, 1935.*—Item 13 of List II was the same as the present entry.

## 6. Public health and sanitation ; hospitals and dispensaries.

### OTHER CONSTITUTIONS

*U.S.A.*—Public health is regulated by the State under its ‘police power’. It has always been regarded as a power reserved to the States. But the Federal Government has also maintained a Public Health service in connection with its control over inter-State and foreign commerce which prevents the introduction of diseases from abroad and helps local health services with research, expert personal and the like.

A State health department has the following functions, inter alia,—infant and maternity hygiene, control of communicable diseases, sanitary engineering, control over public and private sewage systems, control of nurses, hospitals, dispensaries, sanitary condition of tenements; milk, food and drug regulation.

*Canada.*—Under Sec. 92 (7), the Province has the power in relation to—

“The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals.”

*Burma.*—Item 6 (1-2) of the State List are—

“(1) Public Health and sanitation.

(2) The establishment, maintenance and management of hospitals, asylums and dispensaries.”

*Government of India Act, 1935.*—Item 14 of List II of that Act included the subjects of the present Entry.

## 7. Pilgrimages, other than pilgrimages to places outside India.

‘Pilgrimages within India’<sup>17</sup>.—This Entry is to be read with item 20 of List I.

## 8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase, and sale of intoxicating liquors.

### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 31 of List II of that Act was—

“Intoxicating liquors and narcotic drugs,<sup>18</sup> that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs,<sup>18</sup> but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs,<sup>18</sup> to the provisions of List III.”

### INDIA

‘Intoxicating Liquors’.<sup>19</sup>—Duties of excise on alcoholic liquors is also a State subject [Entry 51, List II, *post*], but not ‘medicinal and toilet preparations containing alcohol [Entry 84, List I].

(16) *A.-G. of Ontario v. A.-G. of Dominion*, (1896) A.C. 348.

(17) Item 15 of List II of the Government of India Act, 1935, was the same as the present entry.

(18) Under the Constitution, all drugs,—

narcotic or otherwise, are included in Entry 19, List III.

(19) Item 31 of List II of the Government of India Act, 1935, included the subject of the present Entry.



*Prohibition.*—The power to legislate with respect to intoxicating liquors and narcotics includes the power to introduce partial or total prohibition.<sup>20</sup> The words "that is to say, the production, manufacture . . . ." are explanatory or illustrative words, and not words either of amplification or limitation.<sup>20</sup>

The right to legislate as to *possession* of intoxicating liquors necessarily involves a right to prohibit possession.<sup>21</sup>

*Entry to be read subject to Entry 41 of List I.*—In case of conflict between Lists I and II, it is the duty of Courts to endeavour to reconcile these items with reference to the *non-obstante* clause [Art. 246 (3)] under which the powers of the Central Legislature must prevail in the event of an irreconcilable conflict.<sup>22</sup>

Hence, the State Legislature cannot legislate in respect of possession of intoxicating liquors, etc., in such a way as to encroach upon the powers of the Union Legislature to legislate, under Entry 41 of List I, in respect of 'import and export across customs frontier'.<sup>22</sup> Of course, the mere fact that any legislation which restricts the possession or consumption of intoxicants is likely to have a *prejudicial effect* upon the customs revenue of the Central Government, would not prevent the State Legislature from exercising its powers under Entry 8 or 51 of List II, but the *absolute* prohibition against possession indirectly *destroys* the right of the Central Government to import and export intoxicants across the customs frontiers, and would be invalid.<sup>23</sup>

#### 9. Relief of the disabled and unemployable.

##### OTHER CONSTITUTIONS

*Burma.*—Item 8 (1) of the State List is—'Relief of the poor'.

*Government of India Act, 1935.*—Item 32 of List II was—'Relief of the poor; unemployment'.

##### INDIA

'*Relief of the disabled and unemployable*'.—This Entry differs markedly from item 32 of List II of the Act of 1935. It does not provide for the relief of the poor in general, but only for the 'disabled and unemployable'. Again, unemployment, as such, is included in item 23 of List III.

#### 10. Burials and burial grounds; cremations and cremation grounds.

##### OTHER CONSTITUTIONS

*Burma.*—Item 6 (4) of the State List is—'*Burials and burial grounds*'.

*Government of India Act, 1935.*—Item 16 of List II was the same as the Burma item, quoted above.

#### 11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and 25 of List III.

##### OTHER CONSTITUTIONS

*U.S.A.*—Education has always been regarded as a State function. All the States have a department of education which supervises the State's educational programme. Congress has entered in the field of education through its system

(20) *Bhola Prasad v. King-Emperor*,  
(1942) 46 C.W.N. (F.R.) 32.

(21) *Emperor v. Dantes*, A. I. R. 1940  
Bom. 307 (310) S.B.

(22) *Emperor v. Dantes*, A. I. R. 1940  
Bom. 306 (310) S.B.

(23) *Emperor v. Dantes*, A. I. R. 1940  
Bom. 307 (310) S.B.

of grants-in-aid, but its activities have so far been confined to *higher* education. Thus, the Morrill (Land Grant College Act), 1862, authorizes federal grant to States, of both land and money, for the establishment of colleges and universities offering instruction in agriculture, mechanical arts and military science. The Federal Government also offers financial assistance for the training of high-school teachers in agriculture, domestic economy and industrial arts.

*Australia*.—Similarly, in Australia, education is left to the States, there being no express power of the Commonwealth in this respect, in the Constitution. The Commonwealth has, however, assumed control over education under its power of grants-in-aid, and under its powers over Defence, Trade and Commerce.<sup>24</sup>

*Burma*.—Items 5 (1-2) of the State List are—

“(1) Education excluding, for a period of ten years from the commencement of this Constitution and thereafter until the Union Parliament otherwise provides, University, higher technical and professional education.

(2) All educational institutions controlled or financed by the State.”

*Government of India Act, 1935*.—Entry 17 of List II of the Act, is amended in 1940, was—

“Education including Universities other than those specified in paragraph 13 of List I.”

‘*Education*’.—The present Entry gives the residuary power over education and Universities to the States, subject to the exceptions specified in the Entry itself. These exceptions are—(i) Universities mentioned in Entry 63, List I; (ii) Institutions of national importance (Entry 64, List I); (iii) Union agencies for professional education, etc. (Entry 65, List I); (iv) Co-ordination and determination of standards (Entry 66, List I); (v) Vocational and technical training of labour (Entry 25, List III).

*Existing (Central) Laws*.—Universities Act (VIII of 1904).

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by Parliament by law to be of national importance.

#### OTHER CONSTITUTIONS

*Burma*.—Item 5 (3) of the State List is—

“Libraries, museums and other similar institutions controlled or financed by the State.”

*Government of India Act, 1935*.—Item 10 of List II was similar to the above Burma item.

#### INDIA

‘*Libraries, museums, etc.*’—The present Entry has to be read with Entries 62 and 67 of List I, and 40 of List III.

*Existing (Central) Laws*.—Ancient Monuments Preservation Act (VII of 1904).

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

(24) Nicholas, Australian Constitution, 1948, p. 29.

## OTHER CONSTITUTIONS

*Canada.*—Sec. 91 (13) of the British North America Act gives the Dominion Parliament exclusive power in relation to—

"Ferries between a Province . . . and any foreign country, or between two Provinces."

*Burma.*—Items 4 (1-4) of the State List are—

"(1) Roads, bridges, ferries and other means of communication other than such as extend beyond the borders of the State.

(2) Municipal tramways; rope-ways.

(3) Inland waterways and traffic thereon.

(4) Local works and undertakings within the State other than railways, subject to the power of the Union Parliament to declare any work a national work and to provide for its construction by arrangement with the State Council or otherwise."

*Government of India Act, 1935.*—Item 18 of List II of the Act included the subjects of the present Entry.

## INDIA

*Bridges, dams and ferries.*—These have been made State subjects by specific enumeration, instead of leaving that to judicial determination as in the United States, where also, they have been held to be the proper subject of local authority which can regulate them better than a government at a distance.<sup>25</sup>

*Analogous Provisions.*—Means of communication excepted from the present Entry are those included in Entries 22-25, 30 of List I; 32, 35 of List III.

*Existing (Central) Laws.*—Indian Tramways Act (XI of 1886); Stage Carriages Act (XVI of 1861).

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

## OTHER CONSTITUTIONS

*U.S.A.*—Agriculture is a State subject in the United States. But though the Federal Government has no direct power over it, it has, of late come to exercise profound influence and control over agriculture for securing uniformity and progress. Thus, through its 'spending power', it has extended grants-in-aid to promote research, experimentation and investigation by the States and has itself set up the Office of Experiment Stations in the Federal Department of Agriculture to co-ordinate the activities of the State agencies. It also makes financial grants for agricultural education and demonstration.

Though its 'commerce power', congress has passed laws for securing the purity of food products and this clause gives it the power of regulation and control over agricultural production and trades. Thus, it has legislated to control monopolistic practices and speculation relating to agricultural products;<sup>1</sup> to control the marketing and grading of agricultural products;<sup>2</sup> to regulate the wages paid to packers at the stockyards.<sup>3</sup>

Under its power over 'credit', Congress has enacted legislation providing for moratoria on the foreclosure of farm mortgages<sup>4</sup> to relieve agricultural debtors. It has also provided for agricultural credit by authorizing the establishment of Federal land banks.

(25) *Pound v. Turck*, 95 U.S. 459.

(3) *Stafford v. Wallace*, (1922) 258 U.

(1) *Chicago Board of Trade v. Olsen*, (1922) 262 U.S. 1.

S. 495.

(2) *Mulford v. Smith*, (1939) 307 U.S.

(4) *Wright v. Vinton Trust Bank*, (1937)

38. 300 U.S. 440.



*Burma.*—Item 2 (1) of the State List includes—‘agriculture’.

*Government of India Act, 1935.*—Item 20 of List II of that Act included the present Entry.

‘Agriculture’.—See under Entry 18, List II.

15. Preservation, protection and improvement of stock and prevention of animal diseases ; veterinary training and practice.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 20 of List II included—

“improvement of stock and prevention of animal diseases; veterinary training and practice. . . . .”

#### INDIA

‘*Preservation and Protection of Cattle.*’—These words were added to the original draft entry in response to an amendment proposed by Pandit Bhargava, to incorporate a direct ban on cow slaughter. Though this entry falls short of a direct ban, it empowers a state to ban cow slaughter by legislation in the interest of preservation of cattle.

*Analogous Provision.*—See Entry 17 of List III.

16. Pounds and the prevention of cattle trespass.

#### OTHER CONSTITUTIONS

*Burma.*—Item 2 (1) of the State List includes the present Entry of our Constitution.

#### INDIA

*Existing (Central) Laws.*—Cattle Trespass Act (I of 1871).

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 19 of List II of the Act was—

“Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.”

*Burma.*—Item 2 (6) of the State List is the same as the above item, with the addition of the words—“but excluding inter-unit rivers and water-courses”.

#### INDIA

‘*Water.*’—This entry corresponds to Entry 19 of List II of the Government of India Act, 1935, with this difference that while under that Act the subject of water was exclusively a Provincial subject, under the present Constitution, the State power has been subjected to Union control for the purpose of development of inter-State waterways, under Entry 56 of List I.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents ; transfer and alienation of agricultural land ; land improvement and agricultural loans ; colonization.

## OTHER CONSTITUTIONS

*Burma.*—Item 2 (3) of the State List includes—

"Land; land revenue; land improvement and agricultural loans; colonization."

*Item 5 (29) of the Union List, on the other hand, is—*

"Regulation of land tenures, including the relation of landlord and tenant and the collection of rents; transfer, alienation and devolution of land."

*Government of India Act, 1935.*—The present entry is taken from item 21 of List II of Sch. VII of the Government of India Act, 1935, with the only difference that Courts of Wards, etc., and Treasure Trove have been included in two separate Entries 22 and 44, *below*.

## INDIA

*'Land'.*—This word is not confined to agricultural land only. It includes every form of land agricultural or not; land is primarily a matter of Provincial concern. The land in each Province may have its special characteristics in view of which it is necessary to legislate, and there are local customs and traditions in regard to landholding and particular problems of provincial or local concern which require provincial consideration. It would be strange if the land in a province were to be broken up into separate portions, some within and some outside the legislative powers of the Province. . . . The words which follow the word 'land' in the entry are appropriate to lands which are not agricultural equally with agricultural land.<sup>5</sup> The particular and limited specification of 'agricultural' land in connection with 'transfer and alienation' and improvement and loans proves that the word 'land' at the beginning of the entry is not used with restricted reference to agricultural land but relates to land in general.<sup>5</sup>

*'Pasture'* is land within the meaning of the present entry. It is sufficiently allied to agriculture generally, to be treated as a species of 'agricultural land.'<sup>6</sup>

*'Rights in and over land'.*—The words 'rights in and over land' make it clear that 'land' in this entry comprises both corporeal and incorporeal rights and interests in land.<sup>6,7</sup> 'Rights in land' must include general rights like full ownership or leasehold or all such rights.<sup>8</sup> 'Rights over land' would include easements or other collateral rights, whatever form they might take.<sup>8</sup> The words '*that is to say*', which follow the word 'land' are not words of restriction, but rather words of explanation or illustration, giving instances which may furnish a clue for particular matters.<sup>8</sup>

*Collection of rents.*—The power to legislate with respect to the collection of rents includes the power to legislate with respect to the remission of rents as well as their collection or recovery.<sup>9</sup> Hence, the Provincial Legislature is competent to enact that decrees for rent are executable only in some particular manner.<sup>10</sup>

These words are not confined in their application to agricultural lands only but are appropriate to non-agricultural lands as well.<sup>11</sup>

*'Transfer and alienation of agricultural land'.*—While the preceding matters of the entry relate to both agricultural and non-agricultural land, the exclusive

(5) *Megh Raj v. Alla Rakhia*, (1947) 51 C.W.N. 523 (528) (P.C.).

(6-7) *Megh Raj v. Alla Rakhia* (1942) 46 C.W.N. (F.R.) 61 (66).

(8) *Megh Raj v. Alla Rakhia*, (1947) 51 C.W.N. 527 (527) (P.C.).

(9) *United Provinces v. Atiq Begum*,

A.I.R. 1941 F.C. 16 (25).

(10) *Uday Chand v. Samarendra*, (1947) 82 C.L.J. 1 (F.C.) S. 168-A of the Bengal Tenancy Act upheld.

(11) *Megh Raj v. Alla Rakhia*, (1947) 51 C.W.N. 523 (528) P.C.

power of the Provincial Legislature to deal with transfer of land is confined to agricultural land, for transfer of property other than agricultural land is a concurrent subject under List III (Entry 6). A State law relating to transfer of agricultural land may override the provisions of the Transfer of Property Act.<sup>12</sup>

*Mortgages of agricultural land.*—There is no express provision in the Constitution referring by name to mortgages. But so important a subject as mortgages could not have been left out of the Constitution and left as a residual subject. Mortgages of land properly fall under entry 18 of the State List, in so far as they are mortgages of *land*, though in certain respects they include elements of transfer of property and of contract. Mortgages are properly to be classed not under the head of contracts but as special transactions ancillary to the entry 'land'. Legislation expressly limited to mortgage of agricultural land is thus wholly within the competence of the State Legislature, being covered Item 18 of List II. Entries 6 and 7 of the Concurrent List do not affect the position, since agricultural land is excluded in these entries.<sup>13</sup>

*'Agricultural land'.*—In *Megh Raj v. Alla Rakhia*,<sup>14</sup> the Federal Court declined to determine finally whether for the purposes of the entries in Lists II and III of the Constitution Act, a land will be deemed to be agricultural according to the general character of the land or according to the use to which it may be put at any particular point of time, but it was pointed out that in a *general* sense, it comprehended not merely the raising of grain or food crops but also the cultivation of the ground for the purposes of procuring vegetables and fruits for the use of man and beast, including gardening or horticulture and the raising of cattle and other stock and that in this sense it included land used for pasture. The Privy Council, on appeal<sup>15</sup> seems to have taken the term in the 'general' sense, as their Lordships definitely included *pasture* within the meaning of the term.

Lands used for the following purposes may now be said to be agricultural for the purposes of Lists II and III. (i) *coffee or tea garden*.<sup>16-17</sup>; (ii) *cocoanut garden*;<sup>16</sup> (iii) *lease of land for growing casuarina trees to be used for fuel*,<sup>16</sup> (iv) *land lying unused, but capable of being used for raising crops, vegetables, or other purposes of husbandry*,<sup>18</sup> or for farmer's residence.<sup>20</sup>

But not land covered by a natural forest.<sup>16-18</sup>

Like the word 'land' in the same entry, the words 'agricultural land' also include 'rights in or over' agricultural land.<sup>21-22</sup> Hence, the State Legislature is exclusively competent to legislate as regards usufructuary mortgages of agricultural lands.<sup>21</sup>

*Entries 18 and 65 of List II.*—The words of Entry 18 are comprehensive enough to include the remedial as well as the *procedural* provisions concerning the reliefs in respect of the several rights and liabilities enumerated in this Entry. Of course, there is a separate Entry for 'Civil Procedure' (4 of List III), but

(12) *Paramananda v. Sankar*, (1950) D. L.R. 31 (33) Cuttack.

(13) Adapted from *Megh Raj v. Alla Rakhia*, (1947) 51 C.W.N. 523 (528), (529) P.C.

(14) *Megh Raj v. Alla Rakhia*, (1942) 46 C.W.N. (F.R.) 61. But Varadachariar, J., opined that in the absence of a definition of the expression in the Constitution Act, it must be understood in the sense which it ordinarily bears in the English language.

(15) *Megh Raj v. Alla Rakhia* (1947) 51 C.W.N. 523 (528) P.C.

(16) *Megh Raj v. Alla Rakhia*, (1942)

46 C.W.N. (F.R.) 61 (67).

(17) *Kaju Mal v. Saligram*, (1923) 29

C.W.N. 395 P.C.

(18) *Prov. of Bihar v. U. N. S. Deo*, (1941) 22 P.L.T. 484 (P.C.).

(19) *Sarajini v. Sri Krishna*, A.I.R. 1944 Mad. 401.

(20) *Nil Govinda v. Rukmini*, A.I.R. 1944 Cal. 421; *Paramananda v. Sankar*,

(1950) D.L.R. 31 (34) Cuttack.

(21) *Udham v. Parkash*, A.I.R. 1945 Lah. 282.

(22) *Nil Gobinda v. Rukmini*, A.I.R. 1944 Cal. 421.



there civil procedure is used in a general sense as the procedure applicable to litigation *generally*; it does not include a special law of procedure which is applicable only to a litigation regarding a special matter.<sup>23-24</sup> Entry 65 is wide enough to create and determine the powers and jurisdiction of Courts in respect of *land*, as a matter *ancillary* to the subject of Entry 18.<sup>25</sup>

*Existing (Central) Laws.*—Bengal Tenancy Act (VIII of 1885); Bengal Alluvion and Diluvion Act (IX of 1847); Agriculturists' Loans Act (XII of 1884).

### 19. Forests.

'Forests'<sup>1</sup>.—The power to legislate with respect to forests includes the power to legislate with respect not only to afforestation but also to disafforestation.<sup>2</sup>

*Existing (Central) Law.*—Indian Forests Act (XVI of 1927).

### 20. Protection of wild animals and birds.

*Existing (Central) Laws.*—Wild Birds and Animals Protection Act (VIII of 1912); Elephants Preservation Act (VI of 1879).

### 21. Fisheries.

#### OTHER CONSTITUTIONS

*Australia.*—The power of the States to legislate as regards fishing within territorial limits has been inferred from Sec. 51 (x) of the Constitution Act.<sup>3</sup>

*Canada.*—Contrary to the Australian Constitution, the power over—'inland fisheries' is given to the Dominion Parliament exclusively, by Sec. 91 (2) of the British North America Act.

It has, however, been held that the exercise of this power by the Dominion Parliament is limited by the power of the Provinces to legislate as regards 'property and civil rights within the Provinces' [Sec. 92 (13)]. Hence,—

(a) the authority of the Dominion to legislate in respect of inland fisheries is confined to the enactment of fishery regulations and restrictions, *e.g.*, as to the manner, time and place of fishing, measures for protection and preservation of fish, but does not extend to the direct interference with proprietary rights, such as, the authorisation of the right of fishing in non-navigable waters, the beds of which are the property of private owners.<sup>4</sup>

(b) Dominion legislation setting up a licensing system in respect of fish canneries and curing establishments is *ultra vires*.<sup>5</sup>

"Trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words—'sea coast and inland fisheries'".<sup>5</sup>

The Dominion has no power of buying or selling fish.<sup>6</sup>

(c) The Province is competent to prescribe the modes of transfer and succession in respect of rights in fishery and the terms and conditions thereof.<sup>5</sup>

(23) Cf. *Bir Bikram v. Tofazzal*, (1942) 46 C.W.N. 999 (1002, 1006).

(24) *Uday Chand v. Samarendra*, (1947) 82 C.L.J. 1 (F.C.).

(25) Cf. *Megh Raj v. Alla Rakhia*, (1947) 51 C.W.N. 523 (528) P.C.

(1) Item 22 of List II of the Government of India Act, 1935 ■■■ the ■■■ ■■■ the present Entry.

(2) *United Provinces v. Aliqa Begum*, A.I.R. 1941 F.C. 16 (25).

(3) Wynes, *Legislative & Executive Powers*, p. 137.

(4) *A.-G. for Canada v. A.-G. for the Provinces*, (1898) A.C. 700.

(5) *A.-G. for Canada v. A.-G. for N.S. Columbia*, (1930) A.C. 111 (121).

*Burma.*—Item 2 (2) of the State List is—‘Fisheries within the State’.

*Government of India Act, 1935.*—Item 24 of List II was the same as the present Entry.

#### INDIA

‘*Fisheries*’.—Though the entry does not refer to ‘fishing’, it would be interpreted to include not only the regulation of fishing itself but also the prohibition of fishing altogether in particular places or at particular times.<sup>6</sup>

*Analogous Provision.*—See Entry 57, List I.

*Existing (Central) Laws.*—Indian Fisheries Act (IV of 1897).

22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates.

#### OTHER CONSTITUTIONS

*Burma.*—Item 2 (3) of the State List includes—‘encumbered and attached estates’.

*Government of India Act, 1935.*—The latter part of Item 21 of List II included the subject of the present Entry.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

‘*Regulation of mines. . .*’—The present power is subject to Entries 54-5 of List I.

24. Industries subject to the provisions of entry 52 of List I.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—The latter part of Item 29 of List II was—

“development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.”

#### INDIA

‘*Industry*’.—Industry is distinguished from commerce in that industry produces while commerce distributes. The two are independent in so far as industry on a large scale cannot exist without commerce to market its products, while there would be no commerce unless there are products to trade with.

*Analogous Provision.*—See Entry 52 of List I; 33 of List III.

25. Gas and gas-works.

‘*Gas and Gas-works*’.—This Entry is the same as Item 26 of List II of the Government of India Act, 1935.

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

#### OTHER CONSTITUTIONS

*U.S.A.*—The scope of State regulation of intra-State commerce is rather small since railways and ships running within the State mostly carry goods for transportation to other States, which makes the commerce inter-State;<sup>8</sup>

(6) *United Provinces v. Atiqua Begum*, 1935 was the same as the present Entry. A.I.R. 1941 F.C. 16 (25).  
(7) Item 23 of List II of the Act of  
(8) *Daniel Ball*, (1870) 10 Wallace 557.

Even an indirect interference by Congress with inter-State commerce would be invalid. It is on this ground that the Supreme Court invalidated the Employers' Liability law."

But 'Inter-State' does not mean that the State has the right to regulate all commerce within its territorial limits. If the commerce falls within the category of 'foreign' or 'inter-State' Commerce, Congress has the power to maintain its free flow within the boundaries of the individual States.<sup>10</sup>

*Australia*.—There is no express provision assigning intra-State trade to the States, but it has been held that the limitation of Commonwealth power to 'trade and commerce with other countries' [Sec. 51 (i)] by implication prohibits the Commonwealth to interfere with internal trade except as a necessary and proper means for carrying into execution some other federal power vested in the Commonwealth by the Constitution.<sup>11</sup>

*Government of India Act, 1935*.—Item 27 of List II of the Government of India Act, 1935, included—

'Trade and commerce within the Province; . . . .'

#### INDIA

—'Trade and commerce within the State'.—See Commentary under Entry 42 of List I. The present power is subject to Art. 303 (1), p. 642, *ante*. See also Entry 33, List III, which empowers Parliament to enter into the field of intra-State commerce, by declaring some industry as one which requires control by the Union.

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935*.—Item 29 of List II included—'Production, supply and distribution of goods.'

#### INDIA

'Goods'.—See Art. 366 (12), p. 708, *ante*.

*Existing (Central) Laws*.—Coffee Market Expansion Act (VII of 1942), Agricultural Produce (Grading and Marketing) Act (I of 1937); Rubber (Production and Marketing) Act (XXIV of 1947).

28. Markets and fairs.

#### OTHER CONSTITUTIONS

*Burma*.—Item 2 (5) of the State List is identical with the present Entry of our Constitution.

*Government of India Act, 1935*.—The present Entry of the Constitution is taken verbatim from the latter part of Item 30 of List II of the Act of 1935.

29. Weights and measures except establishment of standards.

*Government of India Act, 1935*.—Item 30 of List II included—'Weights and measures.'

(9) Employers' Liability Cases, 207 U.S. 463. 1; *Leisy v. Hardin*, (1890) 135 U.S. 100.  
(10) *Gibbons v. Ogden*, (1824) 9 Wh. (11) *A-G. for N. S. W. v. Brewery Employees*, (1908) 6 C.L.R. 469, citing *U. S. v. De Witt*, (1824) 9 Wall. 41.



## INDIA

*'Weights and measures'*.—The establishment of standards of weight and measure is a Union subject, under Entry 50, List I.

*Existing (Central) Laws*.—Indian Weights and Measures of Capacity Act (XXXI of 1871).

30. Money-lending and money-lenders ; relief of agricultural indebtedness.

## OTHER CONSTITUTIONS

*Canada*.—Sec. 91 (19) of the Br. N. America Act empowers the Dominion Parliament to legislate exclusively, in relation to—'Interest.'

*Government of India Act, 1935*.—'Money-lending and money-lenders' formed the latter part of item 21 of List II of the Government of India Act, 1935.

## INDIA

*'Money-lending'*.—The power to legislate in respect to a matter must necessarily include the power to legislate over subsidiary and ancillary matters. It has now been conclusively laid down by the Privy Council (1) that the power to make laws in respect to money-lending necessarily imparts the power to affect the lender's rights in respect of *promissory notes* given as security in money-lending transactions, even though promissory notes form a Union subject (*vide* Entry 91 of List I, *ante*).

"To take a promissory note as security for a loan is the common practice of money-lenders and if a legislature cannot limit the liability of a borrower in respect of a promissory note given by him it cannot in a real sense deal with money-lending. All the lender would have to do in order to oust its jurisdiction would be to continue his normal practice of taking the security of a promissory note and he would then be free from any restrictions imposed by the Provincial Legislature."<sup>12</sup>

*'Relief of agricultural indebtedness'*.—This item was not expressly mentioned in any of the Lists in the Government of India Act, 1935, but it was held by the Federal Court,<sup>13</sup> that it would fall within the Provincial subject with respect to 'money-lending and money-lenders' in List II. The doubt is removed by specific enumeration of the subject in the present entry.

*Existing (Central) Laws*.—Interest Act (XXXII of 1839) ; Usurious Loans Act (X of 1918) ; Agriculturists' Loans Act (XII of 1884).

31. Inns and inn-keepers.

*'Inns and inn-keepers'*.—This Entry is the same as Item 28 of List II of the Act of 1935.

*Existing (Central) Laws*.—Sarais Act (XXII of 1867).

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities ; unincorporated trading, literary, scientific, religious and other societies and associations ; co-operative societies.

*'Incorporation, etc., of Corporations'*.<sup>14</sup>—This Entry includes the incorporation etc., of Corporations and societies, which are not included in Entries 43-4, List I,

(12) *Prafulla v. Bank of Commerce*,  
(1947) 51 C.W.N. 599 (608) P.C.

(13) *Subramanyam v. Muttuswami*, A.I.  
R. 1941 F.C. 47 (upholding validity of  
the Madras Agriculturists Relief Act,

1938).

(14) This item corresponds to item 33 of  
List II of the Government of India Act,  
1935.

33. Theatres and dramatic performances ; cinemas subject to the provision of entry 60 of List I ; sports, entertainments and amusements.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 35 of List II was—

"Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition."

*Burma.*—Item 5 (4) of the State List is—

"Theatres, dramatic performances and cinemas, but not including the sanction of cinematographic films for exhibition."

#### INDIA

'Cinematograph'.—It includes any apparatus for the representation of moving pictures or series of pictures<sup>16</sup> sanctioning of cinematograph films is excluded from the present Entry, and included in Entry 60, List I, *ante*.

*Existing (Central) Laws.*—Cinematograph Act (II of 1918) Dramatic Performances Act (XIX of 1876).

#### 34. Betting and gambling.

*Government of India Act, 1935.*—Item 36 of List II was—'Betting and gambling'.

#### INDIA

'Betting, Gambling, Gaming, Wagering'.—A wager is a contract by which two or more persons agree that a certain sum of money or other thing of value shall be paid or delivered to one of them by the other or others upon the happening of an *uncertain* event.

Betting is a form of wagering contract, while gaming is a species of betting. In betting, money or money's worth is made payable on the result of an uncertain event, which may or may not be a game. Thus, there may be a wagering or betting contract on the result of a pending election.

Gaming is a contract between two or more persons by which they agree to play by certain rules at cards, dice or other contrivance that one shall be the loser and the other the winner.

Gaming and gambling are usually used as synonymous; but gambling is a wider term. While gaming refers to playing with stakes at cards, dices and similar contrivances, gambling includes any act or game whereby a man intentionally exposes to his money or thing of value to the risk of loss by chance.

*Existing (Central) Laws.*—Public Gambling Act (II of 1867).

#### 35. Works, lands and buildings vested in or in the possession of the State.

#### OTHER CONSTITUTIONS

*Canada.*—Sec. 92 (5) of the B. N. A. Act gives the Province exclusive jurisdiction over—

"The management and sale of the public lands belonging to the Province, and of the timber and wood thereon."

*Burma.*—Item 2 (4) of the State List of the Burmese Constitution is the same as the present Entry of *our* Constitution.

*Government of India Act, 1935.*—Item 8 of List II was to the same effect.

*'Buildings'.*—A building need not necessarily be a completed structure; it is sufficient that it should be a connected and entire structure.<sup>16</sup> Nor need a building necessarily have a roof.<sup>17</sup> At first there are only foundations and disconnected walls; when the construction can be regarded as a whole and not a series of disconnected structures, such structure can well be regarded as a building.<sup>18</sup>

*Analogous Provision.*—While this Entry deals with the legislative power as regards property vested in a State, Entry 32 of List I deals with the legislative power as regards property vested in the Union.

36. Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III.

*Government of India Act, 1935.*—Item 9 of List II was—'Compulsory acquisition of land.'

#### INDIA

*'Acquisitioning and requisitioning. . . .'*—This Entry is to be read with Entry 33 of List I and 42 of List III.

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

*Government of India Act, 1935.*—Item 11 of List II of the Act was—

"Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder."

#### INDIA.

*'Subject to . . . law made by Parliament.'*—See Arts. 327-8, p. 671, *ante*.

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

#### OTHER CONSTITUTIONS

See Item 1 (4) of the State List of the Burmese Constitution, and Item 12 of List II of the Government of India Act, 1935.

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

*Government of India Act, 1935.*—Item 12 of List II of the Act included—

"the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature."

*Analogous Provision.*—See Art. 194 (3), p. 465, *ante*.

(16) *Queen v. Manning*, (Crown Cases reserved, I, 338).  
 (17) *Waite's Executors v. Commissioners of Inland Rev.*, (1914) 3 K.B. 196.  
 (18) *Mahomed v. Sailendra*, (1950) 54 C.W.N. 642 (647).



## 40. Salaries and allowances of Ministers for the State.

## OTHER CONSTITUTIONS

*Burma.*—Item 1 (4) of the State List includes the present Entry of our Constitution.

## 41. State public services ; State Public Service Commission.

## OTHER CONSTITUTIONS

*Canada.*—Sec. 92 (4) of the British North America Act relates to—'Provincial Offices and Officers'.

*Burma.*—Item 1 (2) of the State List is the same as the present Entry of our Constitution.

*Government of India Act, 1935.*—Item 6 of List II was the same.

## 42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

## OTHER CONSTITUTIONS

*Burma.*—Item 1 (3) of the State List is the same as the present Entry of our Constitution.

*Government of India Act, 1935.*—Item 7 of List II was identical.

*Existing (Central) Laws.*—Pensions Act (XXIII of 1871).

## 43. Public debt of the State.

*Government of India Act, 1935.*—Item 5 of List II was the same.

## 44. Treasure trove.

## OTHER CONSTITUTIONS

*Burma.*—Item 2 (3) of the State List includes—'treasure trove'.

*Government of India Act, 1935.*—This subject was included in item 21 of List II.

*Existing (Central) Laws.*—Indian Treasure-trove Act (VI of 1878).

## 45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

## OTHER CONSTITUTIONS

*Burma.*—Item 2 (3) of the State List includes—'land revenue'.

*Government of India Act, 1935.*—Item 39 of List II was the same as the present Entry.

## INDIA

'Land Revenue'.—Land Revenue includes "every sum, annually payable to Government by the proprietor of an estate or tenure, held *directly* under Government in respect thereof, . . . ." <sup>19</sup>

*The land revenue system in India.*—There are two systems of land revenue settlement in India—(a) the permanent settlement and (b) temporary settlements.

(A) The Permanent Settlement was initiated by Reg. II of 1793 by which the Government's share of the produce was *permanently* fixed by estimating the rents then paid by the tenants, deducting the cost of collection, and then appropriating 10|11 to the State, leaving the remaining 1|11 to the landlord or rent-receiver, who was recognised as the proprietor. By this system, while the State was ensured of a fixed revenue, all the benefit of increase of profits from the land has gone to the landlords or 'zemindars'.

The Permanent Settlement exists in Bengal, Bihar, Orissa and parts of the U. P. and Madras.

(B) The temporary settlements have two sub-divisions—(i) the 'zemindari', 'malguzari' or 'talukdari' and (ii) the 'ryotwari' systems.

(i) Under the 'malguzari' system, it is the landlord or middleman who pays the land revenue to the State, and the land revenue is assessed or adjusted at the interval of 30 years or thereabout. This system exists in Agra, Oudh, the Punjab and the C. P. (ii) Under the ryotwari system, the ryot or the actual cultivator pays the revenue directly to the State. This system prevails in Madras, Bombay and Assam. Here there is no middlemen between the ryots and the State.

*Nature of the Permanent Settlement.*—Reg. I of 1793 relates to the subject of the *jama* to be settled in respect of each estate. It has no reference to the income derived by an individual from land used for agricultural purposes.<sup>20</sup>

"While the Regulations contain assurances against any claim to an increase of the *jama*, based on an increase of the Zemindari income, they contain no promise that Zemindar shall in respect of the *income* which he derives from his Zemindari be exempt from liability to any future general scheme of property taxation, or that the income of a Zemindari shall not be subjected with other incomes to any future general taxation of incomes."<sup>21</sup>

*Existing (Central) Laws.*—Bengal Land Revenue Settlement Regulation (Reg. VII of 1822); Bengal Land Revenue Sales Act (XI of 1859).

#### 46. Taxes on agricultural income.

*Government of India Act, 1935.*—This Entry is taken from item 41 of List II of Sch. VII of the Government of India Act, 1935.

'Agricultural income'.—See under Art. 366 (1), p. 705, *ante*.

*Analogous Provision.*—This Entry is to be read with Entry 82 of List I which makes taxes on income *other than* agricultural income, an exclusively Union subject. These two Entries are complementary to each other.

*Nature of Agricultural Income-tax.*—An Agricultural Income-tax is not repugnant to the provisions of the Permanent Settlement Regulation (I of 1793). While Regulation I of 1793 relates to the subject of the *jama* to be settled in respect of each estate, a tax on agricultural income operates upon the net *income* derived from the land used for agricultural purposes. The *jama* is imposed directly upon the *land*, while income-tax is imposed upon the *income* derived by an individual from land used for agricultural purposes.<sup>22</sup>

A State Legislature is entitled to impose a tax on *some* categories of agricultural income, while excluding others.<sup>23</sup>

(20) *Hulas Narain v. Prov. of Bihar*, (1942) 46 C.W.N. (F.R.) 21 (30).

(21) *Prabhat v. The King*, (1930) 58 Cal. 430 (437) (P.C.).

(22) *Hulas Narain v. Prov. of Bihar*, (1942) 46 C.W.N. (F.R.) 21 (30).

(23) Cf. *Hulas Narain v. Prov. of Bihar*, (1942) 46 C.W.N. (F.R.) 21 (30).

## 46. Duties in respect of succession to agricultural land.

'*Succession duty on agricultural land*'.—The present Entry is the same as item 43 of List II of the Government of India Act, 1935. See, further, under Entry 88, List I.

## 48. Estate duty in respect of agricultural land.

'*Estate duty on agricultural land*'.—There was no such item in the Government of India Act, 1935. See, further, under Entry 87, List I.

## 49. Taxes on lands and buildings.

## OTHER CONSTITUTIONS

*Government of India Act, 1935*.—The present Entry is taken from item 42 of List II of the Government of India Act, 1935, but the words 'hearths and widows' at the end of the item have been *excluded*.

*England*.—The land tax is assessed on the annual value or gross income, *i.e.*, the rent at which the property is let or is worth to be let by the year, after making certain statutory allowances and deductions. The expression 'lands' includes buildings and farmhouses occupied by the tenant farmers and certain miscellaneous hereditaments.

A tax on lands and buildings is specially a good tax where the property has been benefited by local expenditure. In Great Britain as well as in the U. S. A. the bulk of local taxation is levied on the occupier of real property.<sup>24</sup>

*Australia*.—A land tax was imposed by the Commonwealth, by the Land Tax Assessment Act, 1910.<sup>25</sup> The tax is payable by the *owner* of land upon the taxable value of all the land owned by him, unless exempted by the Act. Every part of a holding which is separately held by any occupier, tenant, lessee or owner, is deemed to be a separate parcel.

## INDIA

'*Tax on Land and Buildings*'.—Under the Government of India Acts, 1915 and 1919, Provincial Legislatures had authority to levy a tax on lands and buildings, but for municipal purposes only. The Government of India Act, 1935, removed that limitation and authorised the Provincial Legislature to levy this tax for the purposes of Provincial revenue. The present Constitution has retained that power, and the meaning of the Entry should be determined with reference to the meaning which the tax has gathered previously.<sup>1-3</sup>

An inanimate object cannot pay a tax. Therefore a tax on property must be paid by the owner or occupier. But from the fact that the owner is liable, it does not follow that the tax is an 'income-tax'. If lands and buildings are treated as investments and the *return*, as income, is taxed, it is income-tax. On the other hand, if the tax is on the lands and buildings *themselves* and the assessment is on a standard named by the Legislature which may fluctuate or vary on the produce or income from it, it would be a tax on the property.<sup>3</sup>

A tax on land or 'land tax' is—"a tax on land *directly* imposed by the State".<sup>4</sup>

(24) Findlay Shirras, Public Finance, Vol. I, p. 262.

(25) Quick, Legislative Powers, 1919, p. 322.

(1) Cf. *Byramjee v. Prov. of Bombay*, A.I.R. 1940 Bom. 65 (75).

(2) *Ralla Ram v. Prov. of East Punjab*, (1949) 4 D.L.R. (F.C.) 8.

(3) *Byramjee v. Prov. of Bombay*, A.I.R. 1940 Bom. 65. (The Urban immovable property-tax levied by Bombay Finance Act (II of 1932); held to be a tax on lands and buildings and hence valid).

(4) *Solomon v. New S. W. Sports Club*, (1914) 19 C.L.R. 698.



"A yearly impost laid upon real property by Parliamentary enactment for the provision of public revenue appears to be within the description."<sup>5</sup>

It does not cease to be so because it is imposed upon property within a defined area or upon specified classes of property.<sup>5</sup>

A tax on land and building may be imposed either upon the occupier or upon the owner. It is not necessarily an 'occupation tax' in India.<sup>6</sup>

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

#### OTHER CONSTITUTIONS

*England.*—In England, there is a Mineral Rights Duty since 1910, which is imposed at a particular rate on the rental value of all rights to work minerals and of all mineral wayleaves. The person assessed is the proprietor who works his own minerals or the person who receives the rents from the person who actually works. The term 'minerals' does not include—common clay, common brick clay, common brick earth, sand, chalk, limestone or gravel, or any substance coming within these descriptions.

#### INDIA

*'Taxes on mineral rights'.*—This Entry is to be read subject to Entry 54, List I.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :—

(a) alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

#### OTHER CONSTITUTIONS

*Burma.*—Item 2 (8) of the State List corresponds to the present Entry of our Constitution, but differs on the following points—(i) It includes non-narcotic drugs. (ii) It also includes medicinal and toilet preparation containing alcohol, opium, hemp, etc.

*Government of India Act, 1935.*—Item 40 of List II of that Act was the same as the Burma item, as stated above.

#### INDIA

*'Countervailing duties'.*—If the alcoholic liquors, etc., are produced within the State, the State Legislature may impose 'duties of excise' on them. If they are manufactured or produced outside the State, it may impose 'countervailing duties' at the same or lower rates.

*Analogous Provision.*—The present Entry is to be read with Entry 84 of List I. What is excluded by one of the Entries is included in the other.

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

(5) *Leventhal v. David*, A.I.R. 1930 P.C. 129 (132).

(6) *Ralla Ram v. Prov. of East Punjab*, (1949) 4 D.L.R. (F.C.) 8.

*Government of India Act, 1935.*—The present Entry is a reproduction of item 49 of List II of Sch. VII of the Government of India Act, 1935, with the substitution of the word 'taxes' for the word 'cesses'. The Entry in the Government of India Act, 1935, was—

"Cesses on the entry of goods into a local area for consumption, use or sale therein."

*Essential features of the tax under Entry 52 of List II: distinguished from 'terminal tax'.*—The essential features of the present tax are—(a) the entry of goods into a definite local area; (b) the goods must enter for the purpose of consumption, use or sale therein. Hence, the tax cannot be imposed under the present entry on goods merely passing through that local area. But there is no limitation on the manner by which the goods to be subjected to the tax may enter into that local area.<sup>7</sup>

The tax referred to by the present Entry is commonly known as 'octroi', i.e., a tax on goods brought into a place 'for sale, consumption or use'.<sup>8</sup> It is to be noted that no such purpose Entry 89 of List I, which relates to 'terminal tax'. A terminal tax is a tax collected at the termini or outskirts of a local area, without reference to the purpose for which the goods enter that area. Entry 89 of List I, again, is limited by the words 'railway, sea or air'. But in the present Entry there is no limitation on the manner in which the goods may enter; there is no ground for suggesting that the entry of goods by rail or air is any less contemplated by the present Entry than Entry by waterway or road. It follows that so far as rail-borne or air-borne goods are concerned, the same goods may well be subjected to taxation by the Union under Entry 83 of List I as well as to local taxation under Entry 61 of List II, but the grounds of taxation under the two Entries are radically different.<sup>9</sup>

The existence or non-existence of any provision for refunds is not an essential criterion of the tax under the present Entry.<sup>9</sup>

#### Illustration

In 1926, the Municipality of Lahore imposed a 'Terminal tax' calculated on the gross weight of consignments or per tail on the articles specified in a schedule, imported into the Municipality by rail or by road. The tax was imposed under the powers conferred by the Punjab Municipal Act, 1911, which authorised the Municipal Committee to impose such taxes which the Provincial Legislature has power to impose. In 1938, the Municipality renamed the tax as 'Octroi' (without refunds). The question was whether the tax was a 'terminal tax'<sup>10</sup> within List I of Sch. VII of the Government of India Act, 1935 or a tax on the entry of goods into a local area, under List II (entry 49 of the Act of 1935).

It was found that the goods upon which the tax was imposed, entered into the Municipal limits of Lahore for consumption, use or sale therein. Held, it was not a terminal tax, but a 'tax on the entry of goods . . .' within entry 49 of List II,<sup>11</sup> and, accordingly the tax was not *ultra vires* of the powers of the Provincial Legislature and hence of the Municipality, even though the goods entered into the Municipal area by rail.<sup>12</sup>

#### 53. Taxes on the consumption or sale of electricity.

*'Taxes on consumption or sale of electricity'.*—There was no item in the Government of India Act, 1935, corresponding to the present Entry. The present Entry is to be read subject to Arts. 287-8, ante.

#### 54. Taxes on the sale or purchase of goods other than newspapers.

(7) *Punjab Flour Mills v. Prov. of Punjab*, (1947) 81 C.L.J. 417 (424) (F.C.).

(8) *Empress Mills v. Wardha Municipality*, A.I.R. 1950 Nag. 169 (174).

(9) *Punjab Flour Mills v. Prov. of Punjab* (1947) 81 C.L.J. 417 (423) (F.C.).

(10) Entry 89, List I of the Constitution.

(11) Entry 52, List II of the Constitution.

(12) *Punjab Flour Mills v. Prov. of Punjab*, (1947) 81 C.L.J. 417 (F.C.).

## OTHER CONSTITUTIONS

*Burma.*—Item 4 (4) of the Union List is—‘Taxes on the sale of goods’.

*Government of India Act, 1935.*—Item 48 of List II was—‘Taxes on the sale of goods and on advertisements’.

## INDIA

‘*Taxes on sale . . . .*’—The present Entry differs from Entry 48 of the Government of India Act, 1935, in so far as ‘newspapers’ are excluded from the present Entry and included in Entry 92, List I. Taxes on ‘advertisements’ form a separate Entry (55, *below*).

‘*Sales Tax*’ and ‘*Excise duty*’.—A tax on sale is a tax levied upon a vendor in respect of the sale of his goods (as *existing* articles) as distinguished from a tax levied on a manufacturer on the manufacture of his goods, which is known as an ‘excise duty’. A sales tax, again, is general in its scope and lacks the uniformity of incidence and discrimination in subject-matter which characterise an excise duty.<sup>13</sup> A tax which is in substance a ‘tax on sales’ does not become an excise duty simply because it is imposed on the *first sale* of goods manufactured or produced in India. The Provincial Legislature has thus the power to impose a tax on the first sale of goods manufactured or produced in the Province.<sup>14</sup>

On the other hand, an excise duty may be collected at any stage subsequent to manufacture or production, *e.g.*, on first sale or retail sale. But that is a matter of administrative convenience. The nature and character of a tax is to be determined not from the *point of time* of its collection, but from the real reason of its imposition and its incidence.<sup>14</sup>

A sale tax is a tax of a high merit, being easy of collection and often more productive than customs or excises.<sup>15</sup>

*Analogous Provision.*—The present power is subject to Art. 286.

55. Taxes on advertisements other than advertisements published in the newspapers.

See under Entry 92, List I and Entry 54, List II, above.

56. Taxes on goods and passengers carried by road or on inland waterways.

‘*Taxes on goods and passengers. . . .*’—This Entry is to be read with Entry 89, List I.

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.

‘*Taxes on vehicles*’.—This Entry includes taxes on vehicles used on the roads, but the *principles* on which *mechanically* propelled vehicles are to be taxed is a concurrent subject (Entry 35, List III, *post*).

58. Taxes on animals and boats.

## OTHER CONSTITUTIONS

*Burma.*—Item 2 (10) of the State List is the same as the present Entry of our Constitution.

(13) *Governor-General v. Prov. of Madras*, (1945) 49 C.W.N. 381 (P.C.), affirming *Prov. of Madras v. Boddu Paidanna*, A.I. R. 1942 F.C. 33.

(14) *In re C. P. Motor Spirit Taxation Act*, (1939) 43 C.W.N. (F.R.) 1 (10).

(15) Findlay Shirras, *Public Finance*, Vol. I, p. 261.



*Government of India Act, 1935.*—Item 47 of List II was identical.

## 59. Tolls.

### OTHER CONSTITUTIONS

*Burma.*—Item 2 (12) of the State List is the same as the present Entry.  
*Government of India Act, 1935.*—Item 53 of List II was identical.

### INDIA

*'Toll'.*—It is a "reasonable sum of money due to the owner of a fair or market, upon sale of things tollable within the same".<sup>16</sup> It is also levied for passing over a ferry, bridge or harbour.

*Existing (Central) Law.*—Indian Tolls Act (VIII of 1851).

## 60. Taxes on professions, trades, callings and employments.

### OTHER CONSTITUTIONS

*Burma.*—Item 2 (9) of the State List is—"Taxes on trades and employments".

*Government of India Act, 1935.*—Item 46 of List II was the same as the present Entry of our Constitution.

### INDIA

*'Tax on trade'.*—It may be a tax on the income derived from trade [subject to Art. 256 (2)], or it may be a tax on the total business *turnover* of a trader even though he may not have earned any taxable income.<sup>17</sup>

*Analogous Provisions.*—This Entry has to be read with Entry 82 of List I and Art. 276. The result is that though a tax on professions, trades, etc., is in the nature of an income-tax, a State tax on professions, etc., will be valid if it does not exceed the limit of Rs. 250 per annum.

## 61. Capitation taxes.

### OTHER CONSTITUTIONS

*Burma.*—Item 2 (7) of the State List is—'Capitation and Thathameda taxes'.

*Government of India Act, 1935.*—Item 45 of List II was the same as the present Entry of our Constitution.

### INDIA

*'Capitation tax'.*—A capitation tax is a poll tax upon the person simply, without any regard to his property, business, employment or other circumstances.

## 62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

### OTHER CONSTITUTIONS

*Burma.*—Item 2 (11) of the State List is—"Taxes on entertainments, amusements, betting and gambling".

(16) Tomlin's Law Dictionary.

(17) *Dt. Board v. Prag Dutt*, (1949) 4 D.

L.R. (All.) 1 (F.B.).

*Government of India Act, 1935.*—Item 50 of List II was the same as the present Entry of our Constitution.

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

*'Rates of stamp duty'*<sup>18</sup>. . . .—This Entry relates to *rates* of stamp duty in respect of all documents other than those included in Entry 91, List I. All other matters relating to stamp duties, save *rates*, is included in Entry 44, List III, *post*.

64. Offences against laws with respect to any of the matters in this List.

#### OTHER CONSTITUTIONS

*Canada.*—Though Criminal law is within the exclusive jurisdiction of the Dominion Parliament [Sec. 91 (27)] the Provinces have the power to pass laws imposing "fine, penalty or imprisonment for any law of the Province" [Sec. 92 (15)].

*Government of India Act, 1935.*—There was no item corresponding to the present Entry, but the present power was deduced as a power *ancillary*<sup>19</sup> to that of legislation relating to the different subjects included in List II.

#### INDIA

*'Offences'.*—Though Criminal law is a concurrent subject under List III, Entry 1, each State has, under the present Entry, the exclusive power to pass punitive laws for violation of the laws which its Legislature is competent to enact.

*Analogous Provisions.*—Entry 93, List I.

65. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List.

*Government of India Act, 1935.*—Item 2 of List II of that Act included the present subject.

*Analogous Provisions.*—See Entry 95, List I; 46 of List III, *post*.

66. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

*Government of India Act, 1935.*—Item 54 List II was the same.

*Analogous Provisions.*—See Entry 96, List I; 47 of List III, *post*.

#### List III—Concurrent List.

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

(18) Item 51 of List II of the Government of India Act, 1935, was the same.

(19) *Lakhi Narayan v. Prov. of Bihar*, (1949) 5 D.L.R. 17 (22) (F.B.).

## OTHER CONSTITUTIONS

*Canada.*—Sec. 91 (27) of the Br. North America Act gives the Dominion Parliament *exclusive* jurisdiction over—

"The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters."

Cl. (27) of Sec. 91 of the Br. North America Act makes Criminal law an exclusive Dominion subject, in the fullest sense, except that under Cl. (15) of Sec. 92, "the *imposition* of punishment by fine, penalty, or imprisonment for enforcing any law of the Province in relation to any matter coming within any of the classes of subjects enumerated in Sec. 92", is a Provincial subject.<sup>20</sup> From this it has been held that the Dominion Legislature has the exclusive right by legislation to *create and define crimes* and to impose *penalties* for their commission, and also to direct how penalties for the infraction of criminal law shall be *applied*. . . .

"If the power to direct the manner of application of penalties were to be dissociated from the power to create such penalties and were to be lodged in another authority, it is easy to see how penal legislation may be seriously affected if not stultified."<sup>21</sup>

*Burma.*—Item 5 (12) of the Union List is—'Criminal Law and Procedure.'

*Government of India Act, 1935.*—Item I of List III of that Act was the same as the present Entry of our Constitution.

## INDIA

'Criminal Law'.—As to what is criminal law, the observations of the Judicial Committee in interpreting the corresponding provision of the Br. North America Act [Sec. 91 (27)], would be very useful:<sup>22</sup>

"Criminal law means the criminal law in its widest sense. . . . The power must extend to legislation to *make new crimes*. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition: nor can it be discovered by reference to any standard but on: Is the act *prohibited* with *penal* consequences?"

Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State. . . . It appears to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them ■■ punished."<sup>22</sup>

In ■ later case<sup>23</sup>, the Judicial Committee observed—

"The characteristic feature of ■ crime . . . . the intent to do wrong . . . . There is no 'other feature of wrongness' than the intention of the Legislature in the public interest to prohibit the act or omission made criminal."<sup>23</sup>

In the present Entry, however, Criminal law means the ordinary criminal law of the land and does not include 'military law.'<sup>24</sup>

*Offences, penalties therefor and destination of fines: Analogous Provisions.*—In general, the power to legislate in respect of criminal law includes the power

(20) *A.-G. for Ontario v. Hamilton Street Ry.*, (1903) A.C. 524.

(21) *Toronto City Corporation v. The King*, (1932) A.C. 98.

(22) *Proprietary Association v. Att.-Gen.*, A.I.R. 1931 P.C. 94 (99).

(23) *A.-G. of Br. Columbia v. A.-G. of Canada*, A.I.R. 1937 P.C. 91 (92).

(24) *Cf. Meads v. The King*, (1948) 52 C.W.N. 834 (P.C.) affirming (1944) 49 C.W.N. (F.R.) 23.



to impose penalties for disobedience as well as to legislate for the destination of fines so imposed Criminal law, under *our* Constitution, is a concurrent subject. But Entries 93 of List I and 64 of List II say that offences relating to laws with respect to any of the matters included in List I is an exclusive Union subject, while offences with respect to the matters included in List II is an exclusive State subject and these are expressly excluded from the present Entry. Hence, it is the residue of the criminal law, offences thereunder and punishment for them, that belongs to the Concurrent List.

*Existing (Central) Laws.*—The Indian Penal Code (XLV of 1860); Whipping Act (IV of 1909); Prevention of Seditious Meetings Act (X of 1911); Police (Incitement to Disaffection) Act (XXII of 1922); The Criminal Law Amendment Acts (XXIII of 1932; XX of 1938); Prevention of Corruption Act (II of 1947).

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

#### OTHER CONSTITUTIONS

*Canada.*—‘Procedure in criminal matters’ is an exclusive Dominion subject [Sec. 91 (27)].

But the Province has the power—(a) to impose punishment for any law of the Province [Sec. 92 (15)]; (b) as to the constitution, maintenance and organization of criminal Courts [Sec. 92 (14)].

In the result, though the Dominion Parliament may give jurisdiction to Provincial Courts in criminal matters, in spite of any provincial statute relating to such Courts,<sup>25</sup> the Dominion Parliament cannot regulate the procedure under ■ Provincial penal statute, coming under Sec. 92 (15).

*Burma.*—See under Entry 1.

*Government of India Act, 1935.*—Item 2 of List III of that Act was the same as the present Entry.

#### INDIA

‘*Criminal proceedings*’.—Unless there is a context which so indicates, ‘criminal proceedings’ indicate only those proceedings which are capable of being instituted under the ordinary criminal law of the land and do not include proceedings under military law (i.e., court martial proceedings).<sup>1</sup>

‘*Including all matters included in the Code of Criminal Procedure*’.—The word ‘including’ is a word of enlargement and not *restriction*. Hence all matters included in the Code of Criminal Procedure at the date of commencement of the Constitution, whether they relate to procedure or to *substantive* right, would be a concurrent legislative subject.<sup>2</sup>

*Powers of Criminal Courts.*—Parliament has exclusive power as regards the powers of all Courts (except the Supreme Court) with respect to any of the matters included in List I (Entry 95, List I). But Part II of the Code of Criminal Procedure (V of 1898) deals with the powers of Criminal Courts. Hence, notwithstanding Entry 95 of List I, a State Legislature shall have con-

(25) Lefroy, *Canadian Constitutional Law*, pp. 116-8. in *Meads v. King*, (1948) 52 C.W.N. 834 (P.C.).

(1) *Meads v. King-Emp.*, (1944) 49 C.W.N. (F.R.) 23, affirmed by the P.C.

(2) *Narayanaswami v. Inspector of Police*, (1948) 11 F.L.J. 43 (F.B.).

current power (under Entry 2, List III) to legislate as regards the powers of Criminal Courts, even though the offence to be tried by such Courts is one under List I, *e.g.*, an offence under the Arms Act (Entry 5 of List I).<sup>3</sup>

*Existing (Central) Laws.*—Criminal Procedure Code (V of 1898); Coroner's Act (IV of 1871).<sup>4</sup>

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

#### OTHER CONSTITUTIONS

*Burma.*—Item 3 (3) of the State List is—

"preventive detention for reasons connected with the maintenance of public order; persons subject to such detention."

*Government of India Act, 1935.*—There was no item in that Act corresponding to the present Entry. Item 34 of List III simply was 'Persons subjected to preventive detention under Federal authority'. As a result, the Provinces had no power of preventive detention save in the interests of 'public order.' Thus, it was held that the Provincial Legislature had no power to provide for preventive detention for 'black-marketing.'<sup>5</sup> The present Entry has been inserted to remove such difficulties.

#### INDIA

*'Preventive detention'.*—The present Entry is complementary to Entry 9 of List I [see pp. 126, *et seq.*].

*'Maintenance of supplies and services. . . .'*—Under the Government of India Act, 1935, it was held that though black-marketing in essential commodities might lead to a breach of the public peace, its connection with 'public order' was too remote to justify preventive detention for black-marketing, under Entry I of List II of that Act.<sup>6</sup> Hence, the above-quoted words have been introduced in the Constitution, conferring express power of preventive detention for maintenance of essential supplies and services.

*'Security of State'.*—See *ante*.

*'Public order'.*—See *ante*.

*Laws made by Parliament.*—Preventive Detention Act (IV of 1950), as amended by Act (L of 1950). [See pp. 127, 379, *ante*].

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

#### OTHER CONSTITUTIONS

*U.S.A.*—Art. IV, Sec. 2 (2) of the United States Constitution provides—

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

(3) *The King v. Mrinal Kanti*, (1950) 54 C.W.N. 753 (755).

(4) The Coroner's Act of 1871 lays down the procedure to be followed for inquiry into the violent or suspicious deaths taking place within the Presidency towns of

Calcutta and Bombay.

(5) *Basudeva v. Rex*, (1949) 4 D.L.R. 186 (F.B.).

(6) *R. v. Basudeva*, (1950) D.L.R. 56 (58) (F.C.).

The matter of inter-State delivery of criminals is regulated by an Act of Congress under which the Governor of the State to which the accused has fled, as a matter of course, delivers up the accused at the request of the Governor of the State where the offence was created. There have been some exceptional cases where the requisition has been ignored, *e.g.*, on the ground that the accused would not receive *fair* trial in the State where he stands accused.<sup>7</sup> The constitutional obligation of inter-State rendition of criminals has thus been interpreted as a *moral* duty and not as a mandatory legal duty.<sup>7</sup>

The word 'crime' in the above clause has been interpreted to include only serious offence as distinguished from misdemeanours or trivial offence.<sup>8</sup> Again, the charge against the accused, in order to obtain an extradition, must be made in the form of some judicial proceeding having all the requisites which would have been sufficient for the arrest and detention of the accused had he been within the State seeking extradition.<sup>9</sup>

If the State upon which the demand is made has herself a complaint against the fugitive, she may enforce it before honouring the demand for extradition.<sup>10</sup> Extradition does not lie unless there has been a fleeing from justice'. Hence, (a) the accused must have been within the jurisdiction of the State accusing him and (b) must have fled from it.<sup>11</sup> But if the offender was within the State against which the offence was committed, at the time of the act constituting the offence, he may be liable to extradition, if he is found later outside that State.<sup>12</sup>

*Government of India Act, 1935.*—Item 3 of List III of the Government of India Act, 1935, was—

"Removal of prisoners and accused persons from one unit to another unit."

#### INDIA

*Inter-State removal of offenders.*—One State is not bound under the Constitution to enforce the *criminal* judgments or orders of another State. Criminals may therefore seek to escape punishment by fleeing from the State where the offence was committed. The present Entry seeks to prevent such a situation, by making the inter-State delivery of criminals a concurrent subject of legislation. By making the subject of inter-State rendition of criminals concurrent, the Indian Constitution enables the Union to lay down compulsory and uniform rules for rendition, depriving the States of any discretion to refuse delivery in any case as has been claimed in the U.S.A.

Such delivery of prisoners and accused must be distinguished from 'extradition' which comes within Entry 18 of List I. Extradition is an *international* procedure for surrender of criminals of other States under terms of treaties. Entry 4 of List III deals with the arrest and removal of all offenders within the territory of India.

*Existing (Central) Laws.*—Transfer of Detained Persons Act (XLVIII of 1949)<sup>13</sup>; Prisoners Act (III of 1900).

*Legislation by Parliament.*—Parliament has enacted the Transfer of Prisoners Act (XXIX of 1950) to provide for the removal from one State to another of persons confined in a prison. Sec. 3 of this Act provides—

(7) *Kentucky v. Dennison*, (1861) 24 How. 66.

(8) *Hughes's Case*, 1 Phil. (N.C.) 57 (64).

(9) *People v. Brady*, 56 N.Y. 182.

(10) *Taylor v. Taintor*, 16 Wall. 366.

(11) *Ex parte Smith*, 3 McLean 133.

(12) *Roberts v. Reilly*, 116 U.S. 80.

(13) The Transfer of Detained Persons Act 1949, provides for the removal from one unit to another unit of persons subjected to preventive detention for reasons connected with the maintenance of public order.



"(1) Where any person is confined in a prison in a State,—

(a) under sentence of death, or

(b) under, or in lieu of, ■ sentence of imprisonment or transportation, or

(c) in default of payment of a fine, or

(d) in default of giving security for keeping the peace or for maintaining good behaviour;

the Government of that State may, with the consent of the Government of any other State, by order, provide for the removal of the prisoner from that prison to any prison in the other State.

(2) The officer in charge of the prison to which any person is removed under subsection (1) shall receive and detain him, so far as may be, according to the exigency of any writ, warrant or order of the court by which such person has been committed or until such person is discharged or removed in due course of law."

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

#### OTHER CONSTITUTIONS

*U.S.A.*—Congress has no power relating to marriage and divorce, so that the laws relating to these vary from State to State.

*Australia.*—In Australia these are exclusive federal subjects. Cls. (xxi) and (xxii) of Sec. 51 of the Constitution Act are—

"(xxi) Marriage.

(xxii) Divorce and matrimonial causes;" and in relation thereto, parental rights, and the custody and guardianship of infants;"

*Canada.*—The Dominion has exclusive power [Sec. 91 (26)] over—"Marriage and divorce"; but the Provinces have exclusive authority over "the solemnisation of marriage in the Province" [Sec. 92 (12)].

It has been held that the Provincial jurisdiction as to solemnisation of marriage is an exception to the Dominion power.<sup>14</sup>

*Burma.*—See under Entry 13, *post*.

*Government of India Act, 1935.*—Items 6-7 of List III of the Government of India Act, 1935, were—

"6. Marriage and divorce; infants and minors; adoption."

"7. Wills intestacy, and succession, *save ■ regards agricultural land*."

#### INDIA

*Competence of the State Legislature to modify personal law.*—Under the Government of India Act, 1935, questions were raised whether ■ Provincial Legislature could modify a rule of Hindu or Mahomedan Law.<sup>15</sup> The present Entry specifically gives a concurrent power to the State Legislature over all matters governed by personal law, at the commencement of the Constitution.

*'Intestacy'.*—Intestacy is the condition of dying without having made ■ will. 'Intestate' means and includes "every person deceased who has left undisposed of by will the whole, or any portion, of the estate on which he might (if not subject to incapacity) have tested."

(14) *In re Marriage Legislation in* Canada, (1912) A.C. 880.

(15) *Imperator v. Atmaram*, (1948) 3 D.L.R. 87 (Bom.).

*'Succession'*.—Succession is the 'transmission of the rights and obligations of a deceased to his heirs' and 'includes both intestate and testamentary succession'. 'Succession' in the present entry also comprehends devolution by survivorship under the mitakshara law of joint family.<sup>16</sup>

*Existing (Central) Laws*.—The Child Marriage Restraint Act (XIX of 1929);<sup>17</sup> Hindu Widow's Remarriage Act (XV of 1856); Special Marriage Act (III of 1872); Indian Christian Marriage Act (XV of 1872); Indian Foreign Marriage Act (XIV of 1903); Anand Marriage Act (VII of 1909); Arya Marriage Validation Act (XIX of 1937); Dissolution of Muslim Marriages Act (VIII of 1939); Parsi Marriage and Divorce Act (III of 1936); Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX of 1946); Hindu Marriage Disabilities Removal Act (XXVIII of 1946); Hindu Marriages Validity Act (XXI of 1949);<sup>18</sup> Indian Divorce Act (IV of 1869); Indian Matrimonial Causes (War Marriages) Act (XL of 1948); Muslim Personal Law (Shariat) Application Act (XXVI of 1937); Indian Succession Act (XXXIX of 1925); Indian Majority Act (IX of 1875); Guardians and Wards Act (VIII of 1890); Partition Act (IV of 1893); Hindu Inheritance Removal of Disabilities Act (XII of 1928); Hindu Law of Inheritance (Amendment) Act (II of 1929); Hindu Women's Rights to Property Act (XVIII of 1937); Married Women's Property Act (III of 1874).

6. Transfer of property other than agricultural land ; registration of deeds and documents.

#### OTHER CONSTITUTIONS

*Burma*.—See under Entry 13, *post*.

*Government of India Act, 1935*.—Item 8 of List III of the Government of India Act, 1935, was the same as the present Entry.

#### INDIA

*Analogous Provisions*.—Transfer of agricultural land is a State subject, in Entry 18, List II, *ante*.

*Existing (Central) Laws*.—Transfer of Property Act (IV of 1882); Hindu Disposition of Property Act (XV of 1916); Indian Registration Act (XVI of 1908).

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

#### OTHER CONSTITUTIONS

*Burma*.—See under Entry 13, *post*.

*Government of India Act, 1935*.—Item 10 of List III of that Act was the same as the present Entry.

#### INDIA

*'Contracts relating to agricultural land'*.—Contracts relating to agricultural land are excluded from the present Entry in the Concurrent List, as it was in the corresponding Item 10 of List III of the Government of India Act, 1935.

(16) *Re Hindu Women's Property Act*, A.I.R. 1941 F.C. 72 (79).

(17) Restrains the solemnisation of child marriages.

(18) Provides for the validity of marriages between Hindus, Sikhs, Jains and their different castes, sub-castes and sects.

A contract between a landlord and tenant for payment of rent in respect of agricultural land irrespective of the form in which it might be clothed, is a contract relating to agricultural land and is accordingly excluded from the Concurrent List.<sup>19</sup> Hence, the Provincial Legislature has not exclusive competence over such contracts and no question of repugnancy to the provisions of any existing Indian law (e.g., the Permanent Settlement Regulation) would thus arise.<sup>20</sup>

Read in this connection Entry 24 of List II which gives the State Legislature exclusive jurisdiction to legislate with respect to "relation of landlord and tenant, and collection of rents. . . .". See also Entry 30 of List II,—'relief of agricultural indebtedness.'

*Existing (Central) Laws.*—Indian Contract Act (IX of 1872); Powers of Attorney Act (VII of 1882); Carriers Act (III of 1865); Indian Partnership Act (IX of 1932); Indian Sale of Goods Act (III of 1930).

## 8. Actionable wrongs.

### OTHER CONSTITUTIONS

*Burma.*—See under Entry 13, *post*.

*Government of India Act, 1935.*—Item 14 of List III of the Act was—

"Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II."

### INDIA

*Existing (Central) Laws.*—Indian Fatal Accidents Act (XIII of 1855); Employers' Liability Act (XXIV of 1938); Workmen's Compensation Act (VIII of 1923); Easements Act (V of 1882); Patents and Designs Act (II of 1911).

## 9. Bankruptcy and insolvency.

### OTHER CONSTITUTIONS

*U.S.A.*—Art. I, Sec. 8 (4) empowers Congress to establish—

"uniform laws of the subject of bankruptcies throughout the United States."

This power has, however, been interpreted as a concurrent power. If and in so far as Congress abstains from exercising this power, the States are at liberty to legislate on the subject, but whenever Congress legislates, the State legislation must yield to the uniform laws prescribed by Congress.<sup>21</sup>

*Australia.*—Sec. 51 (xvii) of the Constitution Act confers (concurrent) power upon the Commonwealth Parliament, subject to Sec. 109, to legislate with respect to—"Bankruptcy and insolvency".

(a) This placitum, together with Sec. 77 (iii) empowers the Commonwealth Parliament to confer upon State Courts all powers appropriate to bankruptcy, jurisdiction.<sup>22</sup> (b) Commonwealth bankruptcy law, affecting the allowance payable to the member of a State Legislature, is valid.<sup>23</sup>

*Canada.*—Sec. 91 (21) of the British North America Act confers exclusive jurisdiction upon the Dominion Parliament to legislate in relation to—"Bankruptcy and Insolvency".

(19) *Hulas Narain v. Deen Mohammad*, A.I.R. 1943 F.R. 9. (S. 178 B. of the Bihar Tenancy Act, 1934, upheld).

(20) *Hulm Narain v. Deen Mohammad*, A.I.R. 1943 F.R. 9.

(21) *Sturges v. Crowninshield*, 4 Wh. 122.

(22) *Bond v. Bond & Co.*, (1930) 44 C. L.R. 11.

(23) *Stuart Robertson v. Lloyd*, (1932) 47 C.L.R. 482.



Under this power, the Dominion Parliament is competent to interfere with 'property, civil rights' and procedure within the Provinces, so far as a general law relating to bankruptcy and insolvency might affect them,<sup>24</sup> similarly, notwithstanding the Provincial power over the administration of justice and constitution of Courts. [Sec. 92 (14)], the Dominion Parliament has the power to establish an Insolvency Court and to regulate its procedure<sup>25</sup> or to invest Provincial Courts with a new jurisdiction in insolvency.<sup>1</sup>

*Burma.*—See under Entry 13, *post*.

*Government of India Act, 1935.*—The first part of item 12 of List III contained this subject.

## INDIA

*'Bankruptcy and Insolvency'.*—Broadly speaking, 'bankruptcy' involves the vesting of the property of debtors in trustees, while 'insolvency' provides for assignments and compositions by insolvent debtors without 'bankruptcy'.<sup>2</sup> While laws of insolvency operate at the instance of the debtor, bankruptcy laws operate at the instance of the creditor.

*Object and scope of Bankruptcy and Insolvency laws.*—The following, *inter alia*, may be said to be the objects of such legislation:<sup>3</sup> (a) The equitable and rateable distribution of the debtor's estate amongst his creditors, whether he is willing or not. (b) The discharge of the debtor, who has not been guilty of fraudulent conduct, from future liability for the debts then existing. (c) Ancillary provisions, such as punishment of frauds committed in contemplation of bankruptcy; laying the conditions in which the law of insolvency is to be brought into operation, and the effect of its operation.

"In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration.

The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law."<sup>4</sup>

It cannot be maintained that legislative provision as to *composition* by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation.<sup>4</sup>

*Existing (Central) Laws.*—Presidency Towns Insolvency Act (III of 1909); Provincial Insolvency Act (V of 1920).

## 10. Trust and Trustees.

### OTHER CONSTITUTIONS

*Burma.*—See under Entry 13, *post*.

*Government of India Act, 1935.*—Item 9 of List III of that was the same.

## INDIA

*Existing (Central) Laws.*—Indian Trusts Act (II of 1882); Trustees Act (XXVII of 1866). Trustees' and Mortgagees' Powers Act (XXVIII of 1866).

(24) *Cushing v. Dupuy*, (1880) 5 App. Cas. 40.

(25) *Hodge v. Queen*, (1882) 7 O.A.R. 246.

(1) *A.-G. of Canada v. Sam Chak*, (1909) 44 N.S. 19.

(2) *A.-G. Alberta v. A.-G. Canada*, A.I.R. 1943 P.C. 76 (81).

(3) *A.-G. for Ontario v. A.-G. for Canada*, (1894) A.C. 189.

(4) *Br. Columbia v. A.-G. of Canada*, A.I.R. 1937 P.C. 95 (98).

## 11. Administrators-General and official trustees.

*Government of India Act, 1935.*—This Entry corresponds to the latter part of item 12 of List III of the Government of India Act, 1935.

*'Administrator-General'.*—The Administrator-General is an officer appointed by a Provincial Government or the Central Government, under the Administrator-General's Act (III of 1913), for the protection and administration of the estate of a deceased person where the next-of-kin take no steps or are resident abroad.

*Existing (Central) Laws.*—The Administrator-General's Act (III of 1913); Official Trustee's Act (II of 1913).

## 12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

## OTHER CONSTITUTIONS

*Australia.*—Sec. 51 (xxv) of the Constitution Act gives the Commonwealth Parliament concurrent jurisdiction<sup>5</sup> to legislate with respect to—

"The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States."

*Burma.*—Item 5 (14) of the Union List is—'Law of Evidence'.

*Government of India Act, 1935.*—Item 5 of List III of that Act was the same as the present Entry.

*Existing (Central) Laws.*—Indian Evidence Act (I of 1872).

Bankers' Books Evidence Act (XVIII of 1891; Indian Oaths Act (X of 1873).

## 13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

## OTHER CONSTITUTIONS

*Burma.*—Item 5 (13) of the Union List is—

"Civil Law and Procedure including in particular the laws relating to—  
infants and minors; adoption; transfer of property; trusts and trustees; contracts; arbitration; insolvency; actionable wrongs; lunacy."

*Government of India Act, 1935.*—Item 4 of List III was—

"Civil procedure, including the Law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act."

*'Civil Procedure'.*—This expression in the present Entry is used in the general sense meaning the procedure applicable to litigation generally; it does not include ■ special law of procedure which is applicable only to litigation regarding ■ special matter.<sup>6</sup>

*'Including all matters included in the Code of Civil Procedure'.*—These words mean that all matters, *whether relating to procedure or not*, included in the Code of Civil Procedure at the date of commencement of the Constitution, are concurrent legislative subject. The above words *enlarge* the scope of the present Entry, by including every matter included in the Code of Civil Procedure whether they are matters of procedure or not.<sup>7</sup> But there is no warrant for includ-

(5) *Renton v. Renton*, (1918) 25 C.L.R. C.W.N. 999 (1002).

(6) *Bir Bikram v. Tofazzal*, (1942) ■ Pat. 714 (725).

(7) *Viswanath v. Harihar*, (1938) 17

ing in this Entry anything which neither relates to civil procedure nor is included in the Code.<sup>8</sup>

*Arbitration.*—Arbitration is “a reference to the decision of one or more persons of a particular matter in difference between the parties”.<sup>9</sup> It is a ‘substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law’.

*Analogous provisions.*—‘Civil procedure’ in the present Entry must be held to exclude matters relating to the jurisdiction and powers of Courts relating to matters included in Lists I and II which are specially included in Entry 95 of List I and 65 of List II, excepting of course, those provisions of the Civil Procedure Code (Act V of 1908) itself, which relate to jurisdiction and powers of Courts, e.g., *res judicata*, execution, etc., for the present Entry expressly includes ‘all matters included in the Code of Civil Procedure’.<sup>10</sup>

*Existing (Central) Laws.*—Code of Civil Procedure (V of 1908);<sup>10-a</sup> Indian Limitation Act (IX of 1908); Arbitration Act (X of 1940).

14. Contempt of Court, but not including contempt of the Supreme Court.

‘Contempt of Court’.—See pp. 76-7, *ante*, where the law of contempt of Court has been fully dealt with.

‘Court’.—See under 3, List II, *ante*.

*Analogous Provisions.*—Art. 19 (2) excepts contempt of Court from the guarantee of ‘freedom of speech and expression’ and empowers the State to make any law relating to this subject. That legislative power is contained in the present entry.

Contempt of the Supreme Court is left to be dealt with by that Court [Art. 129, p. 390, *ante*] to regulation by Parliament [Entry 77, List I, *ante*.]

15. Vagrancy ; nomadic and migratory tribes.

#### OTHER CONSTITUTIONS

*Australia.*—Sec. 51 (xxvi) of the Constitution Act gives concurrent power to the Commonwealth to legislate with respect to—

“The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.”

*Government of India Act, 1935.*—Item 23 of List III of the Act was—

“European vagrancy ; criminal tribes.”

#### INDIA

“Vagrancy”.—Vagrancy means the wandering or going about from place to place by an idle person who has no lawful, visible means of support, and who subsists on charity and does not work for a living though able so to do.

*Existing (Central) Laws.*—Criminal Tribes Act (VI of 1924); European Vagrancy Act (IX of 1874).

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

(8) *Stewart v. Brajendra*, A.I.R. 1939 Cal. 628.

(9) *Collins v. Collins*, 28 Ch. 186.

(10) *Stewart v. Brojendra*, A.I.R. 1939 Cal. 628 (635) P.C.

(10-a) The Civil Procedure Code of 1908, as amended up to-date, consolidates the law relating to procedure in the Courts of Civil

Judicature in India. ‘Courts of Civil Judicature’ mean all Courts which try suits and proceedings of a ‘civil nature’. A suit in which civil rights are in question is a suit of a civil nature, and ‘civil rights’ are legal rights such as those relating to person, property, contract, or status, which a person enjoys as a citizen of the State.



## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 18 of List III of the Act was the same as the present Entry, but "Ranchi European Mental Hospital" was placed in List I (item 52).

## INDIA

"Lunacy".—Lunacy is an "imbecility of mind, a weakness of mind between the limits of absolute idiocy on the one hand and of perfect capacity on the other."<sup>11</sup>

*Analogous Provisions.*—While correction of criminals through prisons, reformatories and the like has been made a State subject (Entry 4, List II), the correction of mental deficients has been made concurrent, by the present entry.

*Existing (Central) Laws.*—Indian Lunacy Act (IV of 1912).

17. Prevention of cruelty to animals.

*Government of India Act, 1935.*—The present Entry is the same as item 22 of List III of the Act of 1935.

*Existing (Central) Laws.*—Prevention of Cruelty to Animals Act (XI of 1890).

18. Adulteration of foodstuffs and other goods.

## OTHER CONSTITUTIONS

*U. S. A.*—The State has the power to control adulteration of foods and drugs under its police powers. Congress has also legislated on the subject under its power of inter-State and foreign commerce.<sup>12</sup>

*Government of India Act, 1935.*—This subject belonged to the State List under the Government of India Act, 1935 (Item 30 of List II).

19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 19 of List III of the Act was—

"Poisons and dangerous drugs."

*Burma.*—Item 5 (16) of the Union List is the same as the above item.

## INDIA

'Drug'.—A drug is defined in Sec. 3 (b) of the Drugs Act (XXIII of 1940) as follows—

"'drug' includes all medicines for internal or external use of human being or animals, and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals, other than medicines and substances exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine."

## INDIA

*Existing (Central) Laws.*—Dangerous Drugs Act (II of 1930). Prisons Act (XII of 1919).

*Law made by Parliament.*—Drugs (Control) Act (XXVI of 1950).<sup>13</sup>

(11) *Ingram v. Wyatt*, (1828) 1 Hag.E. R. 401.

(12) *The Dermott v. Wisconsin*, (1913) 231 U.S. 115.

(13) The Drugs (Control) Act, 1950, provides for control of the sale, supply and distribution of drugs, in Part C. States.

## 20. Economic and social planning.

## OTHER CONSTITUTIONS

*Burma.*—Item 5 (28) of the Union List is—‘Planning’.

## INDIA

‘*Planning*’.—Planning is essential to social and economic progress. In a democratic government, where the administration is diversified and is under the control of various persons and agencies, some integrated programme and the special study of particular problems *e.g.*, material resources of the country is housing, population, consumption, is absolutely necessary for a long-range development.

## 21. Commercial and industrial monopolies, combines and trusts.

‘*Monopolies, combines and trusts*’.—Prevention of concentration of means of production to the common detriment is one of the directive principles of our State policy [see Art. 39 (b-c), p. 197, *ante*]. For this purpose, the State may impose reasonable restrictions upon the freedom of trade or business [see p. 101, *ante*].

## 22. Trade Unions ; industrial and labour disputes.

## OTHER CONSTITUTIONS

*U. S. A.*—Congress has undertaken to legislate regarding labour disputes only as regards labour engaged in railroads.<sup>14</sup>

As regards the right of collective bargaining or the right of the worker to join a trade union, the earlier attempts to guarantee such right by federal legislation failed owing to the attitude of the Supreme Court.<sup>15</sup> But in 1937, the Supreme Court has upheld the validity of the National Labour Relations Act, 1935, known as the Wagner Act,<sup>16</sup> which guarantees to all workers engaged in *inter-State* commerce to join any union, and makes it obligatory upon the employer to bargain collectively with the unions and not to interfere with them in any way. It is to be noted, however, that federal legislation relating to trade unions or labour disputes does not extend beyond *inter-State* commerce.

*Australia.*—Sec. 51 (xxxv) of the Constitution Act empowers Parliament to legislate with respect to—

“Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any State.”

This placitum does not empower Parliament to interfere with State instrumentalities.<sup>17</sup> But municipal corporations established under State laws are not such instrumentalities.<sup>18</sup> The immunity of State instrumentalities is confined to strictly governmental functions.<sup>19</sup>

Under the above placitum, Parliament has power (a) to make reference of industrial disputes to the Commonwealth Court of Conciliation;<sup>20</sup> (b) to provide

(14) *Texas & Ne Orleans, R. R. v. Brotherhood of Ry. Clerks*, (1930) 281 U.S. 548.

(15) *Adair v. U.S.*, (1908) 298 U.S. 161; *Schechter Poultry Corporation v. U. S.*, (1935) 295 U.S. 495.

(16) *National Labour Relations Board v. Hartley Act*, 1947, which seeks to control *Jones*, (1937) 301 U.S. 1. [The validity of the Taft-Hartley Act, 1947, which seeks to control the waking of trade unions, has not yet been tested].

(17) *Federated Amalgamated Assn.*, (1906) 4 C.L.R. 488.

(18) *Federated Municipal Employee's Union v. Melbourne Corporation*, (1919) 26 C.L.R. 508.

(19) *Merchant Service Guild v. Commonwealth Steamship Assn.*, (1920) 28 C.L.R. 436; *Engineer's Case* (1920) 28 C.L.R. 129.

(20) *R. v. Commonwealth Court of Conciliation*, (1910) 11 C.L.R. 1.

for registration of associations and for cancellation of such registration;<sup>21</sup> (c) to prohibit the doing of anything in the nature of a 'lockout' or 'strike' as defined by the Act.<sup>22</sup>

The power of arbitration conferred by this placitum is a power of judicial determination.<sup>23</sup> It does not authorise the establishment of a tribunal which would give its decree on discussion amongst themselves, without hearing the disputants.<sup>24</sup>

'Extending beyond the limits of any one State' means that the dispute is one existing in two or more States, or in other words, covering Australian territory comprised within two or more States.<sup>25</sup>

*Burma.*—Item 5 (22) of the Union List is the same as the present Entry of our Constitution.

*Government of India Act, 1935.*—Item 29 of List III of that Act was the same as the present Entry.

#### INDIA

*'Trade Unions; industrial and labour disputes'.*—This Entry has a wide scope. It not only includes the power to legislate with respect to industrial disputes or disputes arising out of 'industry', but also any labour dispute,<sup>1</sup> i.e., dispute arising between employers and employees of any class,—even though the employers were not conducting an 'industry' in the usual sense of that word.<sup>2</sup> Though the Union Parliament has no power to legislate on the powers of a Municipality (Entry 5, List II), it has power to legislate with respect to disputes between a Municipality and its employees, provided the legislation is, in its 'pith and substance', ■ legislation with respect to 'labour disputes'.<sup>3</sup>

*'Industrial Dispute'.*—This expression is defined in Sec. 2 (k) of the Industrial Disputes Act (XIV of 1947) thus:

"'Industrial dispute' means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

*Existing (Central) Laws.*—Industrial Disputes Act (XIV of 1947);<sup>4</sup> Industrial Disputes (Banking and Insurance Companies) Act (LIV of 1949); Trade Unions Act (XVI of 1926).

(21) *Australian Commonwealth Shipping Board v. Federated Seamen's Union*, (1925) 36 C.L.R. 442.

(22) *Stemp v. Australian Glass Manufacturers*, (1917) 23 C.L.R. 226.

(23) *R. v. Commonwealth Court of Conciliation*, (1910) 11 C.L.R. 1.

(24) *Australian Railways Union v. Victorian Ry. Commissioners*, (1930) 44 C.L.R. 319.

(25) *Caledonian Collieries v. Australasian Coal Employees*, (1930) 42 C.L.R. 527.

(1) Our entry is thus wider than the Australian placitum in S. 51 (xxv) [Cf. *School Teachers' Case*, (1929) 41 C.L.R. 569].

(2) *Municipal Commissioners v. P. R. Mukherjee*, (1950) 54 C.W.N. 784.

(3) The Industrial Disputes Act, 1947, provides for the investigation and settlement of industrial disputes. It replaces the Trade Disputes Act, 1929, by ■ far ■ comprehensive legislation. The agencies for

settlement of industrial disputes under this Act are—(a) Works Committees; (b) Conciliation Officers; (c) Boards of Conciliation; (d) Courts of Inquiry; and (e) Industrial Tribunals. In every industrial establishment employing 100 workmen or more, there will be a Works Committee of representatives of employers and workmen to settle day-to-day difference and to promote amicable relations between the two parties. In case of any dispute arising, nevertheless, Conciliation Officers, appointed by Government will try to reconcile the differences. If they fail, Government may either refer it (i) to a Conciliation Board for settlement by conciliation; or (ii) to a Court of Inquiry for enquiry and report to Government; or (iii) to an Industrial Tribunal for adjudication. The award of the Tribunal is final and binding ■ the parties, and so an industrial dispute should end with an award.



23. Social security and social insurance; employment and unemployment.

#### OTHER CONSTITUTIONS

*U.S.A.*—The Federal Social Security Act, 1935, has a threefold programme—1. Unemployment Compensation.<sup>4</sup> 2. Old Age and Survivors' Insurance.<sup>5</sup> 3. Public Assistance, including—(a) Old age assistance, (b) aid to dependent children, (c) aid to the needy blind.

This programme is mainly carried out by the States, under the supervision of the national Social Security Board, and the administration is run at the cost of the national Government, by way of grants-in-aid.

*Australia.*—See under Entry 24, below.

*Canada.*—It has been held that Employment and Social insurance in so far as it affects the rights of employers and employees in the Provinces, is a subject within the exclusive competence of the Provincial Legislature under Sec. 92 (13), ('property and civil rights in the Province'), and that, accordingly, a Dominion legislation (1935) which provided a system of compulsory unemployment insurance throughout Canada, was *ultra vires* of the Dominion Parliament.<sup>6</sup>

*Burma.*—Item 5 (21) of the Union List is 'unemployment insurance'.

*Government of India Act, 1935.*—Item 28 of List III was the same as the above Burma item.

#### INDIA

'Social security'.—Social security is a generic term which includes insurance against industrial accidents, sickness and the like. The principle underlying all social security legislation is that the support of deserving persons, children and the unemployed should not be left to doles or private charity but should be items in the economic programme of the State (see Art. 41, p. 198, *ante*).

*Existing (Central) Law.*—Employees' State Insurance Act (XXXIV of 1948)<sup>7</sup>; Dock Workers (Regulation of Employment) Act (IX of 1948).

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

#### OTHER CONSTITUTIONS

*U.S.A.*—Labour legislation was originally regarded as a State subject, but the development of the factory system and the integration business into huge Corporations called for federal protection labour since the beginning of the 20th

(4) *Steward Machine Co. v. Davis*, (1937) 301 U.S. 548.

(5) *Helvering v. Davis*, (1937) 301 U.S. 619.

(6) *A.-G. of Canada v. A.-G. for Ontario*, A.I.R. 1937 P.C. 89.

(7) This Act provides for the compulsory insurance of all employees of factories and other establishments to which this Act may be extended. An insured person under the Act is entitled to medical treatment and certain periodical monetary benefits for sickness, disablement, employment injury and confine-

ment (in the case of women). It applies to all factories and may be extended by the Government to any other establishment—industrial, commercial, agricultural or otherwise. A Corporation to be known as the Employees' State Insurance Corporation is to be established under the Act for the administration of the scheme under this Act. All employees in factories and establishments to which this Act applies are to be compulsorily insured by contributions from the employer and the employee, to be paid to the Corporation.

century. Congress, accordingly, took up labour legislation as an incident of its power to regulate *inter-State commerce* and the Supreme Court has upheld such legislation even though "it is attended by the same incidents which attend the exercise of the police power of the States".<sup>8</sup>

As regards regulation of wages, the Supreme Court nullified the earlier attempts of Congress on the ground that it was an interference with the freedom of contract.<sup>9</sup> Later, the Supreme Court conceded the validity of fixing minimum wages for women, in connection with a *State law*.<sup>10</sup>

"What can be closer to the public interest than the *health* of women and their protection from unscrupulous and over-reaching employers? And if the protection of women is a legitimate end of the exercise of State power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature was entitled to adopt measures to reduce the evils of the 'sweating system', the exploiting of workers at as low as to be insufficient to meet the bare cost of living thus making their very helplessness the occasion of the most injurious competition."<sup>10</sup>

Subsequently, the Supreme Court has upheld the validity of *federal* legislation to fix both minimum wages as well as maximum hours of labour, in inter-State industries, not only as regards women but also as regards male labour (Fair Labour Standards Work, 1938).<sup>11</sup>

*Australia*.—Placitums (xxiii) and (xxiii-A)<sup>12</sup> of S. 51 of the Constitution Act are—

"(xxiii) Invalid and old-age pensions.

(xxiii-A) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances."

*Burma*.—Item 5 (20) of the Union List is—

"Welfare of labour conditions of labour; employers' liability and workmen's compensation; health insurance; old age pensions."

*Government of India Act, 1935*.—Item 27 of List III of the Act was—

"Welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions."

#### INDIA

'*Welfare of Labour*'.—Labour legislation is a concurrent subject under the Constitution, and such legislation would therefore apply to *all labour* whether employed in an establishment (*e.g.*, railway) subject to the control of the Union or the States.<sup>13</sup>

The subject-matter of this Entry, with the existing law, has been fully dealt with, at pp. 100-1, *ante*.

*Existing (Central) Laws*.—Workmen's Compensation Act (VIII of 1923);<sup>14</sup> Local Authorities Pension and Gratuities Act (I of 1919); Provident Funds Act (XIX of 1925); Payment of Wages Act (IV of 1936); Employers' Liability Act (XXIV of 1938); Employment of Children Act (XXVI of 1938); Mines

(8) *U. S. v. Darby Lumber Co.*, (1941) 312 U.S. 100; *Second Employers' Liability Cases*, (1912) 223 U.S. 1.

(9) *Adkins v. Children's Hospital*, (1923) 261 U.S. 525.

(10) *West Coast Hotel Co. v. Parrish*, (1937) 300 U.S. 379.

(11) *U. S. v. Darby Lumber Co.*, (1941) 312 U.S. 100.

(12) Added in 1947.

(13) This avoids the situation in Canada where Provinces have right to legislate in respect of the employees of Dominion

Railways [*C.N.R. v. Att.-Gen.*, (1948) 1 D.L.R. 580], in view of section 92 (10) (a) of the B. N. A. Act.

(14) The Workmen's Compensation Act, 1923, framed the lines of the English Workmen's Compensation Act, lays down the law relating to payment of compensation to a workman from his employer in case of personal injury caused by accident (including occupational diseases), arising out of and in course of employment, provided that the incapacity lasts for more than 7 days and that the injury is not caused by the fault of the

Maternity Benefit Act (XIX of 1941); Mica Mines Labour Welfare Fund Act (XXII of 1946); Coal Mines Labour Welfare Act (XXXII of 1947); Coal Mines Provident Fund and Bonus Schemes Act (XLVI of 1948); Minimum Wages Act (XI of 1948);<sup>15</sup> Children Pledging of Labour Act (II of 1933); Indian Dock Labourers Act (XIX of 1934).

25. Vocational and technical training of labour.

26. Legal, medical and other professions.

'Legal, medical and other professions'.<sup>16</sup>—For a full treatment, see pp. 99-100, ante.

*Existing (Central) Laws.*—The Dentists Act (XVI of 1948) has been enacted to regulate the profession of dentistry and to constitute 'Dental Councils', at the Centre as well as in the Provinces. The Chartered Accountants Act (XXXVIII of 1949) makes provision for the regulation of the profession of accountants and for that purpose to establish an Institute of Chartered Accountants. The Pharmacy Act (VIII of 1948) has for its object the regulation of the profession of pharmacy. Indian Medical Degrees Act (VII of 1916).

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

*Existing (Central) Laws.*—Rehabilitation Finance Administration Act (XII of 1948); Displaced Persons (Institution of Suits) Act (XLVII of 1948); Displaced Persons (Legal Proceedings) Act (XXV of 1949).

*Legislation by Parliament.*—The Displaced Persons (Claims) Act (XLIV of 1950) provides for the registration and verification of claims of displaced persons in respect of immovable property in Pakistan.

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

#### OTHER CONSTITUTIONS

*Burma.*—Item 7 (2) of the State List is—'Charities and charitable institutions.'

*Government of India Act, 1935.*—This was a State subject under the Act of 1935 (Item 34 of List II).

'Charities'.—The word 'charities' has acquired a technical meaning,<sup>17</sup> since *Pemsel's case*,<sup>18</sup> as meaning—

"relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community."<sup>19</sup>

workman. In case of the accident causing death, the compensation is paid to the dependants of the workman as defined in the Act. The Act now extends to a very wide field of employment, including tapping of palm trees, felling of trees, extinguishing forest fires, hunting of wild animals, and the like.

(15) By the Minimum Wages Act, 1948, provision has been made for the fixing of minimum rates of wages for certain employments (such as in rice and oil mills, public motor transport, tanneries, etc.) by the appropriate Government and penalty has been prescribed for payment by the employer at any lesser rate than prescribed.

(16) Item 5 (15) of the Union List of

the Burmese Constitution and Item 16 of List I of the Government of India Act, 1935, is the same as the present Entry of our Constitution.

(17) *Chesterman v. Federal Commissioner*, (1926) A.C. 128.

(18) *Commissioner of I. T. v. Pemsel*, (1891) A.C. 531 (583).

(19) See also *Trustees of Tribune Press v. Commissioner of Income-tax*, (1939) 43 C.W.N. 1065 (P.C.), *All India Spinners Association v. Commissioner of Income-tax*, (1944) 49 C.W.N. 1 (P.C.); *Haridasi v. Secretary of State*, 7 Cal. 304 (P.C.); *Kayastha Pathisala v. Bhagwati*, (1937) All. 3 (P.C.); *Parmanandas v. Venayek*, 7 Bom. 19 (P.C.).



'Charities', 'Charitable institutions', etc.—The additional words after 'charities' in this entry are only illustrative of the directions which the power to legislate in respect of charities may take. The word 'charities' is a generic term of wide scope, including all public secular, charitable and religious trusts and institutions, recognised as such by the Indian law, and a power to legislate in respect of charities will include the power to legislate in respect of *all matters* connected with charitable and religious institutes and endowments.<sup>19-a</sup>

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

'Prevention of extension of infectious diseases or pests'.—This Entry is the same as item 30 of List III of the Government of India Act, 1935.

*Existing (Central) Laws.*—Destructive Insects and Pests Act (II of 1914); Livestock Importation Act (IX of 1898); Lepers Act (III of 1898); Epidemic Diseases Act (III of 1897).

30. Vital statistics including registration of births and deaths.

#### OTHER CONSTITUTIONS

*Burma.*—Item 6 (3) of the State List is—'Registration of births, deaths and marriages.'

*Government of India Act, 1935.*—'Registration of births and deaths' was included in Item 14 of List II.

#### INDIA

*Analogous Provision.*—See Entries 69, 94 of List I; 45 of List III.

*Existing (Central) Law.*—Births, Deaths and Marriages Registration Act (VI of 1886).

31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.

'Ports other than major ports'.—'Major ports' are included in Entry 27 of List I. All other ports are included in the present Entry.<sup>20</sup>

*Existing (Central) Laws.*—Ports Act (XV of 1908).

32. Shipping and navigation on inland waterways ■ regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

#### OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 32 of List III was—

"Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways."

(19-a) *Manikkasundara v. Nayudu*, (1946) F.L.J. 57; *Gadadhar v. Prov. of Orissa*, A.I.R. 1950 Orissa 47.

(20) Under the Government of India Act, 1935, these other ports were included in Item 18 of List II.

## INDIA

'Shipping and navigation on inland waterways other than national waterways'.—The present Entry includes the same subjects as regards inland waterways (other than 'national waterways') as are included in Entries 24 and 30 of List I as regards 'national waterways'.

*Existing (Central) Laws.*—Indian Merchant Shipping Act (XXI of 1923).

33. Trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union is declared by Parliament by law to be expedient in the public interest.

'Trade, Commerce, production, supply, distribution, relating to products of industries declared by Parliament'.—This Entry has to be read with Entry 52 of List I, which empowers Parliament to vest the control of particular industries in the Union. In respect of such industries, the State shall lose its exclusive powers under Entries 26-27 of List II, and these powers will be concurrent.

34. Price control.

## OTHER CONSTITUTIONS

*U.S.A.*—Control of prices by the State was originally regarded as an undue interference with the freedom of property and contract.<sup>21</sup> But an exception was later introduced as regards businesses 'affected with public interests'.<sup>22</sup> It has also been held permissible under the police power, to restrict harmful methods of competition.<sup>23</sup> During War, the power unquestionably follows from the 'Defence power'.

*Australia.*—In time of *peace*, price control by the States was held to be *ultra vires* being in contravention of freedom of inter-State trade and commerce under S. 92.<sup>24</sup> But in time of peace, it is justified by the 'Defence power' of the Commonwealth,<sup>25</sup> which subsists even after the cessation of actual hostilities.<sup>1</sup>

*Government of India Act, 1935.*—There was no item in that Act corresponding to the present Entry. But the power was deduced in favour of the Provincial Legislature under its power over distribution of goods, under Item 29 of List II.<sup>2</sup> But the attempt to punish black-marketing as an offence against public order failed.<sup>3</sup>

## INDIA

'Price Control'.—The present Entry creates concurrent and independent power of legislation for price control. It need not be deduced from other powers, such as defence, distribution of articles, etc.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

(21) *Chsapeake v. Manning*, 186 U. S. 238 (246).

(22) *Tyson v. Banton*, (1927) 273 U.S. 418.

(23) *Sunshine Anthracite Co. v. Adkins*, (1939) 310 U.S. 381.

(24) *McArthur v. Queensland*, (1920) ■ C.L.R. 530.

(25) *Farey v. Burvett*, (1916) ■ C.L.R. 433.

(1) *Dawson v. Commonwealth*, (1947) 73 C.L.R. 157.

(2) *Khetsidas v. Pratapmull*, A I.R. 1946 Cal. 197 (204).

(3) *Rex v. Basudev*, (1950) D.L.R. 56 (P C).

## OTHER CONSTITUTIONS

*Government of India Act, 1935.*—Item 20 of List III of the Act was—  
'Mechanically propelled vehicles.'

*Burma.*—Item 5 (18) of the Union List is the same as the above item.

## INDIA

*Existing (Central) Laws.*—Motor Vehicles Act (IV of 1939).

*Analogous Provisions.*—Vehicles other than mechanically propelled vehicles included in Entry 13 of List II. See also Entries 24 and 30 of List I.

## 36. Factories.

## OTHER CONSTITUTIONS

*Burma.*—Item 5 (19) of the Union List is the same as the present Entry of our Constitution.

*Government of India Act, 1935.*—Item 26 of List III of that Act was the same.

## INDIA

'Factory'.—A factory is thus described in Halsbury.\*—

"Every place in which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the making of any article, or part of any article or altering, repairing, ornamenting, or finishing it, or otherwise adapting it for sale is *prima facie* a 'factory' or a 'workshop'. If the employer of those who work there has the right of access to the place or has control over it; if any machinery moved or worked by steam, water or other mechanical power is used in such manufacture, or in aid of such manual labour, the place is a 'factory'. If machinery moved or worked by any mechanical power is used, there the place is, generally speaking, a 'workshop'; but to this rule there are exceptions."

*Existing (Central) Laws.*—Factories Act (LXIII of 1948)<sup>5</sup>; Cotton Ginning and Pressing Factories Act (XII of 1925).

## 37. Boilers.

'Boiler'.—A boiler is a closed vessel for generating steam under pressure.

*Existing (Central) Laws.*—Indian Boilers Act (V of 1923).

## 38. Electricity.

'Electricity'.—See, in this connection, Arts. 287-8.

(4) Halsbury's Laws of England.

(5) The Factories Act (LXIII of 1948) replaces the Factories Act (XXV of 1934) by a far more comprehensive enactment. A factory under this Act includes any premises where 10 or more workers are working in a manufacturing process. The Act deals with various matters relating to employment of labour in factories, such as health, safety, welfare, working hours, employment of young persons, leave. As regards working hours, the distinction between seasonal and non-seasonal factories has been abolished and for all factories, the maximum hour of work for an adult worker is 48 hours a week, and there are further restrictions as regards employment of women. As regards health, provisions have been made for cleanliness, ventilation,

drinking water, latrines, spittoons and the like and for prevention of overcrowding, dust and fume. Under 'welfare', there are further provisions for washing, storing and drying clothing; shelters, lunch-rooms, canteens, creches, first-aid appliances. In the interest of safety, provision has been made for fencing machinery, precautions regarding cranes, revolving machinery, pressure plant and the like, for protection of eyes, prevention of employment of young persons on dangerous machines.

(6) This entry is the same as item 21 of List III of the Government of India Act, 1935.

(7) This Entry is the same as item 31 of List III of the Government of India Act, 1935.



*Existing (Central) Laws.*—Indian Electricity Act (IX of 1910); Electricity (Supply) Act (LIV of 1948).

39. Newspapers, books and printing presses.

#### OTHER CONSTITUTIONS

*Burma.*—Item 5 (16) of the Union List is the same as the present Entry of our Constitution.

*Government of India Act, 1935.*—Item 17 of List III of that Act was also identical.

#### INDIA

*Existing (Central) Laws.*—See pp. 84-5, *ante*.

40. Archaeological sites and remains other than those declared by Parliament by law to be of national importance.

*Analogous Provision.*—Read with Entry 67, List I.

*Existing (Central) Laws.*—Ancient Monuments Preservation Act (VII of 1904).

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

*Law made by Parliament.*—Administration of Evacuee Property (XXXI of 1950).

42. Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given.

*'Principle, form and manner of payment of compensation for acquisition or requisition'.*—See p. 156, *ante*; Entries 32 of List I; 36 of List II.

*Existing (Central) Laws.*—Requisitioned Land (Apportionment of Compensation) Act (LI of 1949); Land Acquisition Act (I of 1894).

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

*'Stamp duties'.*—Fees collected by judicial stamps are included in Entries 77 of List I; 3 of List II.

Non-judicial stamps are included in the present Entry, but *rates* are included in Entries 91 of List I and 63 of List II.

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

*'Inquiries and Statistics'.*<sup>8</sup>—See under Entry 94 of List I.

*Existing (Central) Law.*—Industrial Statistics Act (XIX of 1942).

(8) See section 92 (15) of the British North America Act, and items 24 and 35 of List III of the Government of India Act, 1935.

46. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List.

*Government of India Act, 1935.*—Item 15 of List III of the Act was identical.

*Analogous Provisions.*—See under Entries 77 of List I; 65 of List II; 2 of List III.

47. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

*'Fees'.*—This Entry corresponds to Items 25 and 36 of List III of the Act of 1935.

*Analogous Provisions.*—See Entries 96 of List I and 66 of List II.

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## EIGHTH SCHEDULE.

[Articles 344 (1) and 351.]

### *Languages.*

1. Assamese.
  2. Bengali.
  3. Gujarati.
  4. Hindi.
  5. Kannada.
  6. Kashmiri.
  7. Malayalam.
  8. Marathi.
  9. Oriya.
  10. Punjabi.
  11. Sanskrit.
  12. Tamil.
  13. Telugu.
  14. Urdu.
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## APPENDIX I

### THE CONSTITUTION (SCHEDULED CASTES) ORDER, 1950.

In exercise of the powers conferred by clause (1) of Article 341 of the Constitution of India, the President, after consultation with the Governors and Rajpramukhs of the States concerned, is pleased to make the following Order, namely :—

1. This Order may be called THE CONSTITUTION (SCHEDULED CASTES) ORDER, 1950.

2. Subject to the provisions of this Order, the castes, races or tribes, or parts of, or groups within, castes or tribes, specified in Parts I to XVI of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Castes so far as regards members thereof resident in the localities specified in relation to them in those Parts of that Schedule.

3. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from Hinduism shall be deemed to be a member of ■ Scheduled Caste :

Provided that every member of the Ramdasi, Kabirpanthi, Mazhabi or Sikligar caste resident in Punjab or the Patiala and East Punjab States Union shall, in relation to that State, be deemed to be a member of the Scheduled Castes whether he professes the Hindu or the Sikh religion.

4. Any reference in the Schedule to this Order to a district or other territorial division of a State shall be construed ■ ■ reference to that district or other territorial division ■ existing on the 26th January, 1950.

### THE SCHEDULE

#### PART I—ASSAM

Throughout the State :—

- |                           |                     |
|---------------------------|---------------------|
| 1 Bansphor                | 9 Lalbegi           |
| 2 Bhuinmali or Mali       | 10 Mahara           |
| 3 Brittial-Bania or Bania | 11 Mehtar or Bhangí |
| 4 Dhupi or Dhobi          | 12 Muchi            |
| 5 Dugla or Dholi          | 13 Namasudra        |
| 6 Hira                    | 14 Patni            |
| 7 Jhalo or Malo           | 15 Sutradhar        |
| 8 Kaibartta or Jaliya     |                     |

#### PART II—BIHAR

1. Throughout the State :—

- |                                     |                           |
|-------------------------------------|---------------------------|
| 1 Bauri                             | 11 Hari, including Mehtar |
| ■ Bantar                            | 12 Kanjar                 |
| 3 Bhogta                            | 13 Kurariar               |
| 4 Chamar                            | 14 Lalbegi                |
| 5 Chaupal                           | 15 Mochi                  |
| 6 Dhobi                             | 16 Musahar                |
| 7 Dom                               | 17 Nat                    |
| 8 Dusadh, including Dhari or Dharhi | 18 Pan                    |
| 9 Ghasi                             | 19 Pasi                   |
| 10 Halalkhor                        | 20 Rajwar                 |
|                                     | 21 Turi                   |

2. In Patna and Tirhut divisions, and the districts of Monghyr, Bhagalpur, Purnea and Palamau :—

Bhumij

3. In Patna, Shahabad, Gaya and Palamau districts :—

Bhuiya

4. In Shahabad district :—

Dabgar

### PART III—BOMBAY

1. Throughout the State :—

- |                                     |                           |
|-------------------------------------|---------------------------|
| 1 Ager                              | 18 Kolcha, or Kolgha      |
| 2 Asodi                             | 19 Lingader               |
| 3 Bakad                             | 20 Machigar               |
| 4 Bhambi                            | 21 Madig, or Mang         |
| 5 Bhangi                            | 22 Mahar                  |
| 6 Chakrawadya-Dasar                 | 23 Mahyavanshi            |
| 7 Chelvadi                          | 24 Mangarudi              |
| 8 Chambhar, or Mochigar, or Samagar | 25 Meghval, or Menghwar   |
| 9 Chena-Dasaru                      | 26 Mini Madig             |
| 10 Chuhar or Chura                  | 27 Mukri                  |
| 11 Dakaleru                         | 28 Nadia                  |
| 12 Dhegu-Megu                       | 29 Rohit                  |
| 13 Dhor                             | 30 Shenva, or Shindhaya   |
| 14 Garoda                           | 31 Shingdav, or Shingadya |
| 15 Halleer                          | 32 Sochi                  |
| 16 Halsar, or Haslar, or Hulsavar   | 33 Timali                 |
| 17 Holaya, or Garode                | 34 Turi                   |
|                                     | 35 Vankar                 |
|                                     | 36 Vitholia               |

2. Throughout the State except in Gujrat division :—

Mochi

3. In North Kanara district :—

Kotegar

### PART IV—MADHYA PRADESH

<i>Scheduled Castes</i>	<i>Localities</i>
1 Basor or Burud	} Throughout the State.
2 Bahna or Bahana	
3 Balahi or Balai	
4 Chamar	
5 Dom	
6 Mang	
7 Mehtar or Bhangi	
8 Mochi	
9 Satnami	
10 Audhelia	In Bilaspur district.
11 Bedar	In Akola, Amravati and Buldana districts.
12 Chadar	In Bhandara and Sagar districts.
13 Dahait or Dahayat	In Damoh sub-division of Sagar district.
14 Dewar	In Bilaspur, Durg, Raipur, Bastar, Sarguja and Raigarh districts.
15 Dhanuk	In Sagar district except in Damoh sub-division thereof.

*Scheduled Castes*

16 Dohor

*Localities.*

In Akola, Amravati, Buldana,  
Yeotmal, Balaghat, Bhandara,  
Chanda, Nagpur and Wardha  
districts.

17 Ghasi or Ghasia

In Akola, Amravati, Buldana,  
Yeotmal, Balaghat, Bhandara,  
Bilaspur, Chanda, Durg, Wardha,  
Nagpur, Rajpur, Sarguja, Bastar  
and Raigarh districts.

18 Holiya

In Balaghat and Bhandra dis-  
tricts.

19 Kaikadi

In Akola, Amravati, Buldana,  
Yeotmal, Bhandara, Chanda,  
Nagpur and Wardha districts.

20 Katia

In Akola, Amravati, Buldana,  
Yeotmal, Balaghat, Betul, Bhandara,  
Bilaspur, Chanda, Durg, Nagpur,  
Nimar, Raipur, Wardha, Bastar, Sar-  
guja and Raigarh districts, in Hoshan-  
gabad and Seoni-Malwa tahsils of  
Hoshangabad district; in Chhind-  
wara district *except* in Seoni sub-  
division thereof; and in Sagar  
district *except* in Damoh sub-  
division thereof.

21 Khangar

In Bhandara, Buldana and Sagar  
districts; and in Hoshangabad  
and Seoni-Malwa tahsils of Hoshan-  
bad district.

22 Kori

In Amravati, Balaghat, Betul, Bhandara,  
Buldana, Chhindwara, Jabalpur,  
Mandla, Nimar, Raipur, Sagar, Durg,  
Bastar, Sarguja and Raigarh districts;  
and in Hoshangabad district *except*  
in Harda and Sohagpur tahsils there-  
of.

23 Madgi

In Akola, Amravati, Buldana, Yeotmal,  
Balaghat, Bhandra, Chanda, Nagpur,  
and Wardha districts.

24 Mahar or Mehra

Throughout the State *except* in Harda  
and Sohagpur tahsils of Hoshangabad  
district.

25 Rujjhar

In Sohagpur tahsil of Hoshangabad  
district.

## PART V—MADRAS

## Throughout the State :—

- 1 Adi Andhra
- 2 Adi Dravida
- 3 Adi Karnataka
- 4 Ajila
- 5 Arunthathiyar
- 6 Baira
- 7 Bakuda
- 8 Bandi

- 9 Bariki
- 10 Bavuri
- 11 Bellara
- 12 Byagari
- 13 Chachati
- 14 Chakkiliyan
- 15 Chalavadi
- 16 Chamar



17 Chandala	47 Malasar
18 Cheruman	48 Matangi
19 Dandasi	49 Mavilan
20 Devendrakulathan	50 Moger
21 Dom or Dombara, Paidi, Pano	51 Muchi
22 Ghasi or Haddi, Relli Sachandi	52 Mundala
23 Godagali	53 Nalakeyava
24 Godari	54 Nayadi
25 Godda	55 Pagadai
26 Gosangi	56 Paimda
27 Hasla	57 Paky
28 Holeyá	58 Pallan
29 Jaggali	59 Pambada
30 Jambuvulu	60 Pamidi
31 Kadan	61 Panan
32 Kalladi	62 Panchama
33 Kanakkan	63 Panniandi
34 Karimpalan	64 Paraiyan
35 Kodalo	65 Paravan
36 Koosa	66 Pulayan
37 Koraga	67 Puthirai Vannan
38 Kudubi	68 Raneyar
39 Kudumban	69 Samagara
40 Kuravan	70 Samban
41 Kurichchan	71 Sapari
42 Madari	72 Semman
43 Madiga	73 Thoti
44 Maila	74 Tiruvalluvar
45 Mala (including Agency Malas)	75 Valluvan
46 Mala Dasu	76 Valmiki
	77 Vettuvan

## PART VI—ORISSA

Throughout the State :—

1 Adi-Andhra	24 Dhanwar
2 Amant or Amat	25 Dharua
3 Audhelia	26 Dhoba or Dhobi
4 Badaik	27 Dom or Dombo
5 Bagheti	28 Dosadha
6 Bajikar	29 Ganda
7 Bari	30 Ghantarghada or Ghantra
8 Bariki	31 Ghasi or Ghasia
9 Basor or Burud	32 Ghogia
10 Bauri	33 Ghusuria
11 Bauti	34 Godagali
12 Bavuri	35 Godari
13 Bedia or Bejia	36 Godra
14 Beldar	37 Gokha
15 Bhata	38 Gunju or Ganju
16 Bhumji	39 Haddi or Hadi or Hari
17 Chachati	40 Irika
18 Chamar	41 Jaggali
19 Chandala (Chandal)	42 Kandra or Kandara
20 Cherua or Chhelia	43 Karua
21 Dandasi	44 Katia
22 Desuabhumji	45 Kela
23 Dewar	46 Khadala

- 47 Kodalo
- 48 Kori
- 49 Kumbhar
- 50 Kurunga
- 51 Laban
- 52 Laheri
- 53 Madari
- 54 Madiga
- 55 Mahuria
- 56 Mala or Jhala
- 57 Mang
- 58 Mangan
- 59 Mehra or Mahar
- 60 Mehtar or Bhangi
- 61 Mewar
- 62 Mochi or Muchi
- 63 Mundapotta
- 64 Nagarchi
- 65 Paidi
- 66 Paimda
- 67 Pamidi
- 68 Pan or Pano
- 69 Panchama
- 70 Panika

- 71 Panka
- 72 Pantanti
- 73 Pap
- 74 Pasi
- 75 Patial or Patikar or Patratanti  
or Patua
- 76 Pradhan
- 77 Rajna
- 78 Relli
- 79 Sabakhia
- 80 Samasi
- 81 Sanci
- 82 Sapari
- 83 Satnami
- 84 Sidhria
- 85 Sinduria
- 86 Siyal
- 87 Sukuli
- 88 Tamadia
- 89 Tamudia
- 90 Tiar or Tior
- 91 Turi
- 92 Valamiki or Valmiki

## PART VII—PUNJAB

Throughout the State :—

- |                     |                        |
|---------------------|------------------------|
| 1 Ad Dharmi         | 18 Kori or Koli        |
| 2 Bangali           | 19 Marija or Marecha   |
| 3 Barar             | 20 Mazhabi             |
| 4 Batwal            | 21 Megh                |
| 5 Bawaria           | 22 Nat                 |
| 6 Bazigar           | 23 Od                  |
| 7 Balmiki or Chura  | 24 Pasi                |
| 8 Bhanjra           | 25 Perna               |
| 9 Chamar            | 26 Pherera             |
| 10 Chanal           | 27 Ramdasi or Ravidasi |
| 11 Dagi             | 28 Sanhai              |
| 12 Dhanak           | 29 Sanhal              |
| 13 Dumna or Mahasha | 30 Sansi               |
| 14 Gagra            | 31 Sapela              |
| 15 Gandhila         | 32 Sarera              |
| 16 Kabirpanthi      | 33 Sikligar            |
| 17 Khatik           | 34 Sirkiband           |

## PART VIII—UTTAR PRADESH.

1. Throughout the State :—

- |            |             |
|------------|-------------|
| 1 Agariya  | 11 Bangali  |
| 2 Badi     | 12 Banmanus |
| 3 Badhik   | 13 Bansphor |
| 4 Baheliya | 14 Barwar   |
| 5 Baiga    | 15 Basor    |
| 6 Baiswar  | 16 Bawariya |
| 7 Bajaniya | 17 Beldar   |
| 8 Bajgi    | 18 Beriya   |
| 9 Balahar  | 19 Bhantu   |
| 10 Balmiki | 20 Boksa    |

21 Bhuiya	43 Kanjar
■ Bhuyiar	44 Kapariya
23 Boria	45 Karwal
24 Chamar	46 Khairaha
25 Chero	47 Kharot
26 Dabgar	48 Kharwar (excluding Benbansi)
27 Dhangar	49 Kol
28 Dhanuk	50 Korwa
29 Dharkar	51 Lalbegi
30 Dhobi	52 Majhwar
31 Dhusia, or Jhusia	53 Nat
32 Dom	54 Pankha
33 Domar	55 Parahiya
34 Dusadh	56 Pasi
35 Gharami	57 Patari
36 Ghasiya	58 Rawat
37 Gual	59 Saharya
38 Habura	60 Sanaurhiya
39 Hari	61 Sansiya
40 Hela	62 Shilpkar
41 Jatava	63 Turaiha
42 Kalabaz	

2. In Bundelkhand division and the portion of Mirzapur district south Kaimur Range :—

Gond

#### PART IX—WEST BENGAL

Throughout the State :—

1 Bagdi	30 Konal
■ Bahelia	31 Konwar
3 Baiti	32 Kora
4 Bauri	33 Kotal
5 Bediya	34 Lalbegi
6 Beldar	35 Lodha
7 Bhuimali	36 Lohar
8 Bhuiya	37 Mahar
9 Bhumij	38 Mahli
10 Bind	39 Mal
11 Chamar	40 Mallah
12 Dhoba	41 Malpahariya
13 Doal	42 Mehtor
14 Dom	43 Muchi
15 Dosadh	44 Musahar
16 Ghasi	45 Nagesia
17 Gonrhi	46 Namasudra
18 Hari	47 Nuniya
19 Jalia Kaibartta	48 Paliya
20 Jhalo Malo or Malo	49 Pan
21 Kadar	50 Pasi
■ Kandra	51 Patni
23 Kaora	52 Pod
24 Karenga	53 Rabha
25 Kastha	54 Rajbanshi
26 Kaur	55 Rajwar
27 Khaira	56 Sunri
28 Khatik	57 Tiyar
29 Koch	58 Turi



## PART X—HYDERABAD

Throughout the State :—

- |                                 |                         |
|---------------------------------|-------------------------|
| ■ Anamuk                        | 17 Mala                 |
| ■ Aray (Mala)                   | 18 Mala Dasari          |
| 3 Arwa Mala                     | 19 Mala Hannai          |
| 4 Beda (Budga) Jangam           | 20 Malajangam           |
| 5 Bindla                        | 21 Mala Masti           |
| 6 Byagara                       | 22 Mala Sale (Netlani)  |
| 7 Chalvadi                      | 23 Mala Sanyasi         |
| 8 Chambhar                      | 24 Mang                 |
| 9 Dakkal (Dokkalwar)            | 25 Mang Garodi          |
| 10 Dhor                         | 26 Manne                |
| 11 Ellamalar (Yellammalawandlu) | 27 Mashti               |
| 12 Holeya                       | 28 Mehtar               |
| 13 Holeya Dasari                | 29 Mitha Ayyalvar       |
| 14 Kolupulvandlu                | 30 Mochi                |
| 15 Madiga                       | 31 Samagara             |
| 16 Mahar                        | 32 Sindholu (Chindollu) |

## PART XI—MADHYA BHARAT

Throughout the State :—

- |                    |           |
|--------------------|-----------|
| 1 Bagri or Bagdi   | 11 Kanjar |
| ■ Balai            | 12 Khatik |
| 3 Barahar or Basod | 13 Koli   |
| 4 Bargunda         | 14 Mahar  |
| 5 Bedia            | 15 Mochi  |
| 6 Bhambi           | 16 Nat    |
| 7 Bhangi or Mehtar | 17 Pardhi |
| 8 Chamar           | 18 Pasi   |
| 9 Chidar           | 19 Sansi  |
| 10 Dhanuk          |           |

## PART XII—MYSORE

Throughout the State :—

- |                      |           |
|----------------------|-----------|
| 1 Adidravida         | 4 Bhovi   |
| 2 Adikarnataka       | 5 Koracha |
| 3 Banjara or Lambani | 6 Korama  |

## PART XIII—PATIALA AND EAST PUNJAB STATES UNION

Throughout the State :—

- |                     |                        |
|---------------------|------------------------|
| 1 Ad Dharmi         | 18 Kori or Koli        |
| ■ Bangali           | 19 Marija or Marecha   |
| 3 Barar             | 20 Mazhabi             |
| 4 Batwal            | 21 Megh                |
| 5 Bawaria           | 22 Nat                 |
| 6 Bazigar           | 23 Od                  |
| 7 Balmiki or Chura  | 24 Pasi                |
| 8 Bhanjra           | 25 Perna               |
| 9 Chamar            | 26 Pherera             |
| 10 Chanal           | 27 Ramdasi or Ravidasi |
| 11 Dagi             | 28 Sanhai              |
| 12 Dhanak           | 29 Sanhal              |
| 13 Dumna or Mahasha | 30 Sansi               |
| 14 Gagra            | 31 Sapela              |
| 15 Gandhila         | 32 Sarera              |
| 16 Kabirpanthi      | 33 Sikligar            |
| 17 Khatik           | 34 Sirkiband           |

## PART XIV—RAJASTHAN

Throughout the State :—

- |    |                 |    |                  |
|----|-----------------|----|------------------|
| 1  | Adi Dharmi      | 23 | Kapadia Sansi    |
| 2  | Aheri           | 24 | Khangar          |
| 3  | Badi            | 25 | Khatka           |
| 4  | Bagri           | 26 | Kooch Band       |
| 5  | Bajgar          | 27 | Koria            |
| 6  | Bansphor        | 28 | Kunjar           |
| 7  | Bargi           | 29 | Madari (Bazigar) |
| 8  | Bawaria         | 30 | Majhabi          |
| 9  | Bhand           | 31 | Mehar            |
| 10 | Bhangi          | 32 | Mehtar           |
| 11 | Bidakia         | 33 | Mochi            |
| 12 | Chamar          | 34 | Nut              |
| 13 | Chura           | 35 | Pasi             |
| 14 | Dabgar          | 36 | Raigar           |
| 15 | Dhankia         | 37 | Ramdasia         |
| 16 | Dheda           | 38 | Rawal            |
| 17 | Dome            | 39 | Sarbhangi        |
| 18 | Gandia          | 40 | Singiwala        |
| 19 | Garancha Mehtar | 41 | Sansi            |
| 20 | Godhi           | 42 | Thori            |
| 21 | Jatia           | 43 | Tirgar           |
| 22 | Kalbelia        | 44 | Valmiki          |

## PART XV—SAURASHTRA

Throughout the State :—

- |   |              |    |            |
|---|--------------|----|------------|
| 1 | Bawa (Dhedh) | 9  | Meghwal    |
| 2 | Bhangi       | 10 | Senva      |
| 3 | Chamadia     | 11 | Shemalia   |
| 4 | Chamar       | 12 | Thori      |
| 6 | Dangashia    | 13 | Turi       |
| 6 | Garoda       | 14 | Turi-Barot |
| 7 | Garmatang    | 15 | Vankar     |
| 8 | Hadi         |    |            |

## PART XVI—TRAVANCORE-COCHIN

Throughout the State :—

- |    |                 |    |                    |
|----|-----------------|----|--------------------|
| 1  | Ayyanavar       | 16 | Panan              |
| 2  | Bharatar        | 17 | Paravan            |
| 3  | Chakkiliyan     | 18 | Parayan (Sambavar) |
| 4  | Domban          | 19 | Pathiyan           |
| 5  | Eravalan        | 20 | Perumannan         |
| 6  | Kakkalan        | 21 | Pulayan            |
| 7  | Kanakkan        | 22 | Thandan            |
| 8  | Kavara          | 23 | Ulladan            |
| 9  | Kootan (Koodan) | 24 | Uraly              |
| 10 | Kuravan         | 25 | Vallon             |
| 11 | Mannan          | 26 | Valluvan           |
| 12 | Nayadi.         | 27 | Vannan             |
| 13 | Padannan        | 28 | Velan              |
| 14 | Pallan          | 29 | Vetan              |
| 15 | Palluvan        | 30 | Vettuvan           |

## APPENDIX II

### THE CONSTITUTION (SCHEDULED TRIBES) ORDER, 1950

In exercise of the powers conferred by clause (1) of Article 342 of the Constitution of India the President, after consultation with the Governors and Rajpramukhs of the States concerned, is pleased to make the following Order, namely :—

1. This Order may be called THE 'CONSTITUTION (SCHEDULED TRIBES) ORDER, 1950.

2. The tribes or tribal communities, or parts of, or groups within, tribes or tribal communities, specified in Parts I to XIV of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Tribes so far as regards members thereof resident in the localities specified in relation to them respectively in those Parts of that Schedule.

3. Any reference in the Schedule to this Order to a district or other territorial division of a State shall be construed as ■ reference to that district or other territorial division as existing on the 26th January, 1950.

### THE SCHEDULE

#### PART I—ASSAM

1. In the Autonomous Districts :—

- |                      |                             |
|----------------------|-----------------------------|
| ■ Dimasa (Kachari).  | 6 Lakher.                   |
| ■ Garo.              | 7 Any Lushai (Mizo) tribes. |
| 3 Hajong.            | ■ Mikir.                    |
| 4 Khasi and Jaintia. | 9 Any Naga tribes.          |
| 5 Any Kuki tribes.   | 10 Synteng.                 |

2. In the Tribal Areas other than the Autonomous Districts :—

- |            |                    |
|------------|--------------------|
| ■ Abor.    | 7 Mishmi.          |
| 2 Aka.     | ■ Any Naga tribes. |
| ■ Apatani. | 9 Singpho.         |
| 4 Dafla.   | 10 Momba.          |
| 5 Galong.  | 11 Sherdukpen.     |
| 6 Khampti. |                    |

3. In the State of Assam excluding the Tribal Areas :—

- |                     |           |
|---------------------|-----------|
| ■ Boro—Borokachari. | 5 Laling. |
| ■ Deori.            | 6 Mech.   |
| 3 Hojai.            | 7 Miri.   |
| 4 Kachari.          | 8 Rabha.  |

#### PART II—BHIAR

1. Throughout the State :—

- |            |                |
|------------|----------------|
| 1 Asur.    | ■ Chero.       |
| ■ Baiga.   | 9 Chik Baraik. |
| 3 Bathudi. | 10 Gond.       |
| 4 Bedia.   | 11 Gorait.     |
| 5 Binjhia. | 12 Ho.         |
| ■ Birhor.  | 13 Karmali.    |
| 7 Birjia.  | 14 Kharia.     |



15 Kharwar.  
16 Khond.  
17 Kisan.  
18 Kora.  
19 Korwa.  
20 Lohira.  
21 Mahli.

22 Mal Paharia.  
23 Munda.  
24 Oraon.  
25 Parhaiya.  
26 Santal.  
27 Sauria Paharia.  
28. Savar.

2. In the districts of Ranchi, Singbhum, Hazaribagh, Santal Parganas and Manbhum :—

Bhumij.

### PART III—BOMBAY

Throughout the State :—

1 Barda.  
2 Bavacha.  
3 Bhil, including Bhagalia, Bhil Garasia, Dholi Bhil, Dungri Bhil, Dungri Garasia, Mewasi Bhil, and Tadvi Bhil.  
4 Chodhara.  
5 Dhanka.  
6 Dhodia.  
7 Dubla.  
8 Gamit or Gamta.  
9 Gond.  
10 Kathodi or Katkari.  
11 Konkna.

12 Koli Dhor.  
13 Koli Mahadev.  
14 Mavchi.  
15 Naikda or Nayak.  
16 including Advichincher and Phanse Pardhi.  
17 Patelia.  
18 Pomla.  
19 Powara.  
20 Rathawa.  
21 Thakur.  
22 Valvai.  
23 Varli.  
24 Vasava.

### PART IV—MADHYA PRADESH

In (1) Melghat taluk of Amravati district.

(2) Baihar tahsil of Balaghat district.

(3) Bhanupratappur, Bijapur, Dantewara, Jagaldapur, Kanker, Kondagaon, Konta and Narayanpur tahsils of Bastar district.

(4) Betul and Bhainsdehi tahsils of Betul district.

(5) Katghora tahsil of Bilaspur district.

(6) Suroncha and Gharchiroli tahsils of Chanda district.

(7) Amarwara, Chhindwara and Lakhnadon tahsils of Chhindwara district.

(8) Balod (Sanjari) tahsil of Durg district.

(9) Mandla, Niwas and Ramgarh (Dindori) tahsils of Mandla district.

(10) Harsud tahsil of Nimar district.

(11) Dharamjaigarh, Ghargoda, Jashpurnagar and Kharsia tahsils of Raigarh district.

(12) Ambikapur, Baikunthpur, Bharatpur, Janakpur, Manendragarh, Pal, Samari and Sitapur tahsils of Sarguja district :—

1 Andh.  
2 Baiga.  
3 Bhaina.  
4 Bharia-Bhumia, or Bhuinhar-Bhumia.  
5 Bhattra.  
6 Bhil.  
7 Bhunjia.  
8 Binjwar.

9 Birhul or Birhor.  
10 Dhanwar.  
11 Gadaba or Gadba.  
12 Gond [including Madia (Maria) and Mudia (Muria)].  
13 Halba.  
14 Kamar.  
15 Kawar or Kanwar.  
16 Kharia.

- 17 Kondh or Khond or Kandh.
- 18 Kol.
- 19 Kolam.
- Korku.
- 21 Korwa.
- 22 Majhwar.
- 23 Munda.
- 24 Nagesia or Nagasia.

- 25 Nihal.
- 26 Oraon.
- 27 Pardhan.
- 28 Pardhi
- 29 Parja.
- 30 Saonta or Saunta.
- 31 Sawar or Sawara.

## PART V—MADRAS

Throughout the State :—

- 1 Aranadan.
- Bagata.
- 3 Bhottadas—Bodo Bhottada, Muria Bhottada and Sano Bhottada.
- 4 Bhumias—Bhuri Bhumia and Bodo Bhumia.
- 5 Chenchu.
- 6 Gadabas—Boda Gadaba, Cerllam Gadaba, Franji Gadaba, Jodia Gadaba Olaro Gadaba, Pangi Gadaba and Pranga Gadaba.
- 7 Gondi—Modya Gond and Rajo Gond.
- 8 Goudus—Bato, Bhirithya Dudhokouria, Hato, Jatako and Joria.
- 9 Kosalya Goudus—B o s o t h o r i a Goudus, Chitti Goudus, Dangayath Goudis, Doddu Kamariya, Dudu K a m a r o, Ladiya Goudus and Pullosoriya Goudus.
- 10 Magatha Goudus—Bernia Goudu, Bodo Magatha Dongayath Goudu, Ladya Goudu, Ponna Magatha and Sana Magatha.
- 11 Holva.
- 12 Jadapus.
- 13 Jatapus.
- 14 Kammara.
- 15 Kattunayakan.
- 16 Khattis—Khatti, Kommarao and Lohara.
- 17 Kodu.
- 18 Kommar.
- 19 Konda Dhoras.
- 20 Konda Kapus.
- 21 Kondareddis.
- 22 Kondhs—Desaya Kondhs, Dongria Kondhs, Kuttiya Kondhs, Tikiria Kondhs and Yenity Kondhs.
- 23 Kota.
- 24 Kotia—Bartika, Benth Oriya, Dhulia or Dulia, Holva Paiko, Putiya, Sanrona and Sidho Paiko.
- 25 Koya or Goud, with its sub-sects—Raja or Rasha Koyas, Lingadhari Koyas (ordinary) and Kottu Koyas.
- 26 Kudiya.
- 27 Kurumans.
- 28 Manna Dhora.
- 29 Maunc.
- 30 Mukha Dhora—Nooka Dhora.
- 31 Muria.
- 32 Paigarapu.
- 33 Palasi.
- 34 Paniyan.
- 35 Porjas—Bodo Bonda, Daruva, Didua Jodia, Mundili, Pengu, Pydi and Saliya.
- 36 Reddi Dhoras.
- 37 Savaras—Kapu Savaras, Khutto Savaras and Maliya Savaras.
- 38 Sholaga.
- 39 Toda.
- 40 Inhabitants of the Laccadive, Minicoy and Amindivi Islands who, and both of whose parents, were born in these Islands.

## PART VI—ORISSA

Throughout the State :—

- 1 Bagata.
- 2 Baiga.
- 3 Banjara or Banjari.
- 4 Bathudi.
- 5 Bhuiya or Bhuyan.
- 6 Binjhal.
- 7 Binjhia ■ Binjhoa.
- 8 Birhor.
- 9 Bondo Poraja.
- 10 Chenchu.
- 11 Dal.
- 12 Gadaba.
- 13 Ghara.
- 14 Gond.
- 15 Gorait or Korait.
- 16 Ho.
- 17 Jatapu.

- |  |  |
|--|--|
| 18 Juang.  | 31 Kulis.                                  |
| 19 Kavar.  | 32 Mahali.                                 |
| 20 Kharia or Kharian.  | 33 Mankidi.                                |
| 21 Kharwar.  | 34 Mankirdia.                              |
| 22 Khond (Kond) or Kandha, or Nanguli Kandha, or Sitha Kandha. | 35 Mirdhas.                                |
| 23 Kisan.  | 36 Munda (Munda-Lohara and Munda-Mahalis). |
| 24 Kolah-Kol-Loharas.  | 37 Mundari.                                |
| 25 Kolha.  | 38 Oraon.                                  |
| 26 Koli.   | 39 Paroja.                                 |
| 27 Kondadora.  | 40 Santal.                                 |
| 28 Kora.   | 41 Saora, or Savar, or Saura, or Sahara.   |
| 29 Korua.  | 42 Tharua.                                 |
| 30 Koya.   |  |

PART VII—PUNJAB

In Spiti and Lahaul in Kangra District :—  
Tibetan.

PART VIII—WEST BENGAL

Throughout the State :—

- |           |           |
|-----------|-----------|
| 1 Bhutia. | 5 Munda.  |
| 2 Lepcha. | 6 Oraon.  |
| 3 Mech.   | 7 Santal. |
| 4 Mru.    |           |

PART IX—HYDERABAD

Throughout the State :—

- |   |  |
|---|--|
| 1 Andh.                                 | 6 Kolam (including Manner-varlu).          |
| 2 Bhil.                                 | 7 Koya (including Bhine Koya and Rajkoya). |
| 3 Chenchu, or Chenchwar.                | 8 Pardhan.                                 |
| 4 Gond (including Naikpod and Rajgond). | 9 Thoti.                                   |
| 5 Hill Reddis.                          |  |

PART X—MADHYA BHARAT

1. Throughout the State :—

- 1 Gond.
- 2 Korku.
- 3 Seharia.

2. In the Revenue District of Jhabua ; in the tahsils of Sendhwa, Barwani, Rajpur, Khargone, Bhikangaon and Maheshwar of the Revenue District of Khargone ; in the tahsil of Sailana of the Revenue District of Ratlam ; in the Tahsils of Sardarpur, Kukshi Dhar and Manawar of the Revenue District of Dhar :—

Bhils and Bhilalas (inclusive of sub-tribes).

PART XI—MYSORE

Throughout the State :—

- |                |                |
|----------------|----------------|
| 1 Hasalaru.    | 4 Kadu-Kuruba. |
| 2 Iruliga.     | 5 Maleru.      |
| 3 Jenu Kuruba. | 6 Soligaru.    |

PART XII—RAJASTHAN

Throughout the Scheduled Areas of the State :—

Bhil.

PART XIII—SAURASHTRA

Throughout the State :—

- |            |                 |
|------------|-----------------|
| 1 Adodia.  | 4 Miyana.       |
| 2 Daffer.  | 5 Sindhi.       |
| 3 Ghantia. | 6 Wedva Waghri. |



## PART XIV—TRAVANCORE-COCHIN

Throughout the State :—

- |                   |                             |
|-------------------|-----------------------------|
| 1 Hill Pulaya.    | 9 Malayarayar.              |
| 2 Kadar.          | 10 Mannan.                  |
| 3 Kanikaran.      | 11 Muthuvan.                |
| 4 Kochu Velan.    | 12 Palleyan.                |
| 5 Malai Arayan.   | 13 Palliyar.                |
| 6 Malai Pandaram. | 14 Ulladan (Hill dwellers). |
| 7 Malai Vedan.    | 15 Uraly.                   |
| 8 Malayan.        | 16 Vishavan.                |

## APPENDIX III

## STATES RULES OF BUSINESS ORDER, 1950.

By an order, promulgated today under Article 392, the President has provided that the rules of business of a State, which were in force before the commencement of the Constitution shall continue to be in force, with such adaptation and modifications as may be necessary, until fresh rules are framed by the Governor or Rajpramukh of the State concerned.

The Order—Constitution (Removal of Difficulties) Order of 1950—adds a sub-clause to Articles 166 and 238 of the Constitution by which the executive authority of a State is vested in the Governor or Rajpramukh of that State. The Articles provide that the Governor or Rajpramukh can make rules for the convenient transaction of State business and for allocation of such business among the Ministers. The present order provides for the continuation of the old rules until new ones are framed under the Constitution.

## APPENDIX IV

## RESOLUTION REGARDING RESERVATION OF SERVICES.

*Resolution of the Government of India regarding Reservation of Services for Scheduled Castes and Tribes and Anglo-Indians*<sup>1</sup>—The Government of India has made the following resolution under Articles 335-6 :—

1. "The policy of the Government of India in regard to communal representation in the services immediately before the coming into force of the new Constitution was that in appointments made by open competition 12½ per cent. of the vacancies filled by direct recruitment were reserved for candidates belonging to the Scheduled Castes while in regard to posts and services for which recruitment was made otherwise than by competition the principal communities in the country were given appointments in proportion to their population. Certain reservations were also made for Anglo-Indians in services with which they had special past associations.

2. The Government of India have now reviewed their policy in this regard in the light of the provisions of the Constitution of India which lay down *inter alia* that with certain exceptions no discrimination shall be made in the matter of appointments to the Services under the State on grounds of race, religion, caste, etc. The exceptions are that special provision shall be made for Scheduled Castes and Scheduled Tribes in all services and for Anglo-Indians in those services in which they had special reservations on the 14th August, 1947. Pending the determination of the figures of population at the Census of 1951 the Government of India have decided to make the following reservations in recruitment to posts and services under them :—

(1) No. 42/21/49—N.G.S., dated 13-9-50 = *I*, p. 310.  
Gazette of India, dated 16-9-50, Part I, Sec.

(a) *Scheduled Castes*.—The existing reservation of  $12\frac{1}{2}$  per cent. of vacancies filled by direct recruitment in favour of the Scheduled Castes will continue in the case of recruitment to posts and services made, on an all-India basis, by open competition, i.e., through the Union Public Service Commission or by means of open competitive tests held by any other authority. Where recruitment is made otherwise than by open competition the reservation for Scheduled Castes will be  $16\frac{2}{3}$  per cent as at present.

(b) *Scheduled Tribes*.—Both in recruitment by open competition and in recruitment made otherwise than by open competition there will be a reservation in favour of members of Scheduled Tribes of 5 per cent of the vacancies filled by direct recruitment.

(c) *Anglo-Indians*.—The reservations which were in force in favour of Anglo-Indians in the Railway Services, the Posts and Telegraphs Department and the Customs Department on the 14th August, 1947, will be continued subject to the provisions of Article 336 of the Constitution.

3. The reservations prescribed in the previous paragraph will apply in the case of recruitment made on an all-India basis. Under the Constitution all citizens of India are eligible for consideration for appointment to posts and services under the Central Government irrespective of their domicile or place of birth and there can be no recruitment to any Central Service which is confined by rule to the inhabitants of any specified area. In practice however recruitment to Class I and Class II Services and posts is likely to attract candidates from all over India and will be on a truly all-India basis, while for the majority of Class III Services and posts which are filled otherwise than through the Union Public Service Commission only those residing in the area or locality in which the office is located are likely to apply. In the latter class of cases the percentages of reservations for Scheduled Castes and Scheduled Tribes will be fixed by Government taking into account the population of the Scheduled Castes and Scheduled Tribes in that area.

4. (1) The orders regarding reservation of vacancies in favour of the various communities will not apply to recruitment by promotion which will continue to be made as heretofore irrespective of communal considerations and on the basis of seniority and/or merit as the case may be.

(2) In all cases a minimum standard of qualifications will be prescribed and the reservations will be subject to the over-all condition that candidates of the requisite communities possessing the prescribed qualifications and suitable in all respects for the appointment in question, are forthcoming in sufficient numbers for the vacancies reserved for them.

(3) The maximum age limits prescribed for appointment to a service or post will be increased by three years in case of candidates belonging to the Scheduled Castes and Scheduled Tribes and the fees prescribed for admission to any examination or selection will be reduced to one-fourth in their case.

(4) For the purposes of these orders, a person shall be held to be a member of the Scheduled Castes or the Scheduled Tribes, as the case may be, if he belongs to a caste or a tribe which under the Constitution (Scheduled Castes) Order, 1950, or under the Constitution (Scheduled Tribes) Order, 1950, has been declared to be Scheduled Caste or a Scheduled Tribe for the area in which he and/or his family ordinarily reside(s). Separate instructions will issue declaring the castes and tribes which should be considered as Scheduled Castes and Scheduled Tribes for the purpose of these orders in Part C States and Part D territories.

(5) These orders are applicable to all services under the control of the Government of India including posts and services in States in Part C of the First Schedule to the Constitution and will be deemed to have come into effect on the 26th January, 1950.

5. The orders contained in the Ministry of Home Affairs Resolution, No. 16/10/47-Estt., dated the 21st August, 1947, office Memorandum, No. 31/93/47-Estt., dated the 22nd August, 1947 and other orders issued on the basis of those orders are hereby cancelled."

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